E. THE ORDINANCE IS A NEUTRAL LAW OF GENERAL APPLICABILITY.

Plaintiff presents a grab bag full of allegations designed to have the Court, for federal constitutional purposes, review the OLOH Ordinance under strict scrutiny.[47] The constitutional protections for free exercise of religion do not exempt plaintiff:

> from complying with reasonable civil requirements imposed by the state in the interest of public welfare and does not bar legislative control of acts inimical to the peace, good order, and morals of society. State legislatures may regulate conduct for the protection of society and to the extent that their regulations are directed toward the proper end and are not unreasonably discriminatory, they may indirectly affect religious activity without infringing the constitutional guarantee.[48]

The general proposition for addressing the constitutional protection for free exercise of religion established by the Supreme Court is "that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[49] The OLOH Historic District was established to protect the exterior architectural features of the OLOH site after the church which was located on the site was scheduled to be closed and possibly threatened by demolition. The final mass at the OLOH Church was held on

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religious entities. "A legislative judgment that religious activities are suitable in all neighborhoods, whether made on the state or local level, does not by itself promote the practice of religion. It simply recognizes the widely valued role of religious entities within our communities by guaranteeing them a physical place." *Boyajian v. Gatzunis*, 212 F.3d 1, 11 (1st Cir. 2000).

[47] Pl's Mem. 6-15.

[48] 16A AM JUR 2D *Constitutional Law* § 397 (footnotes omitted).

[49] *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531-32 (1993) (citation omitted).

January 1, 2010, while the OLOH Ordinance did not go into effect until January 20, 2010.[50]

> Supreme Court decisions indicate that while the government may not coerce an individual to adopt a certain belief or punish him for his religious views, it may restrict certain activities associated with the practice of religion pursuant to its general regulatory powers.... The critical distinction is thus between a neutral, generally applicable law that happens to bear on religiously motivated action, and a regulation that restricts certain conduct because it is religiously oriented."[51]

This critical distinction between beliefs and conduct is recognized in Massachusetts and used in analyzing the state constitutional scope of religious freedom.

> Religious freedom is not, and cannot be, absolute under either Constitution. Under both documents, the constitutionality of a law that would interfere with the exercise of religion must depend on a balancing of the State's interest in the law's enforcement against the individual's interest in practicing his religion as he chooses.[52]

It is perfectly lawful to "enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city."[53] The Supreme Court has noted that:

> When a property owner challenges the application of a zoning ordinance to his property, the judicial inquiry focuses upon whether the challenged restriction can reasonably be deemed to promote the objectives of the community land-use plan, and will include consideration of the treatment

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[50] *See* the Ordinance, Title 2, Chapter 2.46, Subsection 2.46.030 (G) and Title 1, Chapter 1.12, Ordinances, Subsection 1.12.040 Effective date which provides: "Every ordinance which does not expressly prescribe the time when it shall go into operation shall take effect twenty (20) days from and after its passage. (Prior code §1-13)."

[51] *Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. New York*, 914 F.2d 348, 354 (2d Cir. 1990) (citations omitted).

[52] *Commonwealth v. Nissenbaum*, 404 Mass. 575, 581 (1989).

[53] *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 129 (1978) (citations omitted).

> of similar parcels. When a property owner challenges a landmark designation or restriction as arbitrary or discriminatory, a similar inquiry presumably will occur.[54]

Protection of the exterior architectural features of the OLOH site from significant alteration or possible destruction was justified due to the significance of the OLOH property in the architectural, cultural and religious history of Springfield. A local community has a legitimate concern for preserving the significant exterior architectural features of its environment.

> Because of the importance of religion, and of particular churches, in our social and cultural history, and because many churches are designed to be architecturally attractive, many religious structures are likely to fall within the neutral criteria -- having 'special character or special historical or aesthetic interest or value' -- set forth by the Landmarks Law. This, however, is not evidence of an intent to discriminate against, or impinge on, religious belief in the designation of landmark sites.[55]

The OLOH Ordinance was not created to infringe upon or restrict plaintiff's religious practices. Instead the OLOH Ordinance, like its enabling legislation, the Historic District Act, regulates neutral criteria which are applied generally. Therefore, the correct legal standard of review is whether the OLOH Ordinance is rationally related to its stated goals. "In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of

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[54] *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 133 (1978) (citation omitted) (citation omitted).

