

Boulevard. While this may be its preferred course, alternative courses do not create a substantial burden on the Church's free exercise of religion.

Much of the Church's argument is addressed to the fact that it was landmarked against its wishes. This is an argument that is without merit for a church or any other secular owner of real estate. The Church further attempts to argue that somehow 1319 Hamilton Boulevard has no economic viability for any purpose. This, too, is not a RLUIPA claim and has not been pled and is not appropriate at the present time.

Undisputed Material Facts

The following facts are conceded to be undisputed and material: 1, 2, 6, 8, 9, 11, 12, 13, 14, 23, 28, 33, 37, 38, 39, 43, and 56.

Plaintiff's Fact Nos. 15, 16, 18, 19, and 34 are not facts at all, they are quotations or paraphrasing of the City's Historic Preservation Ordinance. Defendant admits the existence of its Ordinance and objects only to the paraphrasing of it.

Disputed Material Facts

3. The City has admitted in its response to Paragraph 11 of the Original Complaint that the Plaintiff sought permission to demolish in 2000. The record is unclear as to whether a permit was actually issued. In any event, the City admits that an application was at least pending and that it was halted by the landmarking nomination.

5. The City has no idea what the Plaintiff means by calling the apartment building a "religious structure" (Plaintiff's quotation marks). The City has consistently admitted that RLUIPA applies to the facts of this case and continues to do so. The City denies that the apartment building was ever used for religious purposes, *Defendant's Undisputed Material Fact No. 4*.

21. The City admits that the Plaintiff Church is a viable positive institution which contributes to the neighborhood. Defendant denies this matter as to the allegation that the Church would be forced to relocate away from the neighborhood. No Church member has ever

expressed a plan on the part of the Church to leave the neighborhood. Pastor Bettermann, see *Additional Facts*, testified that he had never been involved in a discussion concerning moving the Church, *Bettermann Deposition Pg. 44*. Dr. Hunter found “a really strong commitment to stay in that place,” *Hunter Deposition, Pg. 25*. There is nothing in the Vega Deposition concerning the Church moving. It is true that Robert Powers expressed that it was the fear of himself and some neighbors that the Church could be forced to relocate. Mr. Powers’ fear is objected to as immaterial. To the extent that this undisputed statement of fact purports to state that the Plaintiff Church in fact is considering leaving, the Defendant City denies it.

27. This purported fact presents an opinion that two primary areas hinder the future and ultimate productivity of the Church. The first is that it has landlocked/limited space. Initially, we note that there is not an urban church in America that is not somehow landlocked and does not somehow have limited space. If the Church is allowed to demolish the apartment building at 1319 Hamilton Boulevard, it would still be landlocked and have limited space. Furthermore, the Church already owns space which could be used for expansion. The second portion, that the Church needs to renovate and expand its facilities, is in two parts. Renovation of the facilities is an immaterial fact. Expansion of the facility has been addressed by the City by showing that expansion can occur without demolition of the building at 1319 Hamilton Boulevard.

29. As per Undisputed Fact No. 28, more than 125 children attend KinderMusik at Plaintiff Church on a weekly basis. There is no evidence in the record whatsoever that any children have been denied enrollment in this program due to space limitations. The deposition testimony of Ms. Meissner is not that the program requires relatively large rooms which do not have other equipment or distractions. Rather, she testified,

“Right now the rehearsal room has a piano, and it has file cabinets in there, and those are distracting; so according to the Director that I talked to yesterday, it is nice to just have a big empty room.” *Meissner Deposition, Pg. 15*.

There is no question but that the KinderMusik program has been successful. Shortcomings such as having file cabinets in the room and inconveniences such as having to roll up carpet

and put chairs down after choir rehearsal might be less than ideal, *Meissner Deposition, Pg. 14*, but they do not constitute a substantial burden on the Church's free exercise of religion.

31. The record does not reflect that there is a proposed daycare facility planned. It reflects only a recommendation by Hunter for an upscale daycare center. There is no mention in the Bettermann Deposition or the Neff Deposition of a proposed daycare facility or a wheelchair ministry. Pastor Bettermann speaks specifically of wanting eight meeting rooms to include the possibility for marriage counseling or marriage ministries and small groups.

