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April 26, 2018

HAND-DELIVERED

Robert Houseman, Director of Planning and Zoning  
Town of Hanover Department of Planning and Zoning  
41 S Main Street  
PO Box 483  
Hanover, NH 03755

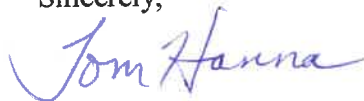
Re: Christ Redeemer Church  
Second Motion for Rehearing  
28 Greensboro Road, Hanover, NH

Dear Rob:

Enclosed are the original and seven copies of Christ Redeemer Church's Second Motion for Rehearing, your office's form, my office's check in the amount of \$100 and copy of the March 28, 2019 decision.

Kindly let me know if I have omitted anything. Thanks for your assistance.

Sincerely,



Thomas R. Hanna

TRH/kmh

cc: (with enclosures)  
Nathan H. Stearns, Esq.  
Michael J. Tierney, Esq.  
Christopher Audino  
Lauren Groves

STATE OF NEW HAMPSHIRE

TOWN OF HANOVER

ZONING BOARD OF ADJUSTMENT

Re: Christ Redeemer Church  
Application for Special Exception  
To Allow Church Use at 28 and 32 Greensboro Road  
Tax Map 25, Lots 14 and 15 in SR-2 and RR Zoning Districts  
Case No. 25015/014 – Z2019-10

CHRIST REDEEMER CHURCH'S  
SECOND MOTION FOR REHEARING

On December 6, 2018, the Hanover Zoning Board of Adjustment (“Board,” “Zoning Board” or “ZBA”), voted 3-2 to deny a Special Exception to allow Christ Redeemer Church (hereafter the Church or CRC) to build its house of worship on a Greensboro Road site. A motion for rehearing was timely filed, granted and a rehearing was held on March 14, 2019. On March 28, 2019, the ZBA reversed and granted the Special Exception pursuant to subjective and oppressive conditions that make this “approval” tantamount to a denial. The conditions limiting onsite occupancy to 300 and curtailing hours of operation would prevent the Church from engaging in its current religious practices, to say nothing of cutting off any growth. Acting through their attorneys, Thomas R. Hanna and Michael J. Tierney, the Church files this Motion for Rehearing and asserts that the Zoning Board’s decision was unlawful and unreasonable and hereby requests a rehearing in accordance with RSA 677:2.

I. INTRODUCTION

Christ Redeemer Church has had an active existence in Hanover for about 20 years, during most of which it has conducted Sunday services at Hanover High School. CRC is

committed to staying in and serving Hanover and has searched for its own permanent home close to downtown Hanover for more than 16 years. Churches are only permitted outright in Hanover in the Institutional and Downtown zoning districts, but it is uncontroverted that no suitable sites for a church are available in either district. In 2007, CRC applied for a variance to build a church in the OL Office and Laboratory district. The variance was denied, and it was suggested at the time by Town officials that CRC locate a site in a residential district where churches are permitted by Special Exception. That is what CRC has now attempted to do. CRC purchased several residential properties on Greensboro Road, including Lots 14, 15, 16 and 32 shown on Tax Map 25. The Church seeks to locate its house of worship on merged Lots 14 and 15, which combined totals approximately 6.7 acres. Two-thirds of the site is located in the RR zoning district and one-third in the SR-2 district. The church building is proposed to be located in the SR-2 portion of the land, while the parking lot spans the zoning district boundary line. About two-thirds of the parking lot is in the RR zone.

The Church has been engaged in the regulatory approval process for more than two full years, starting with so-called “design review” before the Hanover Planning Board, and ultimately appearing before the ZBA for four protracted hearings and two deliberative sessions from June to December 2018 and then an additional rehearing on March 14, 2019 and two more deliberative sessions on March 21, 2019 and March 28, 2019. The regulatory process has been a substantial and burdensome expense for the Church, on top of the site acquisition cost. Assuming that the subjective and oppressive conditions of its Special Exception are reversed and the Church obtains Zoning Board approval, it must then engage in extensive regulatory review by the Hanover Planning Board and New Hampshire Department of Environmental Services.

CRC applied for three Special Exceptions, one to allow a church *use* to be located in the SR-2 and RR zoning districts, one to permit limited encroachment into wetlands buffer areas, and one to allow the church driveway to be widened more than 14 feet. This Motion for Rehearing addresses only the *use* Special Exception. The ZBA granted Special Exceptions on the other two applications. The Church asserts that the ZBA's conditioning of the use Special Exception on occupancy and hour limitations violated State and Federal law, including the Religious Land Use and Institutionalized Person's Act ("RLUIPA"), and the Hanover Zoning Ordinance. The Church further contends that the decision is not reasonably supported by the evidence presented to the Board, and, indeed, is inconsistent with the traffic engineer's report provided to the ZBA. Accordingly, there is "good reason" to grant a rehearing.

This Motion for Rehearing is timely filed within thirty (30) days of the Board's March 28 vote to approve the Special Exception with conditions.

## II. STANDARD OF REVIEW FOR GRANTING A REHEARING

The Board may grant a rehearing "if in its opinion good reason therefor is stated in the motion." (RSA 677:2). The purpose of the rehearing process is to give the Board the opportunity to correct its own errors or to consider additional evidence that was not available at the time of the decision.

## III. SPECIAL EXCEPTION

The Hanover Zoning Ordinance allows a church by Special Exception in both the SR-2 and RR zoning districts at issue in this case. The Special Exception criteria are set forth as follows:

*“207.1 A use of land and structures so designated in Article IV may be allowed as a Special Exception only on approval of the Zoning Board of Adjustment and only when:*

- A. The use conforms to the general and specific standards established by this Ordinance and*
- B. The Zoning Board of Adjustment has first determined that the proposed use will not adversely affect:*
  - (1) The character of the area in which the proposed use will be located;*
  - (2) The highways and sidewalks and use thereof located in the area; or*
  - (3) Town services and facilities.”*

Board Member H. Bernard Waugh, Jr. provided a helpful explanation in his November 12, 2018 proposed draft decision in support of granting the Special Exception about what was at stake in the Church’s application for Special Exception::

A Special Exception is one which is expressly permitted by a zoning ordinance, subject to certain conditions, and is therefore much different from a variance (see Loughlin 15 N.H. PRACTICE, LAND USE PLANNING & ZONING, Ch 23). Indeed, the only zone in Hanover where a church is permitted ***without*** a Special Exception is the Institutional zone, most of which is owned by non-religious institutions. Thus, reading the Ordinance as a whole, it is clear that the Special Exception mechanism constitutes ***the*** way in which Hanover intends to accommodate religious land uses. See paragraph 5 of Waugh draft decision.

The Board determined that the Church satisfied Section 207.1A, Section 207.1B (2) and Section 207.1B (3). However, the Board denied the Special Exception on a 3–2 vote based on Section 207.1B (1) *“that the proposed use will not adversely affect the character of the area in which the proposed use will be located.”* The Board’s March 28, 2019 decision and its conditions of approval also focus on the *character of the area* section of the ordinance.

#### IV. THE CHURCH LISTENED CAREFULLY AND MADE MULTIPLE MODIFICATIONS TO ITS PROPOSAL; IT RETAINED EXPERTS TO PROVIDE ADVICE ON ALL TECHNICAL ISSUES

CRC has made multiple modifications to the building's design and siting, as well as other concessions, in response to concerns raised and recommendations made by Hanover neighbors, the Planning Board, Town planning staff, and the Zoning Board itself. Those changes include the following:

After engaging in the Planning Board's Design Review process in early 2017<sup>1</sup>, CRC spent a year balancing its minimum needs against feedback of Town staff, Planning Board and neighborhood residents. In that spirit, an entirely new design emerged including the following modifications:

- Size: The size of the footprint was reduced by nearly 40%, making it basically the same size as the commercial warehouse just a few doors down, east of the Church site. The footprint of the enclosed building was reduced from 17,960 to 11,591 square feet; the overhangs and porches were reduced from 3,114 to 1,809 square feet. Therefore, the total floor area was reduced from 34,000 to 21,250 square feet.
- Siting: The building was moved from the ridge into the hill to reduce scale.
- Parking lot: The parking lot was moved to be less visible from the road.
- The steeple was eliminated as a concession to concerns about scale.
- Residential-style building materials, including stone, were introduced.

Before submitting a revised zoning application in December 2017, CRC made the following changes in response to additional Town staff suggestions:

- Added parking lot tree islands
- Increased snow removal zones and locations
- Widened access drive north of building per Fire Department to allow better access for emergency vehicles

After the Planning Board's 2018 Design Review, based on the revised December 2017 application, the Church again made changes in response to neighbor and board comments:

- Reduced size of parking lot from 134 to 120 spaces.
- Added landscape screening along the west property boundary shared by 24 Greensboro Road, to protect the abutters from shining headlights
- Added screening fence along south parking lot edge.

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<sup>1</sup> Planning Board Design Review is required by the Hanover Zoning Ordinance when an applicant seeks a special exception for impacts in the wetland buffer.

And, finally, in response to neighbor and Zoning Board concerns expressed during the ZBA's four hearings, CRC offered to consider the following modifications:

- Additional reduction to size of parking lot from 120 spaces to 104 spaces, the minimum number required by the zoning ordinance. The offer to reduce the spaces to 104 was prompted by the strong urging of the Board.
- Security gate at parking lot.
- Work with Hanover town officials to advocate for sidewalks on Greensboro Road which is a state highway.
- Work with Hanover and State DOT to address Greensboro Road culvert condition.
- Post 'No Parking' along street.
- Provide a traffic coordinator on Sunday mornings and to furnish shuttles from Dartmouth campus and other locations should this be deemed necessary.
- Timed, customizable parking lot lighting to limit lighting only as needed.
- Add trees for screening.

In the process, CRC engaged the following expert consultants who presented their conclusions and reports to the Zoning Board:

- RSG, Inc. (Ben Swanson) – traffic study regarding Church's impact on Greensboro Road.
- Breadloaf Architects – architecture and site planning
- Otter Creek Engineering (Brent Rakowski) – drainage/stormwater runoff impacts
- A&D Klumb Environmental – wetlands
- Michael W. Gammal, MAI – church will not have any negative impact on market values of surrounding properties
- RSG, Inc. (Eddie Duncan, INCE Bd. Cert.) – noise
- Breadloaf Architects (Jim Pulver) – lighting
- Keach-Nordstrom Associates, Inc. (Steve Keach, hired by Zoning Board)

#### V. LEGAL ANALYSIS - ZBA CONDITIONS ARE UNLAWFUL AND UNREASONABLE BASED ON THE EVIDENCE

**A. The Board's decision was unlawful in multiple ways, is not supported by a reasonable interpretation of the evidence and is inconsistent with the Zoning Ordinance.**

## **1. The Board's Imposition of an Occupancy Limit Ignores Section 1002.1 of the Hanover Zoning Ordinance**

The Board's conditions are first based on its personal disagreements with the provisions of the Hanover Zoning Ordinance. In particular, HZO 1002.1 provides that for "Theatre, auditoriums, and all places of indoor public assembly including places of worship" there must be one parking space for every five seats. The Board held that it "will require the parking lot to have no more and no less than 113 spaces." Paragraph 48. Pursuant to the provisions of HZO 1002.1, a church that has 113 parking spaces could be limited to 565 seats. (113x5). Nevertheless, ZBA ignored the clear and objective provisions of the Hanover Zoning Ordinance in order to apply a 300 person limitation or only 53% of what is provided for in Section 1002.1 of the Hanover Zoning Ordinance. In fact, Judith Brotman, Hanover zoning administrator at the time, calculated that the zoning ordinance required the Church to provide a minimum of 104 parking spaces based on 415 people in the sanctuary and assorted other people in other parts of the building. See "Hanover Zoning Table 1002.1 Parking Area Plans," attached hereto as Exhibit A. This zoning parking calculation was included in the Church's Special Exception application submission at page 43. It is arbitrary and unlawful to impose a 300-person occupancy limitation based on the board members' subjective feelings instead of the explicit requirements of the ordinance.