[55] *Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. New York*, 914 F.2d 348, 354 (2d Cir. 1990); *see also Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 826 (10th Cir. 1988) (finding "there is no infringement of the Church's religious freedom. A church has no constitutional right to be free from reasonable zoning regulations nor does a church have a constitutional right to build its house of worship where it pleases.") (citation omitted).

general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[56]

To determine the object of the OLOH Ordinance we must begin with its text because "the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[57] The OLOH Ordinance does not discriminate against religious beliefs or regulate or prohibit conduct undertaken for religious reasons. The OLOH Ordinance does not refer to any of plaintiff's religious practices. The OLOH Ordinance regulates some of the exterior architectural features[58] of the OLOH property, but does so for secular purposes. In fact, the OLOH Ordinance has:

> some of the exemptions as many current historic districts overseen by the Springfield Historical Commission: temporary structures, small signs, at grade sidewalks and driveways, exact reconstruction following disaster, screen windows and doors, air conditioners.
>
> The Commission will retain oversight of all other features, including color of paint and color of roofing material, which are exempt in most other districts. Paint and roof color will be controlled because of the highly visible red tile roof and the potential impact of paint color on the structure.[59]

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[56] *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citation omitted).

[57] *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (U.S. 1993)

[58] M.G.L. ch. 40C, § 5 (defining exterior architectural feature as meaning "such portion of the exterior of a building or structure as is open to view from a public street, public way, public park or public body of water, including but not limited to the architectural style and general arrangement and setting thereof, the kind, color and texture of exterior building materials, the color of paint or other materials applied to exterior surfaces and the type and style of windows, doors, lights, signs and other appurtenant exterior fixtures").

[59] *See* FINAL REPORT, 6.

When reviewing a law enacted under the police power of the state, the judicial standard of review is well known.[60] In this case the Court should apply a deferential minimum rationality standard of review to the OLOH Ordinance because it is a police power regulation which imposes a general applicable rule of conduct designed to advance society's broad interest in preserving significant exterior architectural features and historic properties.[61] "Absent evidence of the City's intent to regulate religious worship, the ordinance is properly viewed as a neutral law of general applicability and under *Smith* summary judgment on this free exercise claim was appropriate."[62]

F. PRESERVING THE EXTERIOR ARCHITECTURAL FEATURES ON THE OLOH SITE IS A COMPELLING SOCIETAL INTEREST.

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[60] *Euclid v. Ambler Realty Co*., 272 U.S. 365, 395 (1926) (stating that "it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.") (citations omitted); *Sturges v. Chilmark*, 380 Mass. 246, 256 (1980) (saying that the "constitutional test, which is easier to state than to apply, is whether the by-law is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.") (citations and internal quotation marks omitted).

[61] *Lafayette Park Baptist Church v. Board of Adjustment*, 599 S.W.2d 61, 66 (1980) (stating that the "historic district ordinance is essentially a zoning ordinance. As a zoning ordinance it is subject to the same historic tests established by our courts. Whether the enforcement of such an ordinance is reasonable and constitutional or whether it is arbitrary and unreasonable and therefore unconstitutional depends in each instance upon the evidence and the facts and circumstances of each case. Initially it is the legislative body which has the duty to determine the classification for a particular area. Unless this appears to be arbitrary and unreasonable the court cannot substitute its opinion for the determination by the legislative body. Where this action is fairly debatable, the court cannot and will not substitute its opinion. Such an enactment is presumably valid and anyone who challenges the reasonableness of the ordinance as applied to a specific property has the burden of proving unreasonableness.") (citation omitted).

[62] *Cornerstone Bible Church v. Hastings*, 948 F.2d 464, 472 (8th Cir. 1991) (footnote omitted).

Notwithstanding contrary authority[63] Springfield asserts that the Court should find that the public interest in preserving the exterior[64] architectural and historic features of significant buildings is a compelling societal interest which can be legitimately protected by exercise of the state's police power. There are two major concerns which gave rise to the wide spread efforts embodied in various preservation laws:

> The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today. [Historic] conservation is but one aspect of the much larger problem, basically an

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[63] *See Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879, 886 (D. Md. 1996) (citing cases and a law review article for proposition that historic preservation is not a compelling interest of government).