32, 35. Pastor Bettermann merely stated that the apartment building is not conducive to being used for educational space, music ministry space, auxiliary worship space, the kind of things that we were anticipating we would like to do in the ministry, *Bettermann Deposition, Pg. 11*. The *Hunter Deposition, at Pgs. 28-31*, only reflects that Dr. Hunter considers the building to be an eyesore. Pastor Bettermann spoke at length of the need for rooms in which to conduct marriage programs. While he may consider the apartment building not conducive to education that does not mean it is not viable to have meetings and marriage groups meet in an apartment building.

36. "Fact" 36 is not consistent with Fact. No. 37, which is admitted.

40. While the proposal for a Family Life Center, which was only prepared for the benefit of the Historic Preservation Commission, shows approximately 14,000 square feet, nowhere in the record is it set forth that 14,000 square feet is specifically needed. Pastor Bettermann has stated that eight rooms were needed.

49. The Defendant City agrees that if the apartment building were renovated for residential use, it would need some parking per the proposed plan, which is *Exhibit 1 to Defendant City's Motion for Summary Judgment*. However, there is no evidence that it would be necessary for the Church to reduce its existing parking area. The quoted section from Deponent Larry Franzen, *Pg. 26*, states that there are no formal parking spots there. While Fact No. 49 contains no mention of how many parking spaces would have to be taken away from the Church, a review of Exhibit 1 to Defendant's Motion for Summary Judgment reveals that no parking spaces need be lose if what is labeled on that Exhibit as "Proposed 2,100 square foot play area" were utilized for parking instead. The existing "play area" which the City asserts is available for Church expansion, is an unimproved yard with two or three pieces of plastic playground equipment, *Franzen Deposition, Pg. 24*. The choice of whether to reduce the parking in this instance would be the Church's.

Immaterial Facts

4. While it is immaterial what the Church's purpose was when it purchased the apartment building, there is no evidence in the *Neff Deposition at Pg. 18, 49 or otherwise*, that the purpose was to demolish the building. Neff stated that the purpose of the purchase was for expansion. The purchase having occurred in approximately 1988, it is immaterial what the Church's purpose was.

7, 57 (they are identical). This allegation pertains to the nomination for landmark status of the building by the Randolph-Roanoke Residents Association. The deposition would indicate that the Association voted to nominate it prior to doing the research, not that there was no research done prior to the nomination. The entire matter, however, is much ado about nothing. The Church had every opportunity to object to the landmarking and, in fact, did so. If the information in the nomination were incorrect, the Church had more than sufficient opportunity to call it to the attention not only of the Historic Preservation Commission, but also to the City Council.

10. The fact that the Church objected to the designation of the building at 1319 Hamilton Boulevard as a landmark is irrelevant to any of the matters before this Court.

17. This issue is immaterial primarily because the Plaintiff Church has never attempted to propose an alternative use for the property. The City denies that its Historic Preservation Ordinance prohibits property from being reused. Alterations to the exterior and structural members of the interior require Certificates of Appropriateness. No such Certificates of Appropriateness have ever been applied for by the Plaintiff Church. The interrogatory response in question stated only that residential/apartment use was the original intended use and would require minimal alterations.

20. The fact that at one time there were a number of churches on Hamilton Boulevard is completely irrelevant to any matters before this Court. The City denies that it or any of its employees were responsible for the fire that caused the Presbyterian Church to move.

The City denies that it is embarked on a program of driving churches out of the Hamilton Boulevard area. There is no timeframe given in the record other than the Presbyterian Church fire occurred in 2000.

22. A 1986 assessment is of no relevance to the matters before this Court.

24. The existence of a parking problem in 1986 is irrelevant to the matters before this Court. Since then, the lot across the street has become available for use by the Church. The City has vacated an alley allowing the Church to gain a few additional parking spaces and the Presbyterians no longer vie for on-street parking on Sunday mornings.

25. It is irrelevant whether the Church followed the recommendations in its 1986 study. It is certainly true that the Church has not acquired the entire block.

26. It is immaterial whether the Church has implemented most of the recommendations of the 1986 consultation report. It is relevant only to the well-admitted fact that the Church is a viable entity at its present location when the Church alleges that it has spent more than \$1.4 million in maintaining its property at the present location.