## **2. The Board Mischaracterizes RSG's Traffic Analysis Contrary to the Evidence in the Record**

In Paragraphs 34 to 44 of its March 28, 2019 Decision, the ZBA purports to make findings based on RSG's study. Many of these are not accurate and/or based on the ZBA's misreading of RSG's study.



First, the traffic study was not based and did not assume the occupancy would be limited to 300 people. Rather, as explained in RSG's January 5, 2018 Traffic Study, as well as in RSG's July 9, 2018 Supplement, the trip generation of 102 entering and 110 exiting (for a total of 212) was based on the 21,250 square foot structure divided by the 9.99 standard ITE ratio. The stated typical current attendance of 300 persons played no part in RSG's traffic study. If, instead of basing its trip generation analysis on square footage, RSG had based its analysis on 400 seats, the conclusion would remain the same. Using trip generation rates based on 400 seats would not cause an adverse impact on traffic operations of the surrounding roadway network.

Second, the ZBA decision criticized RSG's use of the 9.99 standard ITE ratio and opined in Paragraph 36 that RSG should have used the 5.99 trips per 1,000 square feet based on a "local" calculation by the Southern New Hampshire Regional Planning Commission. As explained in RSG's July 9, 2018 Trip Generation Memo, the national ITE standard is more appropriate as it results in higher trip generation, while the SNHRPC ratio is based on only three churches. Nevertheless, even if RSG were based on a calculation of 5.99 trips, this would only strengthen the conclusion that this project will not cause adverse impact to traffic operations on the surrounding roadway network. As stated in RSG's July 9, 2018 Memo, if RSG had used the Southern New Hampshire ratio instead of the ITE manual, then the result would be only 127 trips instead of 212. Using the local ratios instead of the national standard results in fewer trips being generated and, therefore, a further reduced traffic impact.

Third, contrary to the Board's assertion, RSG made no assumptions regarding the average number of people in each car. Paragraphs 34-44 repeatedly state that RSG impliedly estimated that there would be 2.9 people per vehicle. This is simply not true. RSG's trip generation analysis was based on square footage, which is the industry standard. RSG offered no opinions

as to the average number of occupants per vehicle, the number of students attending services, the number of people biking to the church, the number of people taking a shuttle bus to church or the number of people walking to the church.

Fourth, RSG was not asked to and did not provide any analysis of the number of spaces in the parking lot. While RSG was aware that Section 1002.1 of the Hanover Zoning Ordinance provides that, in the SR and RR Districts, there shall be 1 parking space for every 5 seats for assemblies such as houses of worship, RSG was not asked to provide an analysis or any opinion concerning the above-referenced parking provision of the Hanover Zoning Ordinance.

Fifth, the ZBA alleges in Paragraph 34 that RSG “does not address the traffic issue at the entrance to the church but only at the distant intersection of Greensboro Road and Route 120.” This is not true. On page 2 of its January 5, 2018 Traffic Impact Analysis, RSG specifically addresses the Church entrance stating “At the Greensboro Road & Site Access intersection, delays of 10 second or less, corresponding with LOS B or better conditions, are projected in both the 2018 design year and the 2028 future planning year. At this intersection, 95th percentile queues of 3 vehicles or less are projected with the addition of site-generated traffic.” Given the current and projected traffic conditions on Greensboro Road, RSG concluded that the amount of traffic anticipated to be generated by the church will not cause adverse impacts in the area of the site access intersection.

Finally, to the extent there still remain misunderstandings of RSG’s conclusions, attached to this Motion for Rehearing is a copy of RSG’s April 11, 2019 Memo, in which RSG refutes each of the ZBA’s characterizations of RSG’s analysis and explains why the ZBA’s findings are contrary to the evidence. See RSG April 11, 2019 Memo attached hereto as Exhibit B.

In short, RSG's analysis does not support a 300-person occupancy limit. As RSG explains in its April 11, 2019 Memo, trip generation based on square footage is equivalent to trip generation based on 391 seats in the sanctuary. There was no evidentiary basis for the Board to conclude that a 300-person occupancy limit<sup>2</sup> is supported by RSG's traffic analysis. Indeed, the Board misread or manipulated RSG's assumptions, analysis and conclusion to create an unjustifiable 300-person restriction.

### **3. The Hours Limitation is Completely Subjective and Based on No Evidence at All**

Condition D imposes an incredibly arbitrary restriction that "Hours of operation and occupancy of the property shall be limited to 7:00 AM – 9:00 PM weekdays and 8:00 AM – 9:00 PM weekends, except 9:00 PM – 12:00 AM on December 24 and 12:00 AM – 2:00 AM December 25." This condition is completely contrary to the evidence as well as common sense and instead is based on the unsupportable personal opinions of board members. Paragraph 49 demonstrates that the Board has failed to apply any narrow, objective or definite standard but instead has "chosen hours that are consistent with our [board members' personal] observations of the hours during which most activities take place at area churches." The Board's restriction is not even based on conditions imposed on other Hanover churches as no condition on hours of operation has ever been imposed on a Hanover church. The evidence presented to the ZBA included that there are First Friday prayer breakfasts at 6 AM. See Paragraph 23. In addition, the arbitrary fixed hours limitation appears to apply to all persons, including staff preparing for

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<sup>2</sup> The Board also erroneously asserts that "Applicant estimates that approximately 300 people using 100 cars will be present for a Sunday service and that there will be concurrent Sunday School classes." See Paragraph 22. This is factually incorrect and contrary to the evidence in the record. While an average Sunday service may only have 300 people in attendance, the attendance will vary week to week and will be larger on Christmas, Easter and other days. As also stated in Paragraph 22, "the proposed Church sanctuary will seat 400 congregants."

an event or cleaning after an event, the pastor preparing his sermon prior to services or the occasional evening leadership meeting. There is no basis for this arbitrary and subjective hours limitation, and it should be rejected.

**B. The Unlawful Conditioning of the Special Exception Violates the Church's Rights Under RLUIPA, is an Unconstitutional Prior Restraint Under the First Amendment and Violates the Equal Protection Guarantees of the New Hampshire Constitution**

CRC applied for a Special Exception to allow the property it owns to be used for church purposes. As cited above, pursuant to Section 207.1(b) of the Hanover Zoning Ordinance, a Special Exception will only be permitted when the "Zoning Board of Adjustment has first determined that the proposed use will not adversely affect: (1) The character of the area in which the proposed use will be located; (2) The highways and sidewalks and use thereof located in the area; or (3) Town services and facilities." This provision of the ordinance is a facially unconstitutional prior restraint and a violation of RLUIPA. In addition, the ZBA, by conditioning the approval of the Church on the basis of the alleged impact on the character of the neighborhood has violated RLUIPA as applied to Christ Redeemer Church. Finally, the ordinance's preferential treatment of governmental assemblies over religious assemblies violates the equal protection guarantees of the federal and New Hampshire Constitutions.

The Hanover Zoning Ordinance facially violates RLUIPA and is an unconstitutional prior restraint. Therefore, the ZBA should grant a rehearing and following such hearing grant the special exception without the oppressive conditions involving the 300-person limitation and hours limitation.

## 1. RLUIPA

The Religious Land Use and Institutionalized Persons Act, 42 U.S.C 2000cc, is a federal statute that protects the rights of religious organizations to build and use their land for religious exercise. In adopting this statute, Congress stated:

The right to assemble for worship is at the very core of the free exercise of religion. Churches and synagogues cannot function without physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes. The hearing record compiled massive evidence that this right is frequently violated. Churches, in general, and new small, or unfamiliar churches in particular, are frequently discriminated against in the fact of zoning codes and also in highly individualized and discretionary processes of land use regulation. 146 Cong. Rec. S. 7774–5 (July 27, 2000)

RLUIPA is intended to be broadly interpreted and applied. “This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” 42 U.S.C 2000cc-3(g). Religious exercise is also broadly defined by RLUIPA. The statute provides: “The term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief. . . [and 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.” The imposition of oppressive conditions restricting church use of its property is clearly within RLUIPA’s ambit.

RLUIPA limits a municipality’s ability to use its zoning ordinance to preclude or unreasonably restrict religious exercise in four different ways. First, a municipality may not “unreasonably limit” the location where churches are permitted. Second, a municipality may not apply a zoning ordinance “in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.” Third, a municipality may not apply a

zoning ordinance that “discriminates against any assembly or institution on the basis of religion or religious denomination.” Finally, a municipality may not apply a zoning ordinance in a way that imposes a “substantial burden” on a church’s use of a property for religious purposes. The Town of Hanover’s 300-person limitation, restriction of hours, and mandate that church windows always be closed violate all four prongs.

**a) The Hanover Zoning Ordinance is an Unreasonable Limitation on Religious Exercise**

Hanover’s Zoning Ordinance unreasonably limits the location of churches in violation of 42 U.S.C. 2000cc(b)(3). According to the ZBA’s decision of December 6, 2018, “the only zone in Hanover where a church is permitted without a Special Exception is in the Institutional zone, most of which is owned by non-religious institutions.” In fact, Section 10 of the Hanover Master Plan states that there are 579 acres in the Institutional Zone, but almost 500 acres are owned by Dartmouth College and its fraternities and sororities, almost 80 acres by the public school district, a few acres owned by the Catholic Church and then only two small residences on Rayton<sup>3</sup> and Conant Streets. See Hanover Master Plan, Section 10.

Due to the minimum lot size requirements, space requirements of the assembly and the parking required by the ordinance, neither of the small residences presents a feasible option even if they were available for sale. Therefore, the only land in the Institutional District is land already owned and used by Dartmouth College, the school district or the Catholic Church. None of this land is available for development as a new church.

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<sup>3</sup> The Master Plan refers to two residences on Tyler and Conant Streets. It is believed this is a typographical error and the Master Plan intended to refer to the residences on Rayton and Conant Streets. 39 Rayton and 16 Conant are both zoned institutional. Neither meet the minimum lot size required by the Hanover Zoning Ordinance and, therefore, could not be developed as a church.

Churches are also permitted in the Downtown zone, but, as indicated above, there was no dispute by ZBA members or anyone else, that there are no suitable sites in downtown Hanover. The Church's real estate agent, Star Johnson, submitted a letter to the ZBA explaining how he has searched for available properties for over 16 years. The last new church building approved in Hanover was in 1960.<sup>4</sup>

Courts have recognized that a primary purpose of RLUIPA was to remedy zoning ordinances "which limited 'new religious groups' from moving into a community." *Mintz v. Roman Catholic Bishop of Springfield*, 424 F. Supp. 2d 309, 321 (D. Mass. 2006). The Hanover Zoning Ordinance greatly limits new churches from moving into Hanover. This is an unreasonable limitation which is prohibited by 42 U.S.C. 2000cc(b)(3).