[64] The Historic District Act only protects the exterior architectural features of a building. The Supreme Judicial Court has determined that the interior architectural features of a house of worship are not sufficiently compelling to justify restraints on religious practices. *Society of Jesus v. Boston Landmarks Com.*, 409 Mass. 38, 43 (1990) (opining that the "government interest in historic preservation, though worthy, is not sufficiently compelling to justify restraints on the free exercise of religion, a right of primary importance. In short, under our hierarchy of constitutional values we must accept the possible loss of historically significant elements of the interior of this church as the price of safeguarding the right of religious freedom."). The exterior architectural features of a building stand on a different footing. For purposes of the Historic District Act the Legislature has defined "the words 'exterior architectural feature' [to] mean such portion of the exterior of a building or structure as is open to view from a public street, public way, public park or public body of water, including but not limited to the architectural style and general arrangement and setting thereof, the kind, color and texture of exterior building materials, the color of paint or other materials applied to exterior surfaces and the type and style of windows, doors, lights, signs and other appurtenant exterior fixtures". M.G.L. ch. 40C, § 5. "It is hereby declared that it is a national policy to preserve for public use historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States." 16 U.S.C. § 461.

> environmental one, of enhancing -- or perhaps developing for the first time -- the quality of life for people."[65]

Springfield has a lengthy religious heritage which has only been partially preserved. Churches and other houses of worship are among Springfield's oldest buildings. They serve as extraordinary examples of architectural styles and function as neighborhood cultural centers. These existing historically and culturally significant structures may only survive if legal controls are implemented to preserve them. "Proper state purposes may encompass not only the goal of abating undesirable conditions, but of fostering ends the community deems worthy."[66]

The public importance of historic preservation has been declared by Congress.[67] It is expressly recognized under the Massachusetts Constitution.[68] It is established as

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[65] *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 108 (1978) (internal quotation marks and footnotes omitted).

[66] *Maher v. New Orleans*, 516 F.2d 1051, 1060 (5th Cir. 1975).

[67] 16 U.S.C. § 470 (stating the purposes of the National Historic Preservation Act and declaring, among other things that "(1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage; (2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people; (3) historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency; (4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans...") *see generally* Julia Hatch Miller, Esq., and Dorothy M. Miner, Esq. 1-2 ENVIRONMENTAL LAW PRACTICE GUIDE § 2.01 (observing that there "are historic preservation laws at the federal, state, and local levels, beginning with the National Historic Preservation Act, which establishes a national program for historic preservation in partnership with state and local governments, and ending with tax programs that encourage private investment in historic resources. Behind these laws rest important public policy considerations that attempt to balance the need to protect these properties for the benefit of present and future generations with other governmental objectives, such as economic development through new construction, accommodation of persons with disabilities, protection against public hazards, and respect for individual

public policy in the statutory[69] and case law of the commonwealth.[70] The purpose of the Historic District Act and the OLOH Ordinance fit "easily within the established

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rights. Some preservation laws limit or restrict changes to historic properties while others seek to place preservation on an equal footing with alternative courses of action. Interspersed among the statutes devoted specifically to the preservation of historic or archeological resources are other substantive laws and a significant body of constitutional law, which either contain an historic preservation component or provide limitations on preservation efforts. These laws, which range from the Religious Land Use and Institutionalized Persons Act to local zoning ordinances, can also affect or influence decision making regarding historic properties....").

[68] MASS. CONST. amend. art. LI (stating that the "preservation and maintenance of ancient landmarks and other property of historical or antiquarian interest is a public use, and the commonwealth and the cities and towns therein may, upon payment of just compensation, take such property or any interest therein under such regulations as the general court may prescribe."); *see also In re Opinion of Justices to Senate*, 333 Mass. 783, 790 (1955) (opining that "the enactment into law of the proposed act [would not] be a taking of ancient landmarks and other property of historical or antiquarian interest, or an interest therein, for which just compensation must be paid, as provided in Article 51 of the Amendments to the Constitution of the commonwealth").

[69] M.G.L. c. 40C, §§ 1-17 (establishing the Historic District Act); *see also* M.G.L. c. 40 § 8D (authoring local Historical Commissions).