30. Again, there is no question that the KinderMusik program is successful. The fact that parents bring only children often in strollers and need access in and out of the facility is irrelevant. They are obviously gaining access with the Church's present configuration.

Meissner, Pg. 15, states as follows:

"We need really a waiting area for parents. Currently, our music director's wife sets up a table in the hallway where she puts cookies and coffee and has chairs in the hallway which is probably not good, especially when you have people coming in."

The record is devoid of claims, accidents or other problems caused by problems with access for KinderMusik students and their families. A variety of floor treatments could be utilized if the surface becomes slippery.

41-42, 44-48, 50-51. All of these "facts" are derived from a business plan prepared by Robert Powers. Plaintiff misuses that business plan and misconstrues it to be a comprehensive

analysis of whether the property in question, the apartment building at 1319 Hamilton Boulevard, has any economic viability. Per the Affidavit of Robert Powers, attached hereto as Exhibit 1 and made a part hereof, the business plan was never intended to be an examination of every conceivable use to which the building could be put, but only to consider alternatives for the building which could be achieved by him and his group and which he understood to be within the parameters allowable by the Church. He did not consider the viability or feasibility of renovating the building for rental units. It should be noted here that the City has already admitted as Undisputed Fact No. 43, that Mr. Powers determined that the building could not be moved. In all other respects, Mr. Powers' conclusions are irrelevant.

52-54. "Fact" 52 is so far removed in time from the present that it has no relevance. Pages 65 to 67 of the Appel Deposition concern a purchase by neighbors from a bank in 1983. That the property was sold to the Church several years later does not indicate anything. Additionally, a purchase price of \$134,000.00 in 1990 does not indicate the absence of economic viability.

55. This alleged fact is irrelevant because it is not up to the City to determine modifications for the building. It is up to the owner to determine modifications that it desires and for the City to respond to requests.

58. This is completely irrelevant. At the time of the landmarking in 2000, the Plaintiff Church was put on notice and had every opportunity to investigate any matters related to the apartment building and bring them to the attention of both the Historic Preservation Commission and the City Council.

59. This is irrelevant. Knowledge of the architect is not required for a building to be a landmark. It would be only one factor to be considered.

60. The fact that the building is eclectic is among the factors to be considered in its appropriateness for landmarking. There is no prohibition on the landmarking buildings that are eclectic. There are good eclectic buildings which may well deserve to be preserved.

61. It is irrelevant that the City's Comprehensive Plan does not specifically address its landmark ordinance or historical landmarks. The landmark ordinance is part of the City Code and, therefore, reflects the City's priorities.

62-63. These alleged facts are irrelevant. The Plaintiff has not requested any zoning changes or any use of the building which has been denied by the City.

64-69. These alleged facts all deal with the National Register of Historic Places, which is completely irrelevant to the matter before this court. The City's ordinance is different from the National Register of Historic Places. Indeed, it would be pointless for the City to duplicate or mimic the National Register Guidelines and Processes.

Additional Material Facts

1. Pastor Bettermann testified that during his time as Pastor, he has not been involved in any discussions of moving the entire Church or relocating the Church to another location, *Bettermann Deposition, Pg. 44*. Dr. Hunter found "a really strong commitment to stay in that place." *Hunter Deposition, Pg. 25*.

2. The play area which is currently the grassy area, generally described as the proposed addition area on Exhibit 1 to Defendant's City of Peoria's Motion for Summary Judgment, contains two or three pieces of plastic playground equipment and, in fact, was called by Larry Franzen a "partial playground." It is not open to the public, *Franzen Deposition, Pg. 24*. Pastor Bettermann describes it as a small playground, toddler playground. He further described it as used in "small increments on Sunday mornings," *Bettermann Deposition, Pg. 21*.

3. The business plan authored by Robert Powers was never intended as a comprehensive study of every conceivable use to which the apartment building could be put. It was only intended to consider alternatives which could be achieved by Powers and his group, which Powers understood to be within the parameters allowable by the Church. Specifically, Powers did not consider the viability or feasibility of renovating the building for rental units, *attached Affidavit of Robert Powers*.