**b) The Hanover Zoning Ordinance Treats Church Assemblies on Less Than Equal Terms With Non-Religious Assemblies**

Hanover's Zoning Ordinance also violates RLUIPA by treating religious assemblies on less than equal terms with non-religious assemblies in violation of 42 U.S.C. 2000cc(b)(1). Throughout the ordinance, governmental assemblies are treated more favorably than religious assemblies. For example, the Church's property is located in the SR and RR zoning districts which both require a Special Exception for religious assemblies. Nevertheless, governmental schools or recreation facilities are permitted uses in the RR district without a Special Exception. See HZO 405.9(B)(3).<sup>5</sup> Therefore, the Hanover Zoning Ordinance would permit a 400 to 500

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<sup>4</sup> Aquinas House, the Catholic Student Center at Dartmouth College, was built in 1960. Since then, the population of the Town of Hanover has increased by over 25% but there have been no new churches.

<sup>5</sup> The HZO explicitly treats schools more favorably than churches. Nevertheless, even if the HZO did not make such unequal treatment explicit, RSA 674:54 requires that Hanover treat schools more favorably than religious assemblies. The First Circuit has specifically recognized that courts must look to the "combined effect of the local ordinance and state law." *Ackerley*

seat assembly to be built as an auditorium<sup>6</sup> or as a school on the property the Church owns at 28 Greensboro Road<sup>7</sup> but that same land cannot be used to build a church building. Treating churches in its ordinance on less than equal terms with senior centers, town auditoriums or public schools is a violation of RLUIPA's equal terms provision. See *Rocky Mountain Christian Church v. Bd. of Cty. Comm'rs*, 613 F.3d 1229, 1237 (10th Cir. 2010)(county violated equal terms provision by requiring church to obtain a special use permit and applying permit criteria differently than applied to a school); *Catholic Archbishop of Seattle v. City of Seattle*, 28 F.Supp. 3d 1163 (W.D.Wash. 2014) (city violated equal terms provision by having a zoning ordinance that restricted Catholic Church's athletic fields but not public school's athletic fields).

The equal terms violation is made even more apparent by looking at the conditions of the ZBA's decision. If the Church was a senior citizen center or a municipal auditorium or a school of the same size or even larger is permitted to be built as of right. The ZBA could not impose any conditions on such non-religious assembly. A school could be built on this site, rent out its auditorium or gymnasium to a church for religious services on a Sunday, and not have the conditions that have been imposed on Christ Redeemer Church. The alleged negative effects of having Christ Redeemer Church's occupancy size at 28 Greensboro Road (its application called

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*Commc'ns of Massachusetts, Inc. v. City of Cambridge*, 88 F.3d 33, 34 (1st Cir. 1996); see also *Ackerley Commc'ns of Massachusetts, Inc. v. City of Cambridge*, 135 F.3d 210 (1st Cir. 1998). See also *Digrugilliers v. Consol. City of Indianapolis*, 506 F.3d 612 (7th Cir. 2007)(look at combined effect of state and local law in determining if there is a RLUIPA equal terms violation).

<sup>6</sup> Article III, Section 302 of the HZO defines government use, recreation to include "such functions as recreation center, senior citizens center, gymnasiums, auditorium, and outdoor recreational facilities." Therefore, an auditorium could be built to host town meetings, musical events or plays or senior activities, just not for religious services.

<sup>7</sup> The lot is 6.7 acres. While the front of the lot is zoned SR, the rear and the majority of the lot is zoned RR.



for 415 seats in the sanctuary) is allowed by the Hanover Zoning Ordinance as long as the scale of the project is caused by a town auditorium or school building and school facilities and not by a religious assembly. All that is prohibited by the HZO is having the primary purpose of the assembly to be for church purposes.

The conditions regarding occupancy and hours limitations makes the equal terms violations all the more plain. The ZBA would not be imposing any conditions if the assembly was not for church purposes. And the conditions were imposed based on the board members' subjective feelings as to how a church is supposed to operate. See, e.g. paragraphs, 46, 49, comparing CRC to other churches.

Finally, the HZO facially violates RLUIPA's equal terms provisions as it allows secular assemblies in other districts where it prohibits religious assemblies. For example, the Business District permits, as of right, private clubs, theaters, restaurants, and funeral establishments but prohibits churches. See HZO 405.3(B). So a commercial assembly could locate in the business district and not face the conditions being imposed on the Church but that option is not available to the Church precisely because it is a church. Numerous courts have held such disparate treatment violates RLUIPA. See *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 272 (3d Cir. 2007)(ordinance which treated religious assemblies less favorably than theaters, restaurants and stores violated equal terms provision); *Chabad of Nova v. City of Cooper City*, 533 F.Supp.2d 1220 (So. D. Fl. 2008) (finding city violated RLUPA's Equal Terms Provision where a zoning ordinance prohibited churches that allowed other assemblies such as movie theaters, day care centers and indoor recreational facilities); *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1229 (11th Cir. 2004)(allowing private clubs and theaters but requiring a special use permit for churches and synagogues violates equal terms provision); see also

*Digrugilliers v. Consol. City of Indianapolis*, 506 F.3d 612 (7th Cir. 2007)(allowing funeral homes but not churches violates equal terms provision); *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163 (9th Cir. 2011) (allowing membership clubs as of right but requiring conditional use permits for churches violates RLUIPA).

**c) The Hanover Zoning Ordinance Discriminates Against Religion in General and New Churches in Particular**

In imposing conditions on the Church's Special Exception that would not be applied against a non-religious assembly, the ZBA violated 42 U.S.C. 2000cc(b)(2) which prohibits municipalities from discriminating on the basis of religion or religious denomination. RLUIPA was adopted to protect a church's right to build, especially a new church. Nevertheless, Hanover discriminates against new churches by making it prohibitively difficult to build in Hanover and imposing conditions not imposed on non-religious assemblies. A town auditorium or school could be built in the RR District, but churches are not allowed except by Special Exception. Churches are restricted not based on size, parking or traffic but on the content of their speech and the purpose of their assembly. It is practically impossible to build a new church anywhere in the Town of Hanover. In fact, the last church to be given permission to build, the Catholic Student Center at Dartmouth/Aquinas House, was built almost 60 years ago in 1960. Before that, the last church built was another 60 years earlier in 1900 before zoning was even adopted.

Finally, there is no standard to guide what "scale" is or is not acceptable to the Town. The occupancy and hours conditions imposed by the ZBA in its March 28, 2019 decision is not based on any standards other than the board members' discretion. Granting standardless discretion to approve or disapprove churches allows for the appearance and the possibility that accepted and popular churches will be approved while new or unpopular churches will not be approved.

“[S]ubtle forms of discrimination by land use authorities [] may occur when a [zoning ordinance] delegates essentially standardless discretion.” *Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 193 (2d Cir. 2014); See also *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005) (“If a land-use decision, [such as this Special Exception denial], imposes a substantial burden on religious exercise (the statute defines “religious exercise” to include the “use, building, or conversion of real property for the purpose of religious exercise,” 42 U.S.C. § 2000cc-5(7)(B)), and the decision maker cannot justify it, the inference arises that hostility to religion, or more likely to a particular sect, influenced the decision.”)

**d) The Application of the Hanover Zoning Ordinance Results in an Unlawful Substantial Burden on Christ Redeemer Church’s Religious Exercise**

The ZBA has also violated RLUIPA by imposing a substantial burden on Christ Redeemer Church’s religious exercise in violation of 42 U.S.C. 2000cc(a). As previously stated, the RLUIPA statute defines religious exercise to “include[] any exercise of religion, whether or not compelled by, or central to, a system of religious belief. . . [and 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.” 42 U.S.C. 2000cc-5(7)(B).

In most substantial burden cases, the area of dispute will be on whether the burden rises to the level of actually being “substantial.” In this case, the conditions imposed by the ZBA were explicitly founded and intended to be substantial. See Paragraph 42 (“our conclusion that any grant should be subject to substantial conditions.”) See also Deliberations where Member Waugh acknowledged that arbitrary conditions can constitute an effective denial.

Even if the ZBA did not explicitly find these conditions to be substantial, the court would still find these conditions to constitute a substantial burden. Determining whether conditions imposed on a permit constitutes a substantial burden usually requires an analysis of what actions the religious organization has taken in the past and the potential for a favorable decision in the future. This is not the Church's first application to the Hanover ZBA. The Church was denied a variance in 2007 for a property at 8 Buck Road which is in the OL District. See ZBA Case 24036-Z2007-04. At that time, the Church was instructed to look for property in zones where a church is permitted by Special Exception such as in the SR and RR Districts. It applied for a special exception for a sanctuary of approximately 415 seats in the SR and RR Districts and was originally denied in a December 2018 decision. Three months later, the ZBA "approved" a Special Exception but conditioned approval on a maximum of 300 people being on the property at any one time and on limiting the hours that any person is allowed in the church. During the rehearing on March 14, 2019, counsel for the Church specifically asked the ZBA to identify a parcel where the Church would be approved but the Chair of the ZBA acknowledged that the ZBA cannot identify where it is that the Church's application would be approved. It could apply for approval for a 400 plus seat church elsewhere but there is no guarantee that the ZBA would approve such a church somewhere else. RLUIPA precludes municipalities from requiring churches to suffer delay, uncertainty, and expense on successive applications with no certainty of whether it will ever meet subjective standards. See *Saints Constantine & Helen v. City of New Berlin*, 396 F.3d 895, 901 (7<sup>th</sup> Cir. 2005)(a substantial burden exists where there is "delay, uncertainty, and expense. That the burden would not be insuperable would not make it insubstantial.")

Furthermore, courts have recognized a substantial burden where a board takes arbitrary actions and ignores its own ordinance. *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007). As explained above, the Board's occupancy conditions is based on its personal disagreement with the provisions of the Hanover Zoning Ordinance. In particular, HZO 1002.1 specifically provides that for "Theatre, auditoriums, and all places of indoor public assembly including places of worship" there must be one parking space for every five seats. The Board held that it "will require the parking lot to have no more and no less than 113 spaces." Paragraph 48. Pursuant to the provisions of HZO 1002.1, a church that has 113 parking spaces could be limited to more than 500 seats. (113x5). Nevertheless, ZBA ignored the clear and objective provisions of the Hanover Zoning Ordinance in order to apply a 300 person limitation or only 53% of what is provided for in Section 1002.1 of the Hanover Zoning Ordinance. It is arbitrary and unlawful to impose an occupancy limitation based on the board member's subjective feelings instead of the explicit requirements of the ordinance.

## **2. The Ordinance and its Application are Unconstitutional Prior Restraints**

The Hanover Zoning Ordinance requires churches to obtain a Special Exception prior to using its property for religious worship services. "As the Supreme Court stated, 'a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.'" *Desert Outdoor v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996) (invalidating an ordinance as an unconstitutional prior restraint and quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51(1969)); see also *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755 (1988).