[70] *Springfield Pres. Trust, Inc. v. Springfield Library & Museums Ass'n*, 447 Mass. 408, 410 (2006) (stating that the Historic District Act "permits cities and towns to establish historic districts to preserve distinctive characteristics of buildings and places . . . or their architecture. Within a historic district, buildings or structures may not be constructed or altered in a manner that "affects exterior architectural features" without first submitting the proposed construction or alteration for review by the historic district commission. A historic district commission is to consider various factors in deciding whether to issue a certificate, including the historic and architectural value and significance of the site, building or structure ... and the relation of ... features to similar features of buildings and structures in the surrounding area. A historic district commission is not to make recommendations or impose requirements except for the purpose of preventing developments incongruous to the historic aspects or the architectural characteristics of the surroundings and of the historic district.") (citations and internal quotation marks omitted); *In re Opinion of Justices to Senate*, 333 Mass. 773, 780-81 (1955) (stating, in a decision before G. L. c. 40C was enacted, that there "has been substantial recognition by the courts of the public interest in the preservation of historic buildings, places, and districts. It is not difficult to imagine how the erection of a few wholly incongruous structures might destroy one of the principal assets of the town, and we assume that the boundaries of the districts are so drawn as to include only areas of special value to the

boundaries of 'benevolent neutrality,' in which religious exercise is supported but not promoted"[71] and afford no basis to conclude that the legislative intent was to advance religion. The OLOH Ordinance was enacted[72] pursuant to the authority of the Massachusetts Historic Districts Act.[73] The OLOH Ordinance and the Massachusetts Historic Districts Act are facially neutral laws of general applicability within the meaning of Supreme Court decisions. These laws have purely secular purposes and are of general applicability; they are enacted:

> to promote the educational, cultural, economic and general welfare of the public through the preservation and protection of the distinctive characteristics of buildings and places significant in the history of the commonwealth and its cities and towns or their architecture, and through the maintenance and improvement of settings for such buildings and places and the encouragement of design compatible therewith.[74]

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public because of possession of those characteristics which it is the purpose of the act to preserve.... The act .... applies only to exterior architectural features subject to public view from a public place.... We are of opinion that in a general sense the proposed act would be an act for the promotion of the public welfare and would be constitutional, and we answer the questions on that basis. There might, however, be particular instances in which decisions of the commission, because of peculiar hardship and remoteness from the legitimate purposes of the act, would be unconstitutional applications of it.") (citations omitted).

[71] *Boyajian v. Gatzunis*, 212 F.3d 1, 5 (1st Cir. 2000) (citation omitted).

[72] *See* **Ordinance Cite here** (providing that there "is established under the provisions of and in accordance with the Historic Districts Act, so-called, as mentioned in this chapter, the Our Lady of Hope Historic District as shown on the map, labeled Exhibit 27-2G, entitled 'Our Lady of Hope District;' said map to be considered part of this chapter.").

[73] M.G.L. c. 40C, § 1 (establishing Chapter 40C as the Historic Districts Act).

[74] M.G.L.ch. 40C, § 2 (specifying the purpose of the Historic Districts Act).

The police power in the lawmaker is not limited to economic, health and safety values.

> It is more generous, comprehending more subtle and ephemeral societal interests. The values [that the police power] represents are spiritual as well as physical, aesthetic as well as monetary. It is within the domain of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[75]

In many urban communities houses of worship are at great risk of being lost to deterioration and demolition.[76] "Throughout the country, there appears to be a

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[75] *Maher v. New Orleans*, 516 F.2d 1051, 1060 (5th Cir. 1975) (citations omitted).

[76] "In May of 2003, the National Trust for Historic Preservation (National Trust) placed America's Historic Urban Houses of Worship at the top of its list of America's 11 Most Endangered Historic Places, a yearly list of important historical and cultural sites threatened by demolition, slow and steady deterioration, and neglect. The National Trust cautioned that these houses of worship are endangered by declining membership, increasing maintenance costs, and in some instances soaring real estate values that make selling the property an attractive proposition for shrinking congregations. Moreover, if these buildings are allowed to deteriorate or be demolished, not only is their architectural and historical value lost, but also their ability to continue to provide critical community services to people in the nation's most impoverished neighborhoods.

