



October 14, 2009

The Honorable Bart Stupak
U.S. House of Representatives
2268 Rayburn House Office Building
Washington, DC 20515

Dear Representative Stupak:

We are writing in reference to H.R. 1291, which would grant approximately 7.02 acres of Coast Guard land to the Cornerstone Christian School¹ (School) *without consideration*. The legislation would run afoul of the Establishment Clause of the First Amendment of the United States Constitution and, thus, we urge you to withdraw it.

The School has been renting a 7.02 acre plot of land in Michigan from the United States Coast Guard since at least 1986. In 1992, the Coast Guard indicated its intent to sell the property, although it has not yet taken the steps required to do so. This bill would bypass the statutorily required competitive process for selling government property and gift the property to the School.²

Although courts have upheld conveyances of public property to religious organizations in which the religious organizations paid fair-market value for the property,³ the transfer of government property to a religious organization for *less than fair-market value* is unconstitutional.⁴ Indeed, the U.S. Court of

¹ Although the bill calls for the land transfer to go to the "Cornerstone Christian Academy," the correct name of the school is the "Cornerstone Christian School."

² The Federal Property and Administrative Services Act of 1949 states that "the Administrator of General Services may make or authorize a disposal or a contract for disposal of surplus property only after public advertising for bids, under regulations the Administrator prescribes." 42 U.S.C. § 545(a)(1)(A). If the government sells the property for a fixed price, "the sale must be publicized to an extent consistent with the value and nature of the property involved and the price established must reflect the estimated fair market value of the property." 42 U.S.C. § 545(a)(d)(1).

³ See, e.g., *Freedom From Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 492-93 (7th Cir. 2000); *Southside Fair Hous. Comm'n v. City of New York*, 928 F.2d 1336, 1348-51 (2d Cir. 1991).

⁴ To determine the fair market value of property, a court may look to information such as the amount offered for the land, real estate appraisals, or an appraisal by a government assessor. *Mercier v. Fraternal Order of Eagles*, 395 F. 3d 693, 702 (7th Cir. 2005); *Annunziato v. New Haven Bd. of Alderman*, 555 F. Supp. 427, 432 (D. Conn. 1982). Fair market value is not established based upon the amount for which the government agrees to sell the property. *Annunziato*, 555 F. Supp. at 432 (rejecting plaintiffs' argument that the fair market value of the land was \$1.00 because that is the amount for which the city decided to sell it).

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Appeals for the Seventh Circuit has held that “a sale well below fair market value resulting in a gift to a religious organization” constitutes “unusual circumstances” that would “indicate an endorsement of religion.”¹ And, in *Annunziato v. New Haven Bd. of Aldermen*,² a federal district court struck down the sale of city property to a religious organization for \$1.00, which was well below the fair-market value of the property.³ It follows that transferring the Coast Guard property to the religious School for no consideration would reflect an unconstitutional preference for and an endorsement of religion.

Selling the property to the School for fair-market value would not necessarily solve the constitutional problem. The method of sale and whether that method diverges from the government’s normal practice also has constitutional implications. For example, to determine whether the government had a secular purpose for selling property to a religious organization, the court in *Annunziato* asked whether “the process by which the city sold the school departed from standard practice.”⁴ In *Buono v. Kempthorne*,⁵ the Ninth Circuit questioned the government’s sale of a cross, in part because the sale was “outside the normal [National Park Service] procedures for transfer of parklands.”⁶ The court cited this “unusual involvement in the transaction” as a factor in its decision to strike down the sale as a violation of the Establishment Clause.⁷

A congressionally mandated sale --- even one for fair-market value --- would bypass the usual practice of disposing of government property under the Federal Property and Administrative Services Act of 1949 (FPAS Act). Dispensing with the Act’s requirements would likely be viewed by a court as reflecting the kind of unusual circumstance that reflects a constitutional impropriety.

We recognize that Representatives Oberstar and Cummings have also introduced a bill, H.R. 3619, which contains a provision regarding the sale of this property. H.R. 3619, in stark contrast to H.R. 1291, grants the School “the right of first refusal to purchase, *at fair market value*, all or a portion of” the property in question.⁸ Although the decisions in *Annunziato* and

¹ *Mercier*, 395 F. 3d at 702; see also *Utah Gospel Mission v. Salt Lake Corp.*, 425 F. 3d 1249, 1259, 1262 (10th Cir. 2005) (explaining that the sale of government property to church for a price far below the far market value would indicate an impermissible religious purpose).

² 555 F. Supp. at 433 & n.16.

³ The religious organization had originally offered \$30,000 for the property and real estate appraisals indicated the land was worth \$50,000-\$75,000. *Id.*

⁴ 555 F. Supp. at 433 & n.16. Similarly, in *Southside Fair Housing Commission v. City of New York*, the Second Circuit explained that property must be sold “according to standard, non-discriminatory practices” and the sale must be neutrally available to all. 928 F.2d at 1348. And, in *Mercier* the court indicated that an “unusual circumstance” indicating religious endorsement “would include a sale that did not comply with applicable state law governing the sale of land by a municipality.” 395 F. 3d at 702.