Zoning ordinances which require houses of worship to obtain a Special Exception “without narrow, objective, and definite standards” have been held to be unconstitutional in other New Hampshire towns. See *Saint Benedict Center v. Town of Richmond*, Docket 08-E-0005, 2009 WL 8635926 (Cheshire Superior Court, 2009) (Mangones, J.) (ordinance’s special exception requirement a facially unconstitutional prior restraint and conditions of approval, including traffic conditions, violated RLUIPA’s substantial burden prong). Other uses protected by the First Amendment likewise cannot be subject to ordinances which grant zoning exceptions without “narrow, objective, and definite standards.” *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1362 (11th Cir. 1999)(a zoning exception that requires the ZBA to determine if the use is “compatible” with the surrounding area is unconstitutional.)

“[S]ome measure of discretion is acceptable, but the cases show that virtually any amount of discretion beyond the merely ministerial is suspect. Standards must be precise and objective.” *Id.* A prior restraint claim can be brought facially regardless of how the ZBA may apply the ordinance. *Van Wagner Boston, LLC v. Davey*, 770 F.3d 33, 38 (1st Cir. 2014)(“It is being subject to a prior restraint on protected expression through requirements embodying standardless discretion, not being harmed by the unfavorable exercise of such discretion, that causes the initial injury.”)

There are several provisions of the Hanover Zoning Ordinance that contain “narrow, objective and definite standards.” For example, HZO 1002.1 provides that for “Theatre, auditoriums, and all places of indoor public assembly including places of worship” must have one parking space for every five seats. This would appear to be an objective and definite standard. Nevertheless, other provisions of the HZO lack ““narrow, objective and definite standards.” For example, Section 207.1(b) requires a subjective analysis of whether a church will

adversely affect “(1) The character of the area in which the proposed use will be located.” Provisions that allow for subjective determinations such as 207.1(b) are facially unconstitutional and may not be applied.

The ZBA’s decision of March 28, 2019 ignored narrow, objective and definite criteria and instead imposed an occupancy limit based on subjective feelings and the misunderstanding of the traffic analysis. In particular, HZO 1002.1 specifically provides that for “Theatre, auditoriums, and all places of indoor public assembly including places of worship” there must be one parking space for every five seats. The Board held that it “will require the parking lot to have no more and no less than 113 spaces.” Paragraph 48. Pursuant to the provisions of HZO 1002.1, a church that has 113 parking spaces could be limited to 565 seats. (113x5). Nevertheless, ZBA ignored the clear and objective provisions of the Hanover Zoning Ordinance in order to apply a 300 person limitation or only 53% of what is provided for in Section 1002.1 of the Hanover Zoning Ordinance. It is arbitrary and unlawful to impose an occupancy limitation based on the board member’s subjective feelings instead of the explicit requirements of the ordinance.

The ZBA’s Decision of December 6, 2018 also demonstrated the extent of the 207.1(b)’s subjective discretion. The ZBA’s decision bases its denial not on any narrow and objective criteria but instead subjectively opined that the Board did not like the “scale” and intensity of use of the proposed church. Such subjective determinations are impermissible restraints on the location of churches. Likewise, the Board’s March 28, 2019 approval, with oppressive conditions, also amounted to an impermissible restraint on the location of churches. Therefore, 207.1(b) is both facially unconstitutional as well as unconstitutional as applied to the Church.

### 3. The Ordinance Violates Equal Protection Guarantees of the New Hampshire Constitution and the Federal Constitution

Under both the Fourteenth Amendment to the Federal Constitution and Part I, Articles 2, 12 of the New Hampshire Constitution, property owners have a right to use their property and not have private land uses treated less favorably than the same governmental land use. See *Community Resources for Justice v. City of Manchester [CRJ I]*, 154 N.H. 748, 761-762 (2007); *Community Resources for Justice, Inc. v. City of Manchester [CRJ II]*, 157 N.H. 152, 154 (2008). When a town's zoning ordinance treats a governmental use more favorably than the same private use, intermediate scrutiny will be applied.<sup>8</sup> *Id.* Intermediate scrutiny requires the Town to prove that the distinction in the "ordinance is substantially related to an important governmental objective."

In *CRJ*, a private non-profit that sought to operate a halfway house for federal prisoners was precluded from doing so by the Manchester Zoning Ordinance. The City acknowledged that state-run halfway houses were allowed but alleged the ordinance could still be applied to prohibit private halfway houses. *Id.* at 153. The Supreme Court disagreed. There was no important governmental objective served by a zoning ordinance allowing state run halfway houses but not private halfway houses. The City's alleged negative effects of a state run halfway house would be equally applicable to a privately run halfway house.

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<sup>8</sup> Because the distinction in the ordinance between a church and town auditorium is a distinction based on the content of the speech, strict scrutiny rather than intermediate scrutiny should be applied. See *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961 (N.D. Ill. 2003)(holding zoning ordinance that classified churches on the basis that they were gatherings for religious purposes mandated strict scrutiny); See also *Citizens for Free Speech*, 194 F. Supp. 3d at 985 (N.D. Cal. 2016) (finding strict scrutiny appropriate in equal protection claim involving sign ordinance favoring government signs); But see *Rideout v. Gardner*, 838 F.3d 65, 72 (1st Cir. 2016)(where statute fails intermediate scrutiny, no need to apply strict scrutiny).



In Hanover, governmental schools or recreation facilities are specifically permitted by the zoning ordinance in the RR district without a Special Exception. See HZO 405.9(B)(3). Article IX of the HZO defines government use, recreation to include “such functions as recreation center, senior citizens center, gymnasiums, auditorium, and outdoor recreational facilities.” Therefore, an auditorium could be built to host a town meeting or plays or senior activities, just not for religious services. The HZO allows the Town to purchase the property the Church owns at 28 Greensboro Road<sup>9</sup> and to build an 400 person auditorium that would have as much or greater impact on the character of the neighborhood as the proposed church. This violates equal protection rights protected by the constitution. See *Citizens for Free Speech, LLC v. City of Alameda*, No. C14-02513 CRB, 2016 WL 3648555, at \*12 (N.D. Cal. July 8, 2016)(ordinance exempting “official public signs or notices” erected by a government speaker but banning billboards by a private speaker violates federal Equal Protection); *Cent. Radio Co. Inc. v. City of Norfolk, Va.*, 811 F.3d 625, 634 (4th Cir. 2016) (“With respect to the City's stated interest in preserving aesthetic appeal, for example, the flag of a private or secular organization was “no greater an eyesore” than the flag of a government.”); See *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1268 (11th Cir. 2005) (“Nor is it clear to us that a government-authorized sign reading, “Support Your City Council” in flashing lights ... degrades the City's aesthetic attractiveness any less than a [private] yard sign reading, “Support Our Troops” in flashing lights.”).

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<sup>9</sup> The lot is 6.7 acres. While the front of the lot is zoned SR, the rear and the majority of the lot is zoned RR.

VI. INCORPORATION BY REFERENCE

The Church hereby incorporates by reference the arguments set forth in its previous Motion for Rehearing dated January 3, 2019.

VII. CONCLUSION

For the reasons stated above, Christ Redeemer Church, by their attorneys, respectfully requests that the ZBA:

- A. Grant a rehearing on this matter, and
- B. Following the rehearing, reverse the Zoning Board of Adjustment's decision of March 28, 2019 and grant the Special Exception without conditions.

Respectfully submitted by the Petitioner,  
Christ Redeemer Church

Dated: April 25, 2019

By their attorneys:



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## MOTION FOR REHEARING

HANOVER, NEW HAMPSHIRE 03755  
Department of Planning and Zoning  
P.O. Box 483 (603) 643-0708

“WITHIN THIRTY [30] DAYS AFTER ANY ORDER OR DECISION OF THE ZONING BOARD OF ADJUSTMENT... any party to the action or proceedings... may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order...” [Excerpt from NH RSA 677:2]

### **SUBMISSION REQUIREMENTS CHECKLIST**

- Payment of application **filing fee** (\$100)
- SEVEN COLLATED SETS** of each of the documents listed below
  - This **checklist** – completed by the applicant
  - Application** page – completed by the applicant
    - Application bears the signature of the property owner or authorized agent **OR** is accompanied by a letter of authorization signed by property owner or authorized agent
  - Notification List** - completed by the applicant **on the form prescribed**
    - Tax map & lot #'s of abutting properties are available from the GIS link on the main page of Town website ([hanovernh.org](http://hanovernh.org)). Do **NOT** use this link for names or mailing addresses.
    - The official records of property owner names & mailing addresses are available from the ONLINE PROPERTY RECORD CARDS link on the Assessing Department page of the Town website ([hanovernh.org/assessing-department](http://hanovernh.org/assessing-department)).
    - **NOTE:** Failure to provide accurate information will result in hearing delays.
  - Applicant attests that the information provided on the Notification List was:
    - acquired from the Hanover Assessor’s ONLINE PROPERTY RECORD CARDS
    - was verified not more than five (5) days before the application filing date
  - A **detailed letter** describing every ground upon which the decision is complained against
  - A **copy of the decision** complained of

### **IF THE MOTION IS GRANTED:**

- the rehearing will be scheduled upon receipt of:
  - a new application submission
  - payment of the Legal Notice fee (\$25) & the Notification fee (\$9.00 per name on Notification List)
- testimony will not be carried over from the original case; all parties to the action or proceedings interested in providing testimony for or against the new application may appear in person, by agent or counsel, or in writing

**ZONING BOARD OF ADJUSTMENT  
TOWN OF HANOVER, NH**

**MOTION FOR REHEARING**

**FOR OFFICE USE ONLY**

Case No. \_\_\_\_\_  
Fee total \_\_\_\_\_  
Date filed \_\_\_\_\_  
Received by \_\_\_\_\_

1. Applicant Name Christopher Audino, Christ Redeemer Church  
Mailing Address P. O. Box 5523, Hanover, NH 03755  
Phone No. 603-643-5588  
Email chris.audino@christredeemerchurch.org

2. Property Owner Christ Redeemer Church  
Mailing Address same as above  
Phone No. same as above

3. Project Location (Street Address) 28, 32 Greensboro Road  
Tax Map 25 Lot 14, 15 Zoning District SR-2, RP

4. Applicant has submitted a Motion for Rehearing of the Zoning Board Decision to:  
GRANT  DENY  Case No. 25015/014-Z2019-10  
Date of Decision March 28, 2019

**FOR OFFICE USE ONLY**

I hereby acknowledge receipt of this application.

Zoning Administrator \_\_\_\_\_ Date \_\_\_\_\_

**FOR OFFICE USE ONLY**

The Zoning Board voted to GRANT  DENY  this request.

Zoning Board Chair \_\_\_\_\_ Date \_\_\_\_\_

**NOTIFICATION LIST** (see also RSA 672:3 and 676:4, I (d))

Complete listing of Town of Hanover Assessor's Tax Maps, Lots, names & mailing addresses of: **Owner** of the subject property; **Applicant** (if different from the property owners); Each project **consultant** (architect, soil scientist, land surveyor, engineer, etc. whose professional seal appears on any plat submitted as part of this application); **Abutters** (*any person whose property is located in [NH] and adjoins or is directly across the street or stream from the land under consideration by the local land use board*);  **Holders of conservation, preservation, or agricultural preservation restrictions.**

-- Please refer to RSA 356-B:3, XXIII regarding properties under a condominium or other collective form of ownership and RSA 205-A:1, II regarding properties under a manufactured housing park form of ownership. When the officers or association are unknown all unit owners must be listed.