A. Historic Value of Houses of Worship

We can't tell American history without talking about the history of our sacred places .... We can't have a strong future for our community without safeguarding the buildings (that are used for worship), Senator Joseph Lieberman told an event organized by the Partners for Sacred Places, a non-sectarian, non-profit organization dedicated to the care and active use of America's older and historic sacred places. Indeed, much of American history has evolved in and around our houses of worship, providing eloquent testimony to the American experience and the quest for religious freedom that helped shape our nation. The National Trust suggests that churches, synagogues, temples and mosques are often the most ambitious, beloved, and architecturally significant buildings in any given urban neighborhood. Their domes, towers, and spires provide identifying elements in the local skyline, and they attest to the diverse traditions that have created cities and towns across the country." *Article: Federal Funding For The Preservation Of Religious Historic Places: Old North Church And The New Establishment Clause*, 3 GEO. J.L. & PUB. POL'Y 151, 154 (2005) (footnotes and internal quotation marks omitted).

burgeoning awareness that our heritage and culture are treasured national assets. Many locales endowed with historic sites have enacted protective measures for them."[77]

As it pertains to the OLOH Historic District the Springfield Historical Commission can "not make any recommendation or requirement except for the purpose of preventing developments incongruous to the historic aspects or the architectural characteristics of the surroundings and of the historic district."[78] A leading treatise on real property points out that it is "well-settled that historic preservation is a valid objective of the police power."[79] The Historic District Act and the OLOH Ordinance are legislative exercises of the police power.

> We deal ... with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia or the States legislating concerning local affairs....
>
> Public safety, public health, morality, peace and quiet, law and order -- these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it....
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> .... The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be

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77 *Maher v. New Orleans*, 516 F.2d 1051, 1060 (5th Cir. La. 1975).

78 M.G.L. ch. 40C, § 7.

79 13-79D POWELL ON REAL PROPERTY § 79D.02 (2010).

> beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[80]

Under state constitutional law Springfield's "assertion of a compelling interest, and the balancing of that interest against the burden imposed on the exercise of religion, is considered in a concrete, pragmatic, and fact-specific way."[81] The court should look at the specific public interests at stake in creating the OLOH Ordinance. The Historic District Ordinance limits destruction or substantial alteration of the exterior of OLOH property without prior permission of the Springfield Historical Commission. An individual's religious beliefs[82] do not "excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition."[83] The OLOH Historic District Ordinance does not suppress any element of the Catholic worship service. The OLOH Ordinance does not regulate any religious or secular uses of the property by the plaintiff or anyone else. The OLOH Historic District Ordinance does not single out for discriminatory treatment any Catholic religious practice. The OLOH Historic District Ordinance seeks to preserve for posterity the unique exterior architectural features of the OLOH site so that they will continue to

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80 *Berman v. Parker*, 348 U.S. 26, 31-33 (1954) (citations omitted).

81 *Soc'y of Jesus of New Eng. v. Commonwealth*, 441 Mass. 662, 671 (2004)

82 "Religious beliefs -- what a person thinks, what faith he holds in his heart and mind -- are indeed protected absolutely. Conduct in furtherance of those beliefs, however, is the 'exercise' of religion, and government infringements on religiously inspired conduct are permissible if they satisfy the compelling State interest balancing test." *Soc'y of Jesus of New Eng. v. Commonwealth*, 441 Mass. 662, 676 (2004) (citation omitted).

83 *Nutt v. Norwich Roman Catholic Diocese*, 921 F. Supp. 66, 73 (D. Conn. 1995) (citation omitted).

beautify Springfield as they have for more than a century. The Historic District Ordinance merely regulates a secular activity significant alteration or destruction of the exterior architectural features of a significantly important property in Springfield. The Ordinance does not pressure the plaintiff to abandon its religious beliefs through financial or criminal penalties or impose taxes upon the exercise of plaintiff's religion. The Ordinance does not infringe upon plaintiff's freedom of religion as protected by the Free Exercise Clause.

F. CHURCH AUTONOMY IS NOT A CONSTITUTIONAL CONCERN

Plaintiff, as the "party claiming an unconstitutional burden on the free exercise of religion must show (1) a sincerely held religious belief, which (2) conflicts with, and thus is burdened by, the state requirement."[84] Plaintiff has not presented facts to bring it within the hybrid rights exception where heightened judicial scrutiny may be appropriate. Plaintiff's free exercise claim is not factually coupled with any other cognizable constitutional claim (such a free speech claim). The regulation of speech in areas which are open to view from a public street, public way, public park or public body of water is given a wider sway than regulation of speech in the interior of a privately owned building, such as a church or other place of public worship, and expressive freedom in such public areas must be given much breathing space.[85] Content-neutral legislation

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[84] *Soc'y of Jesus of New Eng. v. Commonwealth*, 441 Mass. 662, 669-670 (2004) (citation and internal quotation marks omitted).