4. Additional parking is available to the Church on Randolph and other streets around the Church, *Franzen Deposition, Pg. 22.*

5. While the Church considers additional space crucial for both KinderMusik and a proposed marriage ministry, the Church building as it exists is not so busy as to be in use at all times. KinderMusik takes place only Monday through Thursday because the teachers choose to take Friday, Saturday and Sunday off. Pastor Bettermann, in response to a question of whether there were three, four or five rooms open that are not regularly used in his Church on a Friday night, responded,

“That might be a possibility, but it doesn’t answer all the pertinent questions which is – which need to include: Is staffing available? Is the constituency we are trying to reach most conducive to be reached on a Friday night?”

ARGUMENT

Plaintiff, Trinity Evangelical Lutheran Church, is without a doubt a viable and vibrant church congregation. It appears to be doing quite well with its present building. It is certainly doing well enough that it is not a substantial burden on the Church’s free exercise not to be able to expand. The KinderMusik program, for example, has grown to 125 students. While inconveniences such as file cabinets in the same room as the children may be less than ideal, such inconveniences do not rise to the level of being a substantial burden on the free exercise of the Church’s religion. Similarly, there has been no allegation made by the Church that lack of parking represents a substantial burden to the Church. They have use of a sixty-space lot across Randolph Street from the Church which they did not have in 1986. They also have the use of parking on Randolph Street and other streets around the Church without the complicating factor of Presbyterians competing for those spaces on Sunday mornings.

It is not unusual for a church to wish to expand its space and ministries. While Trinity Evangelical Lutheran Church is clearly viable in its present state, the City has never prohibited from expanding and does not wish to prohibit it from expanding here. The City’s position is that

there is room for the Church to expand without demolishing the apartment building at 1319 Hamilton Boulevard. While the demolition may lead to the Church's preferred plan, the existence of alternative methods of expansion means that inability to demolish the apartment building does not rise to a level of substantial burden.

In *Civil Liberties for Urban Believers (CLUB) v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003), *Vision Church v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006), and *Petra Presbyterian Church v. Village of North Brook*, 489 F.3d 846 (7th cir. 2007), the Seventh Circuit cautioned that a religious institutions' inability to purchase its preferred property (*CLUB and Petra*) or carry out its preferred site plan on property it owns (*Vision Church*) is not a substantial burden. To hold otherwise would elevate inconvenience, and the same land-use frustrations experienced by all property owners, to the level of a constitutional injury, but RLUIPA demands that "the requirement of substantial burden is taken seriously." *Vision Church v. Village of Long Grove*, 468 F.3d 975, 998-99 (7th Cir. 2006). See also *Calvary Temple Assembly of God v. City of Marinette, Wisconsin*, 2008 WL 2837774 (E.D. Wis. July 21, 2008) (applying Seventh Circuit case law and finding that church's inability to expand to neighboring property, that it purchased, was not a substantial burden).

The City agrees that RLUIPA's "substantial burden" provision is designed to "backstop" the explicit prohibitions on religious discrimination contained in other sections of RLUIPA and the Free Exercise Clause of the First Amendment. See *Petra Presbyterian Church v. Village of Northbrook*, 498 F.3d 846, 851 (7th Cir. 2007) (quoting *City of New Berlin*). That law prohibits zoning decisions that intentionally or explicitly discriminate against religious land uses. That is to say, zoning decisions are illegal only when they target religious institutions *because of religion*. *Vision Church*, 468 F.3d at 999 (emphasis in original).

In *City of New Berlin*, the *only* case in which the Seventh Circuit has found a violation of RLUIPA's "substantial burden" provision, the Seventh Circuit held that the city's decision-making

was "so utterly groundless as to create an inference of religious discrimination." *Petra Presbyterian*, 489 F.3d at 851 (distinguishing *City of New Berlin*). The "substantial burden" in *City of New Berlin* included the burden of having to comply with the city's misguided zoning procedure when the church was willing to address the alleged "contingency" that the city professed to be concerned about. *City of New Berlin*, 396 F.3d at 900. Likewise in *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2nd Cir. 2007), cited by the plaintiff, the Second Circuit found that the village's decision was utterly groundless, "characterized not simply by the occasional errors that can attend the task of government but by an arbitrary blindness to the facts." *Id.* at 352. As in *City of New Berlin*, it was this arbitrary conduct that transformed the routine inconvenience and disappointment experienced by the plaintiff into a "substantial burden" violation. *Id.* at 350-52.