SUBJECT PROPERTY	OWNER
Map <u>25</u> Lot <u>14, 15</u>	Christ Redeemer Church  <i>Thomas R. Hanna</i> By: Thomas R. Hanna  APPLICANT Christ Redeemer Church  <i>Thomas R. Hanna</i> By: Thomas R. Hanna  CONSULTANTS, ABUTTERS, ETC. (See above)
Map _____ Lot _____	_____
Map _____ Lot _____	_____
Map _____ Lot _____	_____
Map _____ Lot _____	_____
Map _____ Lot _____	_____



HANOVER, NEW HAMPSHIRE 03755  
P.O. BOX 483 603/640-3200

Zoning Board of Adjustment  
Town of Hanover, New Hampshire  
Case No. 25015/014 Z2019-10

Date of Public Rehearing: March 14, 2019

Dates of Deliberations: March 21, 2019 and March 28, 2019

Board members participating: Radisch, Eggleton, Gardiner, Green, Waugh.

Green prepared the preliminary draft. It was published and reviewed by Board members individually and without discussion prior to the March 28, 2019 deliberation session.

## PROCEEDINGS

1. Rehearing of Case No. 25015/014 Z2018-28: Chris Audino, agent for Christ Redeemer Church, is requesting a Special exception under Article IV, Sections 405.8 and 405.9, to permit construction of a Church at 28 and 32 Greensboro Road, Tax Map 25, Lots 14 and 15 in the SR-2 and RR zoning districts.
2. The Board met in public session on January 28, 2019 to consider the Christ Redeemer Church (hereinafter "CRC" or "applicant") motion for rehearing of Case No. 25015/014 Z2018-28. The Board voted 5-0 to rehear the case and to consult with counsel under the RSA 91-A:2(b) "consultation with counsel" exception to the RSA 91-A public meeting requirements.
3. During the rehearing, Waugh moved to adopt the record of the three 2018 cases so that representation of evidence already presented would be unnecessary. Gardiner seconded. The Board approved the motion 5-0.

## SUMMARY OF THE RECORD – CASE NO. 25015/014 Z2018-28

4. Dates and Board participants:
  - a) Dates of Public Hearings: June 28, July 9, August 30, September 6, and October 25, 2018
  - b) Dates of Deliberations: November 12, December 6, 2018
  - c) Board members participating: Radisch, Eggleton, Gardiner, Green, Waugh

5. The following materials were presented by the Applicant and those favoring the project, prior to and during the hearing process:
  - a) 5/29/18 Letter/narrative from Breadloaf Architects, Planners & Builders (Chris Huston, Architect) detailing how the project is claimed to meet the special exception standards.
  - b) Set of plans, prepared mainly by Breadloaf, including land title survey (Wayne McCutcheon), Existing and Demolition Plan C-0.1, Zoning Exhibit C-0.2, Zoning Exhibit w/Overlay C-0.3, Proposed Layout C-1.1, Proposed grading C-1.2, Utility Plan C-1.3, Erosion & Sediment Control Plan C-1.4, Access Drive Profile C-2.1, Utility Profiles C-2.2 and 2.3, Utility Notes and Details C-4.1 and 4.2, Stormwater Notes and Details C-4.3, Erosion Control C-4.4, and Site Planting Plan L-1.0 (2 sheets).
  - c) Building plans and drawings, sheets A-2.1, 2.2, 4.1, 4.2 and Zoning Use diagram.
  - d) A traffic and congestion analysis performed by RSG, Inc., and concluding for the reasons given therein that the project will not cause undue adverse impacts to traffic on the surrounding roadways; *also see* 7/9/18 supplement.
  - e) Noise report from RSG, Inc. (Eddie Duncan) with attachments, concluding that the project will meet the Town's noise standards.
  - f) A 5/11/18 letter from Michael W. Gammal, MAI, Certified Real Estate Appraiser, concluding that the church will not have a negative impact on the market values of surrounding properties.
  - g) A set of 8 analyses of several individual churches, in the Upper Valley and elsewhere (e.g. Keene NH), intended to demonstrate the lack of any negative impact on neighboring property values.
  - h) Lighting report prepared by Jim Pulver of Breadloaf, including an update submitted on 7/10/18.
  - i) 7/20/18 Stormwater System Design Narrative from Otter Creek Engineering, with numerous attachments.
  - j) Copies of relevant tax maps and numerous photographs.
  - k) 7/10/18 Memo from Eddie Duncan, rebutting the presentation of Atty. Stearns on the noise issue.
  - l) 7/12/18 Supplemental Memo from Ben Swanson of RSG addressing background levels of traffic.
  - m) 7/20/18 Memo in rebuttal on engineering issues by Brent Rakowski, PE of Otter Creek Engineering, plus attachments.
  - n) 7/10/18 Letter in favor from Drew Modder, church member.
  - o) 7/3/18 E-mail from Linda Yaman, church member, in favor of the project.
  - p) 7/10/18 letter from William H. "Star" Johnson reciting his efforts as a realtor to find church property for the Applicant in Hanover.
  
6. The following materials were submitted by persons questioning or opposed to the application (most either abutters or near neighbors) prior to and during the hearing process:
  - a) 6/21/18 and 6/29/18 letters from Sandra White;

- b) 6/22/18 letter from Jennifer Stone Randolph;
  - c) 6/22/18 E-mail from Emily Taylor, Justin Assad & Henley Assad;
  - d) 6/24/18 letter from Heide Whelan;
  - e) 6/24/18 letter from Lara Acker;
  - f) 6/25/18, 7/20/18, and 9/6/18 letters from Jeffrey Acker (accompanied by a petition from other area residents in support of his position);
  - g) 6/26/18 letter from Atty. Nathan Stearns;
  - h) 6/27/18 letter from Ingrid Zimmermann, Gabriel Aeppli and Yeong-Ah Soh;
  - i) July 2018 Report on wetlands and drainage, by Wetlands Scientist Rick Van de Poll on behalf of the Ackers (with attachments);
  - j) 7/3/18 E-mail from Paul Beisswenger & Carolynne Krusi;
  - k) 7/9/18 Drainage evaluation by Ann G. Kynor PE and Jeffrey Goodrich PE, on behalf of the Ackers (with attachments);
  - l) 7/9/18 letter from Margaret Bragg;
  - m) 7/13/18 E-mail from Clair Hunt;
  - n) 6/27/18 and 7/24/18 letters from Amit Chakrabarti;
  - o) 7/28/18 letter from Debra Truman and Bruce Hettleman, MD;
  - p) Letter (undated) from Tracy Smith.
7. The Applicant was represented at the hearings by Mr. Audino, its Executive Pastor, Attorney Thomas Hanna, Chris Huston, Architect AIA from Breadloaf (project), Jim Pulver of Breadloaf (light), Eddie Duncan, INCE (noise), Ben Swanson, PE of RSG, Inc. (traffic) and Brent Rakowski, PE of Otter Creek Engineering (water). In addition, the following persons spoke in favor:
- a) Perry Seale, testifying about other churches (including some as large as the proposed one) and their lack of adverse impact on neighborhoods or property values;
  - b) Bob Sidler of Etna, generally in favor;
  - c) Chase Carlyle (church member) in favor.
8. The following persons testified at the hearings in opposition to the project:
- a) Abutters Jeffrey and Lara Acker;
  - b) Attorney Nathan Stearns, representing the Ackers;
  - c) Pietie Birnie (Velvet Rocks resident);
  - d) Maria LaScaris (Velvet Rocks resident);
  - e) Josh Hunt (#24 Greensboro Road);
  - f) Heidi Whelan (#43 Greensboro);
  - g) Sandy White (#44 Greensboro);
  - h) Gary Levine (Velvet Rocks resident);
  - i) Amit Chakrabarti (see his letters);



- j) Margaret Bragg (see her letter);
  - k) Dana Schlosser (#42 Greensboro).
9. Additional materials and testimony were also submitted in favor of, and against, the two companion applications by Christ Redeemer Church – viz., the wetlands special exception Case No. 25015/014-Z2018-29, and the driveway width Case No. 25015/014-Z2018-27. Those cases were decided separately by the Board. The record was held open to permit consideration of any evidence received in the other two cases that may have been relevant. By including the record from the other two proceedings, we consider evidence from those proceedings to the extent we consider it relevant to reaching our decision.

#### SUMMARY OF THE RECORD - REHEARING

10. The following materials were presented by the Applicant and those favoring the project, prior to and during the rehearing:
- a) Motion for Rehearing submitted January 4, 2019 on behalf of CRC by attorneys Thomas R. Hanna, Esq. and Michael J. Tierney, Esq. The motion included a copy of the Board's decision, transcripts of both deliberation sessions for the case, and excerpts from an earlier draft decision to approve the application that failed by a 3-2 vote of the Board.
  - b) A letter dated March 14, 2019 from Michael J. Tierney, counsel for CRC, responding to RLUIPA arguments raised in a letter from Nate Stearns, counsel for Jeffery and Lara Acker (see 13a below).
  - c) An email from Joe Roberto (230 Dogford Road).
  - d) An email from Kay Hillinger, M.D. (Hanover Center Road).
  - e) A letter from Javier Valenzuela (4 Bacchus Circle, Velvet Rocks).
11. The following materials were presented by those opposed to the project prior to and during the rehearing:
- a) A letter dated March 13, 2019 from Nate Stearns, counsel for Jeffery and Lara Acker, responding to arguments in CRC's motion for rehearing.
  - b) A letter dated March 14, 2019 from Jeffery Acker (#27 Greensboro Road) regarding character of the area (5 pages).
  - c) A letter dated March 14, 2019 from Jeffery Acker regarding RLUIPA (6-pages).
  - d) A letter dated March 14, 2019 from Jeffery Acker regarding traffic issues and the RSG traffic study.
  - e) A letter dated March 13, 2019 from Heide Whelan (#43 Greensboro) and Lara Acker (#27 Greensboro Road).
  - f) An email from Sandra White (#44 Greensboro Road).
  - g) An email from Susan Pietie Birnie (Velvet Rocks Resident). Thread also containing comments from Lara Acker (#27 Greensboro Road).
  - h) An email from Susan Hawley.
  - i) An email from Sarah K. LaBombard (#41 Greensboro Road).

12. The Applicant was represented at the rehearing by Chris Audino, CRC's Executive Pastor, as well as attorneys Thomas Hanna and Michael Tierney. Mr. Hanna presented the motion for rehearing, while Mr. Tierney spoke about matters related to the federal Religious Land Use and Institutionalized Persons Act (RLUIPA). In addition, the following persons spoke in favor of the project:
  - a) William Johnson (realtor for CRC in his personal capacity);
  - b) Drew Modder, church member.
13. The following persons spoke in opposition to the project:
  - a) Nate Stearns, counsel for Jeffery and Lara Acker;
  - b) Abutter Jeffrey Acker (#27 Greensboro Road);
  - c) Abutter Lara Acker (#27 Greensboro Road);
  - d) Abutter Amit Chakrabarti (#25 Greensboro Road);
  - e) Yeong-Ah Soh (resident of Velvet Rocks development).
14. Members of the Board are familiar with the area and individually visited the properties involved. The Board has also thoroughly reviewed the extensive documentary record. The failure to emphasize a particular detail in this decision does not mean that detail has been ignored.