[85] *Texas v. Johnson*, 491 U.S. 397, 417 (1989) (pointing out to "conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant

regarding publicly visible expressions such as the exterior architectural features of architecturally significant or historically important sites is permissible because it does not pose any danger of governmental censorship or political orthodoxy. Limiting the destruction or substantial alteration of the exterior architectural features of the OLOH property is not even a hypothetical infringement of plaintiff's purported free speech rights.[86] Where, as in this case, the communicative content of the regulated activity--its

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this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.").

[86] *First Vagabonds Church of God v. City of Orlando*, 2010 U.S. App. LEXIS 13736, 10-11 (11th Cir. 2010) (observing that conduct "that is expressive comes within the First Amendment's protection. All conduct is not expressive. Nor is conduct presumptively expressive; the party invoking the First Amendment's protection has the burden to prove that it applies. To determine whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have traditionally asked two things: (1) whether the person seeking the First Amendment's protection had an intent to convey a particularized message; and (2) whether the likelihood was great that the message would be understood by those who viewed it. A narrow, succinctly articulable message is not a condition of constitutional protection. Instead, in determining whether conduct is expressive, we ask whether the reasonable person would interpret it as some sort of message, not whether an observer would necessarily infer a specific message. This inquiry is an objective one.") (citations and internal quotation marks omitted). In this case an objective reasonable observer in viewing the exterior architectural features of the OLOH Historic District would understand its factual context and environment – that the plaintiff closed the former church located at the site and it is no longer a place of sacred worship. Moreover an objective observer would be aware of the architectural significance of the OLOH site and its historic significance to the neighborhood in which it is located. Similarly the individualized exemption exception does not apply in this case because plaintiff has not shown a case of religious hardship demonstrating compelling reasons to grant it a hardship exemption from the legal obligation to maintain the exterior architectural features of the OLOH property. Moreover, the "exception does not apply to statutes that, although otherwise generally applicable, contain express exceptions for objectively defined categories of persons." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004) (citations omitted); *but cf. Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 247 (3d Cir. 2008) (believing "the hybrid-rights theory to be dicta"). The Historic District Act is a statute that contains precisely such objectively defined categories. *See* M.G.L. c. 40C, § 6 (prohibiting construction or alteration of a "building or structure within an historic district ... in any

message--is irrelevant to the government's reason for regulation then it is conduct, not speech, which is being regulated and the First Amendment values are not implicated. Assuming, *arguendo*, that plaintiff's concerns about church autonomy[87] are sincerely held religious beliefs within the meaning of the constitution, those concerns do not rise to the level of an unconstitutional burden on the free exercise of religion. Under the doctrine of church autonomy:

> the courts lack subject matter jurisdiction over church disputes touching on matters of doctrine, canon law, polity, discipline, and ministerial relationships.... However, in each of the cases illustrating the application of this doctrine, the court was being asked to resolve a dispute within the church itself, or to impose liability for the manner in which the church had handled or resolved that intra-church dispute.[88]

In this case the court is not called on to resolve any dispute concerning an intra-church dispute. After OLOH site was closed and abandoned as a place of worship protection of its exterior architectural features from substantial alteration or destruction[89] became essential to accomplish the overriding governmental interest in preserving the historic and architectural heritage of the OLOH site. The OLOH Historic District was properly established in furtherance of advancing the government's compelling interest in

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way that affects exterior architectural features unless the commission shall first have issued a certificate of appropriateness, a certificate of non-applicability or a certificate of hardship with respect to such construction or alteration.").

[87] Pl's Facts ## 18-21; 24; 33-42; 67-68.

[88] *Soc'y of Jesus of New Eng. v. Commonwealth*, 441 Mass. 662, 667-68 (2004) (citations and internal quotation marks omitted).

[89] "Where it is either impossible or impractical to remove religious symbols from the building exterior (a frieze or carvings of sacred scripture) such symbols are covered with concrete or other suitable material to prevent desecration. In some instances, in order to make certain that religious symbols or expressions are not desecrated, such items must be properly destroyed." Pl's Facts # 40 (footnote omitted).

the preservation of the exterior architectural features of an architecturally and historically significant site in one of Springfield's urban neighborhoods. As such, Defendants are entitled to summary judgment in their favor.

