


OPINION OF THE CITY ATTORNEY

TO: East Lansing City Council

FROM: Thomas M. Yeadon, City Attorney 

RE: **ST. ANNE DEVELOPMENT AND THE ESTABLISHMENT CLAUSE**

DATE: August 31, 2012

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I have been asked to give an opinion on whether the Establishment Clause of the First Amendment was violated by the use of tax increment financing (TIF) to provide public facilities for the development of the St. Anne's project. The claim of an Establishment clause violation arises from what now appears to be a large cross as an architectural feature on the front of the structure.<sup>1</sup> For the reasons discussed below, there was clearly no violation of the Establishment Clause under these circumstances. Likewise, the First Amendment would prohibit the City from precluding such an architectural feature on this private property and/or requiring its removal.

The relevant facts are that site work and public facilities for this structure were provided by the use of a lawfully adopted Brownfield tax increment financing plan (TIF Plan).<sup>2</sup> No public funds were approved or provided for the development of the structure itself. Rather, funds were used for demolition of the existing structure, asbestos abatement, public infrastructure and site preparation activity.

The TIF plan was approved by the Brownfield Redevelopment Authority on February 24, 2011 and by City Council on March 15, 2011, prior to receiving any elevation plans which show the architectural feature described above. Likewise, the original approval of the project site plan and special use permit by the Planning Commission and City Council was given without any elevation plans showing the architectural feature described above. The elevation plans showing the architectural feature described above first appeared in the plans when the project was resubmitted

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<sup>1</sup>For purposes of this opinion, I am assuming this architectural feature was intended by the developer to be a Christian cross.

<sup>2</sup>TIF plans allow a local government to finance eligible improvements in a designated area by capturing the property taxes levied on any increase in property values within the area. Tax increment financing is premised on the theory that, without the redevelopment project, property values would not increase, or that increases in land values and assessments in the project area are caused by the redevelopment authority's own construction of economic activity in the district. See *Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich 93, 101-102 (Mich 1988).

for approval of the fifth floor submitted April 25, 2012. Nothing in the administrative record shows that this particular architectural feature was observed by anyone from City staff, the Planning Commission, or Council to be a religious symbol. There is simply no mention of it by anyone as such. Assuming that is the intent of the feature, it does not seem that it was apparent to any City staff or City officials.

The "Establishment Clause," as it is termed, is contained in the First Amendment and reads:

Congress shall make no law respecting an establishment of religion  
or prohibiting the free exercise thereof; . . . ."

As such, this Amendment to the Constitution contains both the "Establishment Clause" and the "Free Exercise" clause.

In *Emerson v Bd of Education of Ewing*, 330 US 1, 15; 67 S Ct 504; 91 L Ed 2d 711(1947), the Supreme Court articulated six practices that the Establishment Clause prohibits: (1) neither a state nor the federal government can set up a church, (2) neither can pass laws which aid one religion, aid all religions, or prefer one religion over another, (3) neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion, (4) no person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance, (5) no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion, (6) neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organization or group and vice versa.

To the extent it could be argued that the Brownfield TIF Plan violated the establishment clause as constituting aid to a religion, the law is clear that it does not provide aid in the constitutional sense. In *Mitchell v Helms*, 530 US 793; 120 S Ct 2530; 147 L Ed 2d 660 (2000), the Supreme Court held that a law that provided aid to both public and private schools did not unconstitutionally advance religion because it neither resulted in religious indoctrination by government nor defined recipients by religious preference. In determining whether government aid advances religion, the courts apply a three-prong test:

- (1) whether the aid has a secular purpose,
  - (2) whether it has a primary effect of advancing or inhibiting religion, or
  - (3) whether it creates an excessive entanglement and religion.
- See *Mitchell, supra*, at 808.

Since this particular feature of the building was not present at the time the Brownfield Plan was

approved, it would be a spurious argument indeed to assert an Establishment Clause violation. It is clear that the aid/assistance provided by the Brownfield TIF Plan did not have a secular purpose, did not have a primary effect of advancing or inhibiting religion, and does not create excessive entanglement between government and religion. In fact, even if the architectural feature had been present from the beginning of the process, it would not have met this standard of being aid which advances religion.

The question then turns to whether the existence of this architectural feature on building assisted with TIF funding violates the Establishment Clause by supporting religion. The Establishment Clause not only limits the religious content of the government's own communications, it also prohibits the government's support and promotion of religious communications by religious organizations. *County of Allegheny v ACLU*, 492 US 573; 109 S Ct 3086; 106 L Ed 2d 472 (1989). Arguably, if this were a public building, a finding of a violation of the Establishment Clause could be made (even if the feature went unnoticed in the approval process) since the Establishment Clause prohibits the perception of governmental endorsement of religion. See *Secretary of the Interior v Buono*, 130 S Ct 1803; 173 L Ed 2d 634 (2010) (finding that a cross on national parkland property violated the Establishment Clause even though it was not constructed or maintained by the government). However, despite the use of tax increment financing to assist in the construction of this building, the fact of the matter is it remains private property and a privately owned building. "As a general matter, courts considering Establishment Clause challenges do not inquire into reasonable observer perceptions with respect to objects on private land." *Id.* In other words, there is no fear of the perception that government is endorsing a particular religion because this is not a government building. The government's hand in financing the removal of the preexisting structure and site preparation would likewise not be perceived by a reasonable person as a government endorsement (even if people were aware that tax increment financing was involved) since the agreement for government financing occurred prior to any knowledge of this particular feature and the financing did not apply to the structure itself. The existence of this particular architectural feature, even if understood by all to be a Christian symbol, simply does not violate the Establishment Clause.

The question then becomes: Could Council do anything with respect to requiring the removal of the cross even if it had the desire to do so? Again, the answer is clearly "no". "There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the free speech and free exercise clauses protect." See *Capital Square Review and Advisory Board v Panette*, 515 US 753, 765-766; 115 S. Ct. 2440; 132 L. Ed. 2d 650(1995). In that case, the Court held that the City's advisory board could not preclude the Ku Klux Klan from placing a cross on public property based on the government's claim that the Establishment Clause would prohibit allowing it. Likewise requiring this private property owner to remove a religious symbol from his property would violate the free exercise clause whether it was placed there during the construction phase or at some subsequent time.

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It is clear that not only was there no violation of the Establishment Clause by using tax increment financing to assist in the preparation of the site for this structure, but had this issue arisen during the approval process, the City would have clearly been prohibited from requiring removal of this particular architectural feature on the basis of the Establishment Clause.

bks

Ret Ord Admin - St Anne Devel

Ref 096

cc East Lansing City Clerk  
East Lansing City Manager