## **FINDINGS OF FACT**

15. From the voluminous testimony there emerge the following primary facts. Applicant is a Church group that has been in existence approximately 18 years, and currently holds its services in the Hanover High School (generally from 10 to 11:30 on Sundays). It has been seeking its own more permanent location for many years. A prior effort to relocate to a site on Buck Road was unsuccessful.
16. In the Hanover Zoning Ordinance churches are allowed by right in the Institution (I) district and the Downtown (D) district<sup>1</sup>, and by special exception in the Residence and Office (RO), General Residence (GR), Single Residence (SR), and Rural Residence (RR) districts. Churches are not allowed in the Business and Limited Manufacturing (BM), Business (B), Office and Laboratory (OL), Forestry and Recreation (F), Natural Preserve (NP) and Goose Pond (GP) districts. The Buck Road property on which Applicant previously sought permission to locate the church was in the OL District.
17. Applicant now owns Lots 14 and 15, the two lots involved in the current proposal, plus some adjacent lots which it plans to retain as residences, and which are not involved in this application. Lots 14 and 15 lie primarily in the SR-2 Zoning District; their northerly extremities extend into the RR Zoning District. They are now occupied by two existing

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<sup>1</sup> Our previous decision incorrectly states that Churches are only allowed by right in the Institution (I) district. Applicant's Motion for Rehearing correctly states that both the Institution (I) and Downtown (D) districts allow Church use by right, as does Mr. Acker's 5-page letter of March 14, 2019.

residences with an accessory barn on Lot 14 and an accessory shed on Lot 15. The existing structures are of advanced age and characteristic of early 20th century rural residences. Applicant proposes to remove those residences and accessory structures and the access drive for the residence on Lot 15.

18. The SR-2 Zone in which Applicant proposes to place the church extends for roughly 200 or 300 yards on either side of Greensboro Road from its western terminus at Route 120 all the way to Great Hollow Road and then north on Hanover Center Road. The Zone is characterized by modest single-family homes, primarily pre-war cape style homes on relatively large lots.
19. There is one commercial use in the neighborhood. That is a relatively non-obtrusive one-story multi-use building that remains as a non-conforming preexisting use about one quarter mile to the east of the proposed project. Several open space subdivisions, including Velvet Rocks, Silent Brook and Berrill Farms developed in the late 1990-early 2000's lie in the area. They are in the RR district. They are adjacent and to the north with drives through the Zone providing access to Greensboro Road.
20. Applicant proposes a new 13,400 square foot footprint two story Church and an attached structure for associated uses including a gathering hall and offices. Total size of the building will be 21,250 square feet. The building will present 128 feet of building frontage facing east. The south side of the building facing Greensboro Road will extend parallel to the road for about 60 feet. At its nearest point it will be set back about 45 feet from the road. While built into a rise, the western end of the Church structure for 34 feet of its frontage along the road will be approximately nine feet higher than the roof ridge of the existing residence.
21. The proposed Church would be accessed by a two-lane driveway on the west side of Lot 14. The new two-lane road will replace and expand the existing driveway for residence on Lot 14 to provide access to a parking lot upland away from Greensboro Road. The parking lot will consist of three separate areas the most northerly of which will extend into the RR Zone. Based on the proposed maximum occupancy of 415 persons, the parking lot must include at least 104 spaces to conform to requirements of the Zoning Ordinance.
22. The proposed Church sanctuary will seat 400 congregants. Up to 15 staff members may also be present. The primary use of the Church will be for Sunday services. Applicant estimates that approximately 300 people using 100 cars will be present for a Sunday service and that there will be concurrent Sunday School classes. The record includes information from the Church website as it existed in July 2018 that reports its founder's vision for the future: "average weekly attendance is now over 400." The Church will also be the point of services for weddings and funerals and associated post service gatherings.
23. As for use during the weekdays, the Applicant contemplates office use for two to five people, and periodic morning or evening meetings for 10 to 20 people. Applicant's written submission contemplates "further auxiliary uses (including service to the community) with the goal to 'love and care for the Upper Valley community by serving our neighbors and contributing to the overall building up of our neighborhoods, schools and communities'."

The Church website in July 2018 states that the schedule at that point included a Youth Group and Women's Book Group on Monday evenings, 6:00 to 7:00 AM and 9:00 to 10:30 AM Bible Study Groups on Tuesday, other Bible Groups on Tuesday and Thursday evenings and a First Friday Men's Breakfast at 6:00 to 7:00 AM. Testimony of Applicant at the hearing made clear that the Church meeting spaces will be open as appropriate for other non-religious groups for community purposes such as Boy Scouts, Little League and the like. At our hearings, representatives of the Church were reluctant to establish any arbitrary fixed limit on the amount of weekday and evening use.

24. Testimony from many long-time residents reflected their fear that the project will negatively affect the 20-30 residences in the immediate vicinity and impair seriously what they appreciate as the quiet modest residential character of the neighborhood. Their testimony voiced strenuous objection to the traffic, light, and noise of the project, its disruption of existing pastoral views, and its potential to aggravate existing stormwater runoff problems from the project site onto Greensboro Road and adjoining residences. The most immediately and seriously affected residents are the owners of the adjacent properties to the project at 24, 25 and 27 Greensboro Road.
25. Applicant's Motion for Rehearing, and letters submitted by counsel for CRC and the Ackers for the rehearing, focused on the Ordinance, the Board's reasoning and related matters of law. Those materials contain many case law citations which we will not enumerate here. Otherwise, no facts were introduced prior to or during the rehearing that were not in the case record.
26. Further factual matters from the record are addressed in the Reasoning section below.

## **REASONING OF THE BOARD**

### **INTERPRETATION AND APPLICATION OF THE ORDINANCE**

27. Applicant's motion contends that the Board unreasonably and unlawfully interpreted and applied the special exception provisions of Section 207 of the Ordinance by including impacts from aspects of the project that meet the general and specific standards of the Ordinance in its determination that the project will adversely affect the character of the area under 207.1.B(1). For example, if the noise generated by a project in the SR-2 district does not exceed 60dB at the property line by day and 50dB by night, then the Board cannot include that noise in its determination under Section 207.1.B(1). We disagree.
28. Section 207.1.A requires compliance with all general and specific standards of the Ordinance. Section 207.1.B(1) requires the Board to determine whether the project will adversely affect the character of the area. These are separate requirements, and there is no provision in the Ordinance that excludes consideration of compliant aspect of the project in the Board's determination under 207.1.B(1), or for that matter 207.1.B(2) and 207.1.B(3). Further, it does not comport with common experience to say that just because an aspect of a project complies with the Ordinance it cannot adversely affect the character of the area. For

example, the crowing of a rooster confined to an area sufficiently far from the property line may comply with the noise standards of the Ordinance, but when heard by neighbors at sunrise may be considered by the Board to adversely affect the character of the area.

29. Even if we were to accept applicant's assertion about compliant aspects, we would still include negative aspects of traffic levels and congestion in our determination under 207.1.B(1) because the Ordinance does not set general or specific standards for traffic levels or congestion. Further, noise from idling cars on Greensboro Road queued to enter the CRC property on Sundays is not regulated by the Ordinance because it does not emanate from the property.
30. Applicant also has asserted that the Board unlawfully combined the "cumulative effects" of multiple negative impacts to arrive at its determination that the project will adversely affect the character of the area. We disagree. There is nothing in the Ordinance that prevents the Board from assessing the combined impacts from the project, even if none of them individually warrants a determination that the project will adversely affect the character of the area. Indeed, the Ordinance asks whether the "proposed use" will adversely affect the character of the area, which we take to mean *all* the impacts taken together.
31. Applicant contends that the Board's definition of "area" was too narrow, focusing primarily on the three abutters most affected by the project when it should have considered "area" to include the larger "environs", "neighborhood" and "town". We disagree. The Board believes that the area relevant to our analysis is principally the Zones in which the project is located, with the importance of effects increasing as proximity to the site increases.
32. Applicant's motion is critical of the word "scale" used in our decision and by some in the majority during deliberations. While some members of the Board are concerned about the size of the building and parking lot, which are aesthetic aspects of scale, our shared larger concern about scale is the intensity of use. By intensity of use, we mean the number of people converging on and departing from the property over a given period of time, along with their activities while on the property. In the case of the CRC project, the more people that arrive and depart, and the shorter the time over which arrivals and departures take place, the more intense will be the use and the larger will be the impacts from traffic, noise and, to a lesser extent, light. While Board members were not unanimous about whether these impacts warranted denial of the application, the facts of the case clearly show that the project's intensity of use will generate potentially negative impacts. Therefore, our previous decision was based on details of the site and plan, additional facts taken from the record, as well as readily observable facts from our visits to the property. It was not unreasonable, capricious, or based on mere opinion and vague concerns.

#### CONSIDERATIONS FOR CONDITIONS

33. Section 207.4 of the Ordinance gives the Board broad authority to impose conditions on its approval of a special exception:

In addition to the general and specific standards established by this Ordinance, the Board shall impose upon the approval of a special exception such additional conditions as it finds reasonably appropriate to safeguard the neighborhood...

The phrase "In addition to the general and specific standards established by this Ordinance" makes clear that the Board is empowered to impose restrictions that go beyond the general and specific standards of the Ordinance to mitigate negative impacts from both compliant and unregulated aspects of the project, and that the Board is required to do so. We believe by using our broad power to impose conditions, we can safeguard the character of the subject neighborhood in the SR and RR districts as described for those districts in the Ordinance.

34. The RSG study does not adequately address the problem of traffic congestion and noise in six respects: It estimates the effect on traffic over a period of an hour, not the shorter time during which cars can be expected to drive to and from the church. It assumes an average number of trips based on the square feet of the building rather than expected attendance at a service. It assumes an average of 2.9 people in each car driving to the church. It does not address the traffic issue at the entrance to the church but only at the distant intersection of Greensboro Road and Route 120. It assumes church attendance of 300, while the capacity of the assembly room in the church is 415. It fails to consider the number of spaces in the parking lot.
35. The RSG study calculates a total of 212 trips (102 entering and 110 exiting) during the peak hour on Sundays. Ben Swanson, RSG's traffic expert, confirmed at the June 28, 2018 hearing that estimated traffic flow and congestion was based on 212 trips averaged over a 60-minute period, not 102 entering and 110 exiting in 15-20 minute periods before and after church services, which in our experience is when most church traffic takes place. Mr. Swanson conceded that the study did not model traffic flow or congestion using shorter time periods than 60 minutes. As such, we find that the RSG study cannot be relied upon to estimate traffic flow and congestion during peak periods before and after church services.
36. During the June 28, 2018 hearing, Mr. Swanson was asked for the source of the assumed 2.9 persons per vehicle that results from dividing the typical attendance of 300 stated in the study by 102 inbound trips. Mr. Swanson did not provide an answer, but RSG later submitted a supplementary memo dated July 9, 2018 explaining that the number of trips was calculated based on the square footage of the building, proposed to be 21,250 square feet, not the expected average attendance divided by an assumed average persons per vehicle. The memo states that RSG used the industry standard Institute of Transportation Engineers (ITE) method for calculating traffic for church land use (LU 560), selecting the more conservative national average of 9.99 trips per 1,000 square feet rather than the 5.99 trips per 1,000 square feet "local" calculation by the Southern New Hampshire Regional Planning Commission.
37. We find two related issues with the ITE methodology. First, it results in an average of 2.9 persons per vehicle at the current typical CRC attendance of 300 on Sundays, an average which some Board members consider to be optimistic relative to our experience of church traffic in the area. RSG has not provided details on how ITE arrived at its average trips per 1,000 square feet of building, and how that average may be influenced by different building

designs and sanctuary capacities, average church attendance, or by church demographics such as the percentage of families with children. The second and more significant problem with the RSG study is that the capacity of the proposed sanctuary is 415 persons, and the aspirational vision of the church's founder is "average attendance of 400". With those numbers, RSG's trips per 1,000 square feet require an average of 3.9-4.1 persons per vehicle, greatly in excess of the RSG assumption.