⁵ 502 F. 3d 1069, 1086 (9th Cir. 2007), *amended by* 527 F.3d 758 (2008) (amending footnote 13 on page 1082 only), *cert. granted*, 129 S. Ct. 1313 (2009).

⁶ *Id.*

⁷ *Mercier*, 395 F. 3d at 702, indicates that another “unusual circumstance” indicating religious endorsement “would include a sale that did not comply with applicable state law governing the sale of land by a municipality.”

⁸ Section 1125 of H.R. 3619, <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.3619> (emphasis added).

Buono might counsel against passing a law to bypass the FPAS simply in order to transfer land to a religious organization, H.R. 3619 at least requires that the School purchase the property at fair-market value.

In order to further assist you, we have attached a memorandum to this letter setting out the constitutional analysis in more detail. If you have any further questions or would like addition information, please contact me. We look forward to working with you on this matter.

Sincerely,



Aaron Schuham
Legislative Director



Maggie Garrett
Assistant Legislative Director

cc: Chairman James L. Oberstar, Committee on Transportation and Infrastructure
Chairman Elijah E. Cummings, Subcommittee on Subcommittee on Coast Guard and
Maritime Transportation.

MEMORANDUM

To: Interested Parties
From: Americans United for Separation of Church and State
Contact: Maggie Garrett, Assistant Legislative Director, 202-466-3234
Date: October 14, 2009
Re: H.R. 1291

H.R. 1291 seeks to gift 7.02 acres of land to the Cornerstone Christian School (School).¹ This memorandum sets forth the reasons why the bill is unconstitutional.

History

In 1970, the Coast Guard purchased 22.5 acres of land to build housing for personnel, but ultimately did not use all of the land for the project.² In 1986, the Coast Guard and the School entered into an agreement allowing the school to construct a building on a vacant 7.02 acre plot. The agreement required the school to pay a fee of \$75.00 per month to the Coast Guard for use of the land and to

actively pursue purchasing land suitable for multi-family housing in the St. Ignace, Michigan area . . . [that is] of equal appraised value as the Coast Guard land licensed to the Cornerstone Christian School. The property purchased . . . will then be conveyed to the Coast Guard in exchange for the [7.02 acre plot].

The School never purchased land for the land-swap, and the Coast Guard instead purchased land in the St. Ignace area itself.

In 1992, the Coast Guard indicated its intent to sell the 7.02 acre plot, although it has not yet taken the steps required to do so. It also continued to license the property to the School even though the School had breached the first license/property swap agreement.

The Coast Guard and the School most recently renewed their agreement in 2007. This new agreement allows the School use of the 7.02 acres for a mere \$81.00 a month (\$972.00 per year) through 2014 or until the Coast Guard is able to properly divest the property.³

At the request of the School, Congressman Bart Stupak introduced H.R. 1291, which would trump the sale requirements set out in the Federal Property and Administrative Services Act of 1949,⁴ and would simply *gift* the property from the government to the School.

¹ Although the bill calls for the land transfer to go to the "Cornerstone Christian Academy," the correct name of the school is the "Cornerstone Christian School."

² Ed Brayton, "Experts: Stupak Land Transfer Deal Runs Afoul of Constitution," *Michigan Messenger*, Aug. 10, 2009, <http://michiganmessenger.com/24546/experts-stupak-land-transfer-deal-runs-afoul-of-constitution>.

³ 2007 "License to Use Coast Guard Real Property" entered into by the Cornerstone Christian School; Aug. 10, 2009 email from Lt. Dave French, External Affairs Officer Ninth Coast Guard, to Ed Brayer.

The Requirements of the Federal Property and Administrative Services Act of 1949

The sale of government land is governed by the Federal Property and Administrative Services Act of 1949 (“FPAS Act”).⁵ Under this law, land sales must meet certain requirements. First, the government “may make or authorize a disposal or a contract for disposal of surplus property only after public advertising for bids.”⁶ The government may also negotiate sales without the bidding process, but only if it is “subject to obtaining competition.”⁷ In addition, the government may sell property at a fixed price, “[h]owever, the sale must be publicized to an extent consistent with the value and nature of the property involved and the price established must reflect the estimated fair market value of the property.”⁸

After signing the 2007 agreement, the School wrote to Congressman Stupak to ask “whether he could do anything to leapfrog over that lengthy [FPAS Act] process and try to get the property transferred directly to the school.”⁹ H.R. 1291 seeks to accommodate the School’s request by allowing the sale without adhering to the statutory requirements of publication, competition, or sale for the fair-market value of the property.

Giftng the Land to a Religious Organization Is Unconstitutional

Although courts have upheld fair-market-value conveyances of public property to religious organizations,¹⁰ the transfer of government property to a religious organization for *less* than fair market value is unconstitutional.¹¹

In *Annunziato v. New Haven Bd. of Aldermen*,¹² the U.S. District Court for the District of Connecticut struck down the sale of city property to a religious organization for \$1.00, which was well below the fair-market value of the property.¹³ The City had been trying to sell surplus property that had become the target of vandalism and maintenance costs, but the city was having difficulty finding buyers.¹⁴ Although the court held that this factor could justify the City’s expeditious handling of the sale, it could not justify the gifting of the property to the religious

⁴ 42 U.S.C. § 545.