In our case, there is no suggestion, and not a whiff of evidence, that the landmarking was undertaken with discriminatory intent. Rather the evidence demonstrates that the City's Historic Preservation Commission and City Council carried out, with all seriousness and diligence, their authorized mission to preserve historic buildings in the city. There can be no doubt that landmarking is a legitimate, state and nationally recognized, tool used to improve cities and the lives of residents. Further the City's historic preservation expert, Dr. Susan Appel, testified unequivocally that circa 1912 Roanoke Apartments building was "a historically significant architectural assets that deserves to be preserved, enhanced and restored to use," worthy of landmark status, and that its designation as a landmark complemented the city's existing Randolph-Roanoke Historic District, located less than a block away. Given that the City's decision to landmark the building is well supported, and there is no evidence of anti-religious intent, the limitations on the plaintiff's use of the building imposed by landmarking does not rise to a "substantial burden" or violate RLUIPA.

The plaintiff makes both "facial" and "as applied" challenges to the landmark designation. As to its facial challenge, the plaintiff essentially argues that when property owned by a religious institution is landmarked without the owner's consent, the landmarking automatically constitutes a "substantial burden" because it deprives the religious institution of its preferred use (in this case, demolition) and imposes a duty to maintain the building in a manner befitting an historic structure.

Whether analyzed under the Free Exercise Clause or its "backstop," RLUIPA, this is not the law. The Free Exercise Clause and RLUIPA prohibit discriminatory treatment based upon religion. They do not require that special benefits or exemptions be accorded property owned by religious institutions. RLUIPA does not provide religious institutions a "free pass" from neutral and generally applicable zoning regulation. *CLUB*, 342 F.3d at 762. Zoning and land use law, and the marketplace in general, may make it more difficult for churches to purchase or maintain property, but so long as municipalities apply the same laws and standards to religious and non-religious institutions, there is no violation of First Amendment or RLUIPA. *CLUB*, 342 F.3d at 761; *Vision Church*, 468 F.3d at 998-99. A municipality's decision to landmark property owned by a religious institution is no different. *Rectors, Wardens and Members of St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 354-55 (2nd Cir. 1990) (no violation of Free Exercise Clause even when if properties owned by religious institutions were more likely to be landmarked than other properties); *Episcopal Student Foundation v. City of Ann Arbor*, 341 F.Supp.2d 691 (E.D. Mich. 2004).

The City's landmarking scheme is authorized by the state, and similar to other state and local landmarking ordinances. It employs a *neutral* set of principles to determine both the property's worthiness for initial designation, and issues involving the issuance of a Certificate of Appropriateness (e.g., for repair or demolition).

On its *face*, the City's criteria for designation and the issuance of a Certificate is the same for properties owned by religious and secular institutions. It is true that the owner of properties designated as historic structures must accept limitations on their use of the property and may incur certain maintenance obligations. These "burdens" sometimes make owners unhappy, but they apply universally to *all* owners of historic property in the City. The fact that the "purposes of the Ordinance stand in sharp contract . . . to the goals which are the object of religious use," Plaintiff's Brief at 16, is simply irrelevant. Secular owners whose buildings have been landmarked also complain that landmarking is at odds with *their* goals and vision for their properties. See, e.g., *International College of Surgeons v. City of Chicago*, 153 F.3d 356 (7th Cir. 1998) (private property owner challenged landmarking and city's denial of demolition permit); *Zaruba v. Village of Oak Park*, 695 N.E.2d 510 (Ill. App. Ct. 1998) (owner challenged village's refusal to grant certificate of economic hardship).

Finally, if plaintiff is arguing that, under the City's landmarking ordinance, a religious institution can *never* receive a Certificate to convert a landmarked building from a secular use to a religious use, this argument is: (i) unsupported by the language of the ordinance; (ii) unripe (because the plaintiff never asked for such a Certification – it simply sought to demolish the building); (iii) contrary to the evidence, which shows that the City *encouraged* and supports reuse of Roanoke building.

In discussing their "as applied" challenge, plaintiff essentially details the economic costs and burdens associated with owning an historic building. These include: (i) the costs associated with maintaining the landmarked building (even though plaintiff has, in fact, allowed the condition of the building to deteriorate) and (ii) the burden associated with an inability to demolish the building and expand as desired. Pl. Br. 17-18.