38. At the rehearing, applicant offered a condition that only 104 vehicles would be allowed to park on the property, which given the 113 spaces permitted by our conditions for approval in case Z2018-29 leaves nine spaces for staff. This should preclude the possibility of cars parking in the wetland buffer, which was a concern expressed in our decision. Applicant also offered that if attendance exceeds the lot capacity, shuttle busses will be used to ferry remaining attendees to the church.
39. While we are skeptical of RSG's implied estimate of 2.9 persons per vehicle, we have no facts to prove that it is high. Therefore, we must assume that 113 parking spaces will accommodate 300 attendees, and shuttle busses will not be required. But that is the limit of the parking lot. If occupancy per vehicle is lower, or if attendance were ever greater than 300, some alternative transportation arrangement like shuttle busses will be required.
40. We find that potential problems from the limited capacity of the parking lot will be considerably worse at an average attendance of 400, a 33% increase from 300. Assuming an attendance in excess of 400, RSG's estimate of 2.9 persons per vehicle would require about 100 attendees to be transported by shuttle bus, perhaps requiring two large school busses or 4-6 smaller shuttle busses. If the estimate of 2.9 persons per vehicle is high, the number of busses required will increase. For example, vehicle occupancy of 2.0 would require busses for 200 people, or half the attendance. That could require four large school busses or 8-12 smaller shuttle busses. And if RSG's traffic study understates traffic congestion on Sunday mornings, which seems almost certain because attendees will arrive in a 15-20 minute period rather than over an entire hour, then larger and noisier vehicles will join cars idling on Greensboro Road in front of neighboring properties and on the property. We conclude that at an average attendance of 400, the chances are much greater that there will be adverse impact from traffic congestion, noise and disruption in a neighborhood that currently gets respite from the sounds of heavy traffic and school busses on only two days of the week.
41. We have concerns about the use of shuttle busses to compensate for the capacity of the parking lot. A plan will be required to limit the number of vehicles parking in the lot to 113 and manage arrival of more than 113 vehicles. In addition to greater traffic flow and congestion on Greensboro Road, pick-up/drop-off vehicles may cause congestion and safety issues in the parking lot, which they must enter to change direction.
42. Another concern is that the RSG study doesn't take into consideration that the walk from the parking lot to the building is quite long, and we expect that a large percentage of drivers will pause at the entrance of the building to drop off their passengers, especially in the winter. This could result in traffic backing up all the way to the property entrance at Greensboro Road and beyond. The greater the number of vehicles attempting to enter the property, the

more likely this scenario is. The above considerations support our conclusion that any grant should be subject to substantial conditions.

43. The parking lot, which by our condition in Z2018-29 must have no more than 113 spaces, is another serious problem with the proposed project. It is too small for the maximum capacity of the sanctuary, which is 415 persons. At RSG's implied vehicle occupancy of 2.9 persons, it would take 144 spaces to accommodate maximum capacity, as well as 31% more trips than predicted in the study. The parking lot has barely enough spaces to handle the 110 vehicles predicted by RSG for outbound trips.
44. RSG concluded that CRC traffic will not adversely affect the highways of the area, satisfying 207.1.B(2). But that conclusion may only be valid for typical attendance of 300, and it does not necessarily satisfy 207.1.B(1) because neither RSG nor applicant's noise expert assessed noise from cars and buses queued on Greensboro Road on Sunday mornings. We conclude that applicant has not provided convincing evidence that traffic flow and congestion will not have adverse impacts on the neighborhood when attendance grows over 300. Given the potential consequences to the neighborhood from a lower-than-expected average vehicle occupancy and the maximum building capacity of 415 persons, a number RSG did not model, we believe the key condition for approval is a limit on occupancy of the premises, as permitted by 207.4.E. We will impose this condition to limit the negative impacts from elevated levels of traffic flow, congestion and noise that are expected to occur before and after services on Sundays.
45. In determining the limit on occupancy, we are faced with the problem of defining for the applicant the permissible occupancy of the church, given the character of the area. We see no better measure to establish this limit, than to adopt one suggested by the applicant in its presentation to us, which is a limit of 300 persons implied by the traffic study.
46. Reference is made to the First Baptist Church (footprint 5,119 sf, finished area 10,000 sf, seating capacity 120) in Etna Village and the First Congregational Church in Hanover Center (footprint 4,048 sf, finished area 6,400 sf, seating capacity 150). Both of these churches would be in character with the area, according to the testimony of the opponents of the project and the observation of the Board members. A church with capacity of 300 persons is much closer to this baseline, and also in character with the area.
47. In order to enforce the occupancy limit, which the Town has insufficient resources to do, we will restrict occupancy on the property and seating in the sanctuary.
48. We will require the parking lot to have no more and no less than 113 spaces. Although the lower occupancy may allow a smaller number of spaces under the Ordinance, based on the RSG traffic study we believe that 113 spaces is the minimum that can accommodate the current typical attendance on Sundays, and that a smaller lot would lead to additional trips by shuttle busses and drop-off/pick-up vehicles.



49. We will limit the hours of operation in order to reduce noise, light, traffic and commotion during nighttime and early morning hours. We have chosen hours that are consistent with our observations of the hours during which most activities take place at area churches.
50. We will place conditions on auxiliary uses to ensure that they are consistent with church use and traditional community uses of churches, but will not otherwise restrict those activities, which are commonplace at area churches and benefit both church members and the rest of the community. It may be argued that the large membership of CRC will lead to more auxiliary use than that which takes place at other area churches, but we point out that other area churches have memberships that number in the hundreds, albeit with much lower average attendance. It is possible that greater enthusiasm among CRC's congregants will drive more participation at its auxiliary activities than takes place at other churches, but we have no way of knowing if this will be true. We will point out, however, that like members of all the churches in the area, CRC's members have weekday and weeknight obligations that likely will limit their participation in activities at the church.
51. On the subject of exterior illumination, we defer to the Planning Board, which has jurisdiction in the applicable site plan regulations.

#### **ACTION OF THE BOARD**

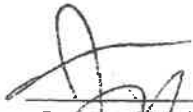
It was moved by Green, and seconded by Gardiner, to *GRANT* the requested special exception, as detailed above, subject to the following conditions:

- A. The project must be completed substantially in accord with the plans, materials and testimony on file. No substantial or material deviations shall be permitted without further action by this Board, even if such deviations arise out of review by the Planning Board or State agencies.
- B. The maximum occupancy on the premises shall not exceed 300 persons.
- C. At no time shall the sanctuary have seating for more than 300 persons.
- D. Hours of operation and occupancy of the property shall be limited to 7:00 AM – 9:00 PM weekdays and 8:00 AM – 9:00 PM weekends, except 9:00 PM – 12:00 AM on December 24 and 12:00 AM – 2:00 AM December 25.
- E. There shall be no residential housing or overnight occupancy on the property except for refuge from natural disaster.
- F. The number of spaces in the parking lot shall be 113. No more than 113 vehicles shall park on the property, and only in the parking lot, except for temporary parking in the driveway for delivery of goods. Spaces in the parking lot shall not be rented, nor permitted to be used, for purposes of parking for off-site uses or activities.


- G. A traffic coordinator shall be utilized as needed to avoid unreasonable congestion and ensure neighborhood driveways are not blocked by vehicles queued to enter the property.
- H. Windows of the sanctuary shall remain closed during all activities except in case of emergency or failure of the HVAC system.
- I. The noise mitigation screen around the mechanical equipment, as described in RSG's 1/30/18 letter, is an element of the application and is required to be implemented.
- J. Landscape screening shall be added along the west property boundary and along the south parking lot edge to shield abutters from headlights. Landscape screening shall be added along the south and east sides of the building. In addition to the vegetation shown on the updated landscaping plan, the existing trees on the church-owned lots not involved in the application shall be retained.
- K. The principal use of the premises shall be for a church, as defined in the Zoning Ordinance, and shall not be changed to any other principal use without further review. No portion of the premises shall be rented, or allowed to be used, for commercial purposes. In addition to the Applicant's own religious uses, space on the premises may occasionally be used for nonprofit or community group activities in the manner traditional with church properties in New Hampshire (for example Trumbull Hall in Etna), and the church may charge customary rental fees for use of its space for such activities; however such uses, each and as a whole, must remain "accessory" to the principal use as a church, as the term "accessory" is defined in the Zoning Ordinance and relevant N.H. case law, including the requirement for such uses to remain "subordinate" and "incidental" to the principal use as a church.
- L. The special exception in this case may be implemented only if the special exception granted in Case No. 25015/0214-Z2018-29 is not reversed on appeal.

Voted in favor: 5

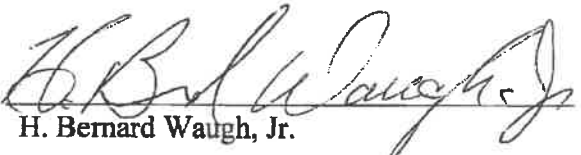
Opposed: 0

  
\_\_\_\_\_  
Jeremy Eggleton

\_\_\_\_\_  
Arthur Z. Gardiner, Jr.

  
\_\_\_\_\_  
Richard L. Green

\_\_\_\_\_  
Carolyn Radisch, Chair

  
\_\_\_\_\_  
H. Bernard Waugh, Jr.

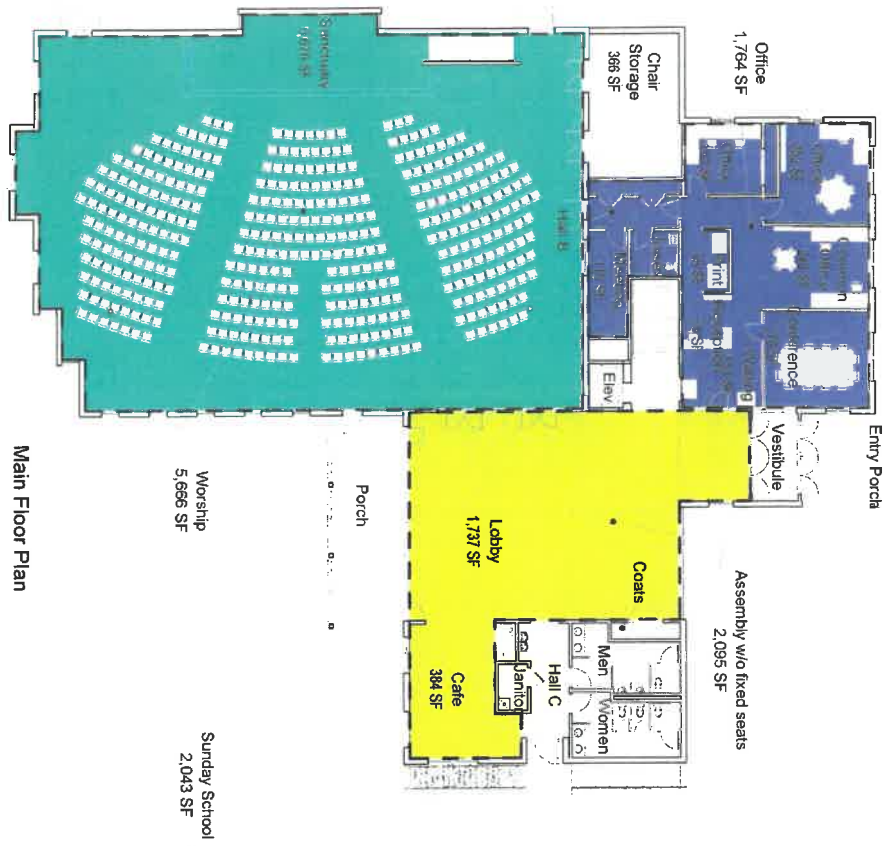
Your right to appeal this decision depends on your compliance with the New Hampshire RSA 677.