⁵ *Id.*

⁶ 42 U.S.C. § 545 (1)(A).

⁷ 42 U.S.C. § 545(1)(b)

⁸ 42 U.S.C. § 545 (a)(d)(1).

⁹ Ed Brayton, “Experts: Stupak Land Transfer Deal Runs Afoul of Constitution,” *Michigan Messenger*, Aug. 10, 2009, <http://michiganmessenger.com/24546/experts-stupak-land-transfer-deal-runs-afoul-of-constitution>.

¹⁰ See, e.g., *Freedom From Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 492-93 (7th Cir. 2000); *Southside Fair Hous. Comm’n v. City of New York*, 928 F.2d 1336, 1348-51 (2d Cir. 1991).

¹¹ Fair-market value is determined not by reference to the amount the government has agreed to accept, but by reference to real estate appraisals, an appraisal by the government assessor, or by amounts offered by potential buyers. *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 702 (7th Cir. 2005); *Annunziato v. New Haven Bd. of Alderman*, 555 F. Supp. 427, 432 (D. Conn. 1982)(rejecting Plaintiffs’ argument that the fair-market value of the land was \$1.00 because that is the amount for which the City decided to sell it).

¹² 555 F. Supp. at 433 & n.16.

¹³ The religious organization had originally offered \$30,000 for the property and real estate appraisals indicated the land was worth \$50,000-\$75,000. *Id.*

¹⁴ *Id.* at 432.

organization.¹⁵ The Court concluded that the \$1.00 sale lacked a secular purpose and had the primary effect of promoting religion in violation of the Establishment Clause because the sale granted a windfall to the church while granting no secular benefit to the City.¹⁶

The sale price of transferred property was also fundamental in *Mercier v. Fraternal Order of Eagles*.¹⁷ In *Mercier*, the U.S. Court of Appeals for the Seventh Circuit upheld the sale of a Ten Commandments monument and the surrounding land in part because “the Eagles paid the market rate, as determined by the City Assessor.”¹⁸ According to the Seventh Circuit, “a sale well below fair market value resulting in a gift to a religious organization” constitutes “unusual circumstances” that would “indicate an endorsement of religion.”¹⁹

Finally, in *Utah Gospel Mission v. Salt Lake City Corporation*,²⁰ the Tenth Circuit upheld the sale of property to the Church of Jesus Christ of Latter-Day Saints in large part because “the City was well compensated.”²¹ The court explained that the sale of the property to the church below fair-market value would indicate an impermissible religious purpose or the existence of a “sham transaction.”²² The court, however, found no evidence that “there was a grossly disproportionate exchange of value from the City’s perspective, [or] that no consideration was received”²³

In the same way that the government could not gift property to religious organizations in *Annunziato* and *Utah Gospel Mission*, nor gift a religious icon to the secular Eagles in *Mercier*, Congress cannot gift property to the religious School. In order to transfer the land constitutionally, the government would have to sell the property to the religious School at fair-market value.

Congressional Involvement in the Method of Sale Could Signify an Endorsement of Religion

Selling the property to the School for fair market value, however, is not dispositive, as the method of sale also has constitutional implications.²⁴ The court in *Annunziato*,²⁵ for example, determined whether the government had a secular purpose in selling property to a religious organization by asking whether “the process by which the city sold the school departed from standard practice.”²⁶ In *Southside Fair Housing*, the court held that sales to religious organizations must occur “according to standard, non-discriminatory practices” and must be

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 395 F.3d at 702.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 425 F.3d 1249, 1259, 1262 (10th Cir. 2005).

²¹ Indeed, the church paid \$5 million for an easement appraised for \$500,000. *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Southside Fair Hous. Comm’n*, 928 F.2d at 1348.

²⁵ 555 F. Supp. at 433.

²⁶ Unlike the federal government, however, the City in *Annunziato* did not have a standard practice for the sale of property. *Id.*

neutrally available to all.²⁷ If H.R. 1291 were enacted, the government would clearly depart from the “standard practice” required by the FPAS. This could further indicate an unconstitutional religious purpose.

Gifts of the Land Violates the Principles of Good Government

In addition to violating the Establishment Clause, H.R. 1291 violates core principles of good government. First, it would trample on the fair, competitive sales processes set out in the FPAS Act. This would take away the opportunity for all others to bid or negotiate for the property as well as deprive taxpayers of the fair-market value of the land they own. Second, gifting the property to School would reward the School for having breached its first contract with the Coast Guard. Finally, the School has what appears to be a sweetheart deal— paying \$81.00 a month for 7.02 acres of land. There is no reason why the taxpayers should have to part with the land for even less.

²⁷ *Southside Fair Hous. Comm’n*, 928 F.2d at 1350-51.