G. ORDINANCE DOES NOT SUBSTANTIALLY BURDEN RELIGIOUS EXERCISE.

Under RLUIPA the government is prohibited from imposing or implementing any land use regulation "in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution."[90] A RLUIPA plaintiff "bears the burden of persuasion" on whether the challenged laws, or Springfield's

[90] 42 USCS § 2000cc (a) (1); *see also San Jose Christian College v. City of Morgan Hill*, 2004 U.S. App. LEXIS 4325 (9th Cir. 2004) (stating that RLUIPA "prohibits the government from imposing 'substantial burdens' on 'religious exercise' unless there exists a compelling governmental interest and the burden is the least restrictive means of satisfying the governmental interest.") (citation omitted); *Cathedral Church of the Intercessor v. Inc. Vill. of Malverne*, 353 F. Supp. 2d 375, 389 (D.N.Y. 2005) (stating that in "order to establish a prima facie violation of RLUIPA, a Plaintiff must present evidence that the land use regulation at issue as implemented: (1) imposes a substantial burden, (2) on the "religious exercise," (3) of a person, institution, or assembly. If the Plaintiffs are successful in making that prima facie showing, the burden shifts to the government to demonstrate that the regulation furthers a compelling governmental interest and is the least restrictive means of furthering that compelling interest.") (citations omitted); *see generally Westchester Day Sch. v. Village of Mamaroneck*, 386 F.3d 183, 190 (2d Cir. 2004) (stating that as "a legislative accommodation of religion, RLUIPA occupies a treacherous narrow zone between the Free Exercise Clause, which seeks to assure that government does not interfere with the exercise of religion, and the Establishment Clause, which prohibits the government from becoming entwined with religion in a manner that would express preference for one religion over another, or religion over irreligion. As the Supreme Court has noted, [a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents. While government unquestionably may take positive steps to protect the free exercise of religion, it must avoid going so far in this goal as to adopt a preference for one religion or for religion generally.") (citations and internal quotation marks omitted).

"application of those laws" to plaintiff "substantially burdens its exercise of religion."[91] Since the OLOH Historic District Ordinance does not impose a "substantial burden" on "religious exercise" plaintiff cannot carry its RLUIPA burden of proof. Under these circumstances Springfield is entitled to summary judgment on plaintiff's RLUIPA claims[92].

1. OLOH Ordinance as a RLUIPA land use regulation.

Plaintiff's position is implicitly grounded upon a fundamental misconception of the nature of Historic District legislation. The Historic Districts Act and its legislative derivative, the OLOH Ordinance, do not regulate the religious or any other uses of property. Plaintiff abandoned religious use of the OLOH property; Springfield is not preventing or inhibiting plaintiff from reviving its former religious use of the OLOH property. Unlike traditional zoning the Historic District Act and the OLOH Ordinance strive to preserve from unlawful alteration the existing features of property.

> Zoning is primarily directed at the use of land, as well as the density and the location of buildings on the land. Historic area zoning, on the other hand, is not directed at any of these factors, but only at the preservation of the exterior of buildings having historic or architectural merit.... Traditional zoning is directed at limited control of land within the framework of the police power; historic area zoning is directed at preservation of the exterior of certain buildings.
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> Secondly, to accomplish the primary purposes of historic area zoning, it is necessary that the exterior of the building having historic or architectural value be preserved against destruction or substantial impairment by every one, whether a

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91 *San Jose Christian College v. City of Morgan Hill*, 2004 U.S. App. LEXIS 4325 (9th Cir. 2004) (citations and internal quotation marks omitted); *see also Acad. of Our Lady of Peace v. City of San Diego*, 2010 U.S. Dist. LEXIS 31873 (D. Cal. 2010) (stating that the "plaintiff bears the burden of persuasion on whether RLUIPA's general rule applies, and whether the land use regulation at issue imposes a 'substantial burden' on plaintiff's 'religious exercise.'") (citation omitted).