This approval shall become void if the work is not begun within 2 years from the approval date of such special exception.

**EXHIBIT A**  
**SECOND MOTION FOR REHEARING**

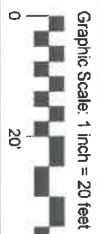
Zoning Parking Calculation		
Area Occupancy/	Area	Comments
Assembly w/o fixed seats	4,291 SF	1 per 500sf = 9
Office	1,764 SF	1 per 400sf = 5
Sunday School	3,363 SF	10 volunteer staff / 1.5 = 7
Worship	5,666 SF	(400 seats + 15 participants) / 5 = 83

TOTAL PARKING SPACES REQUIRED: 104



**Hanover Zoning Table 1002.1 Parking Area Plans**

Christ Redeemer House of Worship 28 Greensboro Rd, MAP 25 LOT 14



12/18/17



**BreadLoaf**  
Architects  
Planners  
Builders



EXHIBIT B  
SECOND MOTION FOR REHEARING

# MEMO

**TO:** Chris Audino  
**FROM:** Ben Swanson; Erica Wygonik PhD, PE  
**DATE:** April 11, 2019  
**SUBJECT:** Response to ZBA Findings regarding Traffic

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In its March 28, 2019 Decision, the ZBA makes several findings and statements with reference to RSG's traffic analysis. Several of the statements in the Decision are inconsistent with the documents provided by RSG or draw unsupported conclusions. This document is meant to clarify these items. This is our fourth document submitted to the ZBA on this project, and it draws upon our January 5, 2018 Traffic Impact Analysis, our July 9, 2018 Supplement on Trip Generation, and our July 12, 2018 Supplemental Memo on Weekday Traffic Volumes.

Paragraph 34 of the ZBA Decision takes issue with the projected trip generation presented in the traffic impact study and states: *"The RSG study does not adequately address the problem of traffic congestion and noise in six respects: It estimates the effect on traffic over a period of an hour, not the shorter time during which cars can be expected to drive to and from the church. It assumes an average number of trips based on the square feet of the building rather than expected attendance at a service. It assumes an average of 2.9 people in each car driving to the church. It does not address the traffic issue at the entrance to the church but only at the distant intersection of Greensboro Road and Route 120. It assumes church attendance of 300, while the capacity of the assembly room in the church is 415. It fails to consider the number of spaces in the parking lot."*

Subsequent paragraphs 35 through 44 of the ZBA Decision elaborate on the six overall issues noted above. A response to these perceived issues is provided below.

## **Item 1: Duration of Trip Generation**

- ZBA Paragraph 34 states: *"The RSG study does not adequately address the problem of traffic congestion and noise in six respects: **It estimates the effect on traffic over a period of an hour, not the shorter time during which cars can be expected to drive to and from the church.** It assumes an average number of trips based on the square feet of the building rather than expected attendance at a service. It assumes an average of 2.9 people in each car driving to the church. It does not address the traffic issue at the entrance to the church but only at the distant intersection of Greensboro Road and Route 120. It assumes church attendance of 300, while the capacity of the assembly room in the church is 415. It fails to consider the number of spaces in the parking lot."*

### **Response to Item 1:**

1. The industry standard is to calculate trip generation for the peak hour. Thus, trip generation rates are provided per hour. No data is available to support an assumption that all traffic would occur within a shorter period.



## Item 2: The trip generation calculation methodology

- ZBA Paragraph 34 states: *“The RSG study does not adequately address the problem of traffic congestion and noise in six respects: It estimates the effect on traffic over a period of an hour, not the shorter time during which cars can be expected to drive to and from the church. It assumes an average number of trips based on the square feet of the building rather than expected attendance at a service. It assumes an average of 2.9 people in each car driving to the church. It does not address the traffic issue at the entrance to the church but only at the distant intersection of Greensboro Road and Route 120. It assumes church attendance of 300, while the capacity of the assembly room in the church is 415. It fails to consider the number of spaces in the parking lot.”*

### Response to Item 2:

- The ITE Trip Generation Manual is the generally accepted trip generation reference relied upon by traffic engineering professionals and NHDOT for projects of this type in New Hampshire.
- As explained in the January 5, 2018 Traffic Study, as well as the July 9, 2018 Supplement, the Institute of Transportation Engineer’s (ITE) Trip Generation Manual often provides trip generation rates for a given land use based on multiple independent variables. ITE defines an independent variable as “a physical, measurable and predictable unit describing the study site or generator that can be used to predict the value of the dependent variable (in this case, trip ends).”
- For the Church land use (LU 560), ITE includes trip generation rates per 1,000 sq. ft. of building area and per the number of seats (which is not equivalent to attendance). In both cases, trip rates are based on observed traffic data collected at churches across the country, including sites in New Hampshire.
- Because the proposed church was described as not having any fixed seats, the January 5, 2018 traffic study projected trip generation based on the building square footage. Trip generation of 102 entering and 110 exiting trips (for a total of 212) was based on the 21,250 square foot building size.<sup>1</sup>
- Because the proposed church does not include a fixed number of seats, trip generation for the traffic impact study was not calculated using the ITE rate per seat. However, for reference, a church with 391 seats would yield a similar total number of trips (212) using the ITE rate per seat.<sup>2</sup>

## Item 3: Vehicle Occupancy

- ZBA Paragraph 34 states: *“The RSG study does not adequately address the problem of traffic congestion and noise in six respects: It estimates the effect on traffic over a period of an hour, not the shorter time during which cars can be expected to drive to and from the church. It assumes an average number of trips based on the*

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<sup>1</sup> The Institute of Transportation Engineers (ITE) rate for Land Use 560 (Church) is 9.99 trips per 1,000 sq. ft. Multiplying the proposed 21,250 square feet by this rate yields 212 trips.

<sup>2</sup>The Institute of Transportation Engineers (ITE) rate for Land Use 560 (Church) is 0.54 trips per seat. Multiplying this rate by 391 seats would yield an equivalent trip generation of 212 trips.



square feet of the building rather than expected attendance at a service. **It assumes an average of 2.9 people in each car driving to the church.** It does not address the traffic issue at the entrance to the church but only at the distant intersection of Greensboro Road and Route 120. It assumes church attendance of 300, while the capacity of the assembly room in the church is 415. It fails to consider the number of spaces in the parking lot.”

- ZBA Paragraph 36 states: “During the June 28, 2018 hearing, Mr. Swanson was asked for the source of the assumed 2.9 persons per vehicle that results from dividing the typical attendance of 300 stated in the study by 102 inbound trips.”
- ZBA Paragraph 39 states: “While we are skeptical of RSG’s implied estimate of 2.9 persons per vehicle, we have no facts to prove that it is high.”

#### **Response to Item 3:**

- The study includes no statements regarding vehicle occupancy, and no component of the analysis is based on an assumption of the average number of people in each car.
- Further, the ZBA’s inferred vehicle occupancy of 2.9 people per car assumes all attendees arrive during the peak hour. Given church programming, it is likely a portion of the overall arrivals occur outside of the peak hour.<sup>3</sup>

#### **Item 4: Site Access**

- ZBA Paragraph 34 states: “The RSG study does not adequately address the problem of traffic congestion and noise in six respects: It estimates the effect on traffic over a period of an hour, not the shorter time during which cars can be expected to drive to and from the church. It assumes an average number of trips based on the square feet of the building rather than expected attendance at a service. It assumes an average of 2.9 people in each car driving to the church. **It does not address the traffic issue at the entrance to the church but only at the distant intersection of Greensboro Road and Route 120.** It assumes church attendance of 300, while the capacity of the assembly room in the church is 415. It fails to consider the number of spaces in the parking lot.”

#### **Response to Item 4:**

- Page 2 of the January 5, 2018 Traffic Impact Analysis specifically addresses the Church entrance, stating “At the Greensboro Road & Site Access intersection, delays of 10 second or less, corresponding with LOS B or better conditions, are projected in both the 2018 design year and the 2028 future planning year. At this intersection, 95th percentile queues of 3 vehicles or less are projected with the addition of site-generated traffic.”

#### **Item 5: The underlying calculation of trip generation.**

- ZBA Paragraph 34 states: “The RSG study does not adequately address the problem of traffic congestion and noise in six respects: It estimates the effect on traffic over a period of an hour, not the shorter time during

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<sup>3</sup> As noted on the Christ Redeemer Church website, the church holds Sunday School for both children and adults one hour in advance of the service. Sunday school attendees arrive earlier than other church patrons.

*which cars can be expected to drive to and from the church. It assumes an average number of trips based on the square feet of the building rather than expected attendance at a service. It assumes an average of 2.9 people in each car driving to the church. It does not address the traffic issue at the entrance to the church but only at the distant intersection of Greensboro Road and Route 120. **It assumes church attendance of 300, while the capacity of the assembly room in the church is 415. It fails to consider the number of spaces in the parking lot.***

**Response to Item 5:**

- As noted in the response to Item 2, trip generation is calculated based on the square footage of the proposed building and does not rely on any assumptions of church attendance.

**Item 6: Parking**

- ZBA Paragraph 34 states: *“The RSG study does not adequately address the problem of traffic congestion and noise in six respects: It estimates the effect on traffic over a period of an hour, not the shorter time during which cars can be expected to drive to and from the church. It assumes an average number of trips based on the square feet of the building rather than expected attendance at a service. It assumes an average of 2.9 people in each car driving to the church. It does not address the traffic issue at the entrance to the church but only at the distant intersection of Greensboro Road and Route 120. It assumes church attendance of 300, while the capacity of the assembly room in the church is 415. **It fails to consider the number of spaces in the parking lot.**”*

**Response to Item 6:**

- RSG was not asked to and did not provide any analysis of the number of spaces in the parking lot. Section 1002.1 of the Hanover Zoning Ordinance provides that, in the SR and RR Districts, there shall be 1 parking space for every 5 seats for assemblies such as houses of worship. We were also not asked to provide analysis or any opinions on this provision of the Hanover Zoning Ordinance.

After considering the points raised in the March 28, 2019 ZBA Decision, we maintain the initial conclusion of the January 5, 2018 Traffic Impact Study that this project will not cause undue adverse impact to traffic operations on the surrounding roadway network.