The City disagrees with some of these assertions, including the assertion that demolition of the building is the *only* way the plaintiff can expand its faculty. In fact, there are many different ways in which the church can expand both within the existing building and on surrounding land, see *Statement of Facts* ¶¶ 6-7, 9, 11-12, 15, 18. Plaintiff, however, has chosen to ignore these opportunities. This way, "substantial burden" does not lie. See, e.g., *Episcopal Student Foundation*, 341 F.Supp.2d at 703-04 (contrary to the plaintiffs suggestion, demolition of historic building was not the only "feasible choice" for obtaining additional space).

Second, with respect to preserving the historic building, the plaintiff has the option to sell the building, *Statement of Facts* ¶ 5, 8, or expend reasonable sums to maintain the building. Operation as an apartment building, which was plaintiff's use of choice for approximately 15 years (1990-2003) is also an option, as is conversion to religious use. The fact that none of these options is preferred by plaintiff or that they entail expenses (which expenses would be equally incurred by a secular owner) does not result in a "substantial burden." The City questions the plaintiff's use of the Powers Report to imply that the historic building is nothing but an economic anchor and a money pit, but even if plaintiff's characterization is true, its claim would be one for regulatory taking, not violation of RLUIPA. A claim for regulatory taking has not been pled and, if it had, the City would have several defenses including: (i) plaintiff never challenged, through established state-law procedures, the Commission's decision to deny its request for a Certificate, see *Zaruba*, 695 N.E.2d at 515 (setting for standards for owner's challenge to denial of certificate); (ii) plaintiff did not exhaust its taking arguments in state court before coming to Federal Court. See, e.g., *Peters v. Village of Clifton*, 498 F.3d 727 (7th Cir. 2007).

The Plaintiff Church had a viable purchaser for its property in 2004. It rejected the purchase offer, did nothing to maintain the building, and now claims that the building is not

viable for any use. In fact, it has made no effort to explore the option of selling the building. It is, therefore, not in a position to show that it has no economic use or value.

But *even if* the plaintiff's expansion plans are frustrated and it must comply with the City's rules regarding the upkeep of landmarked buildings that is not a "substantial burden." *Vision Church*, 468 F.3d at 999-1000 (ordinance that limited development to 55,000 sq. ft. on 27 acre site – rather than plaintiff's preferred 99,000 sq. ft - was not a "substantial burden"); *Living Water Church of God v. Charter Township of Meridian*, 258 Fed. Appx. 729, 741 (6th Cir. 2007) (recognizing that "the action of the Township in this case will require Living Water to incur expense to accomplish its goal of building a significantly larger church and school, and to endure inconvenience if it is not able to build a facility of the desired size" but concluding that RLUIPA *does not* guarantee that Living Water the facility of its choice and that there was no imposition of a "substantial burden").

Because there is no "substantial burden," the City need not show a compelling governmental interest. See *Petra*, 489 F.3d at 851-52. However, the City's interest in preserving the building is well documented by Ms. Appel's report including her accompanying photographs. These demonstrate that the City's decision to landmark the building was not only "rational" in the constitutional sense, but fully justified given the building's history, style, workmanship, condition and location. On this point, her pictures are worth a thousand words. Requiring plaintiff, or any owner, to be a steward of this historic building is a civic honor. The plaintiff may be unwilling to accept that honor, and the responsibility that comes with it, but whatever responsibility the plaintiff must bear, it is not a "substantial burden" within the meaning of RLUIPA.

For the foregoing reasons, the City of Peoria is entitled to judgment as a matter of law.

Respectfully submitted,
CITY OF PEORIA, Defendant

BY /s/ Randall Ray
Randall Ray, Corporation Counsel

CERTIFICATE OF SERVICE


I hereby certify that on September 2, 2008, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system which will send notification of such filing to the following:

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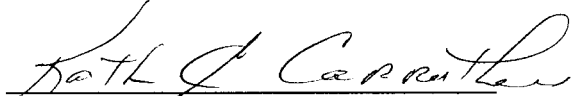
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FURTHER, YOUR AFFIANT SAYETH NOT.



Robert Powers

Subscribed and sworn to before me
this 29 day of August,
2008.



Notary Public