92 Pl's Mem. 24-33.

> private citizen or a governmental body. In short, the historically or architecturally valuable building is just as much lost by destruction by a public body as it would be by a private owner. The facts in the present case should lay to rest the notion that public bodies -- as contrasted with private owners -- would not be likely to press for demolition of buildings having established historic or architectural value. The General Assembly could well conclude that, to accomplish historic and architectural preservation, the jurisdiction of the Commission should extend to all owners be they private persons or governmental agencies. Otherwise, the primary purpose of the legislation would be frustrated.[93]

The Historic Districts Act and the OLOH Historic District are legislative acts which do not prohibit any types of use of property. They forbid the substantial alteration or destruction of the exterior architectural features of property without prior approval of the Springfield Historical Commission. Because neither the Historic Districts Act nor the OLOH Historic District limits or restricts plaintiff's use or development of the OLOH site these local preservation laws do not, as a matter of law, constitute a "land use regulation"[94] within the meaning of RLUIPA; consequently, plaintiff's RLUIPA claims against Springfield must be dismissed.

While the Historic Districts Act and the OLOH Ordinance enacted pursuant to it are not technically zoning laws they may be considered to be a form of landmarking laws. Considering them as such, and assuming, *arguendo*, Springfield were to apply them in a manner which limits or restricts plaintiff's use or development of the OLOH site these

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[93] *Annapolis v. Anne Arundel County*, 271 Md. 265, 291-92 (1974) (enjoining the Anne Arundel County from proceeding with the demolition of a building known as Mt. Moriah African Methodist Episcopal Church of Annapolis).

[94] 42 USCS § 2000cc-5 (defining a "land use regulation" to mean "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.").

laws would then be deemed RLUIPA land use regulations[95]; nevertheless that would not change the result in this case because the OLOH Ordinance does not substantially burden plaintiff's religious exercise.

2. No Religious Exercises at OLOH Site

As a result of various internal problems[96] plaintiff decided to close the Our Lady of Hope church.[97] "The last public Masses at Our Lady of Hope Church were celebrated on the weekend of December 31, 2009 and January 1, 2010."[98] Plaintiff's religious exercises at the OLOH site ended when plaintiff closed the Our Lady of Hope Church. RLUIPA defines "religious exercise" in a somewhat ambiguous and circular manner.[99] Case law provides clarification regarding the meaning of a "religious exercise" under RLUIPA.

> to qualify as "religious exercise" under RLUIPA, the practice need not be "compelled by, or central to, a system of religious belief." Moreover, religious exercise includes "the use, building or conversion of real property for the purpose of religious exercise." Of course, every building owned by a religious organization does not fall within this definition. Buildings used by religious

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95 *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 699 (E.D. Mich. 2004) (stating that "Ann Arbor's ordinance, which governs historical preservation, including the demolition of historical structures, certainly qualifies as a 'land use regulation' within the Act's purview.").

96 Pl's Facts ## 18.

97 Pl's Facts ## 22-23.

98 Pl's Facts # 22.

99 42 USCS § 2000cc-5 (7) (A) (stating that in general the phrase "religious exercise includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief"); and (B) (establishing as a rule that the "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.").

> organizations for secular activities or to generate revenue to finance religious activities are not automatically protected.[100]

Unlike *Mintz*, where an "ancillary" building was deemed to be "central" to the church's mission and, hence, part of its "religious exercise," in the present case, the plaintiff has ceased using the property for religious purposes. The plaintiff does not cite any current or planned future use of the OLOH site for religious exercises of any kind. In an attempt to invoke RLUIPA, plaintiff describes the process it generally follows when selling its property to a third party:

> an agreement must be reached between the Bishop and the purchaser that any religious symbols may not be desecrated or put to a sordid use. If such an accommodation cannot be reached, all religious symbols are removed from the interior and exterior building. This would involve the removal of all exterior Christian crosses and stained glass windows depicting religious symbols or scenes. Where it is either impossible or impractical to remove religious symbols from the building exterior (a frieze or carvings of sacred scripture) such symbols are covered with concrete or other suitable material to prevent desecration. In some instances, in order to make certain that religious symbols or expressions are not desecrated, such items must be properly destroyed.[101]

Nothing in the OLOH Ordinance prevents plaintiff from applying to the Springfield Historical Commission for a certificate to conduct these types of activities. The historical designation of the OLOH exterior architectural features does not transform the sale of the closed OLOH property, which was formerly used as a place of worship, into any form of "religious exercise" under RLUIPA. Plaintiff's title to the OLOH property, or even its incidental use for religious purposes, would not convert plaintiff's secular plan for the

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[100] *Mintz v. Roman Catholic Bishop*, 424 F. Supp. 2d 309, 318-19 (D. Mass. 2006) (citations omitted).

[101] Pl's Facts # 40.