



April 8, 2021

Christopher J. Caso
Dallas City Attorney
1500 Marilla Street, Room 7DN
Dallas, TX 75201

Sent via email and CMRRR (7017145000099159907)

Re: OurCalling, Inc.

Mr. Caso:

First Liberty Institute represents OurCalling, Inc. (“OurCalling”) in connection with the City of Dallas’s (“the City”) temporary inclement weather shelter (“TIWS”) ordinances. Please direct communication on this matter to my attention. This letter shall serve as notice¹ that the City’s misinterpretation of land use ordinances to require OurCalling to obtain a TIWS permit and the buffer zone excluding OurCalling from the TIWS permitting program substantially burden OurCalling’s free exercise of religion and violate the Texas Religious Freedom Restoration Act (“TRFRA”), Tex. Civ. Prac. & Rem. Code § 110.001 et seq.

OurCalling’s Religious Practice

OurCalling is a faith-based nonprofit organization that ministers to people experiencing homelessness. Its mission is to build long-term relationships with friends on the street, guiding them to a relationship with Jesus Christ that will help them to realize their worth and inspire them to invest in their lives. OurCalling’s facility, located at 1702 S. Cesar Chavez Boulevard, is zoned as a church and opened in April 2017. OurCalling hosts worship services, Bible studies, substance abuse recovery programs, peer group meetings for men and women, one-on-one mentorship and ministry, laundry services, showers, clothing, and meals. OurCalling partners closely with the Dallas Office of Homeless Solutions (“OHS”), as well as healthcare providers and other charities, including the North Texas Food Bank, the Salvation Army, Union Gospel Mission, the Bridge, the Stewpot, and others. During the historic February 2021 snowstorm, OurCalling staffed the Kay Bailey Hutchison Convention Center, providing shelter to over 1000 people.²

Although OurCalling is not a shelter, it will stay open 24 hours if necessary as a last resort during emergencies, so homeless individuals can stay safe when shelter space runs out. During the 2020–21 winter, OurCalling cooperated with OHS to coordinate emergency shelter intake. Homeless individuals in need of emergency shelter came to OurCalling, where OHS personnel arranged shelter and hotel accommodations, as well as transportation. Once the City’s budget for

¹ This notice is provided pursuant to Texas Civil Practice and Remedies Code § 110.006.

² Chloe Atkins, *Texas homeless population seeks refuge amid bone-chilling temperatures*, NBC NEWS (Feb. 18, 2021), <https://www.nbcnews.com/news/us-news/texas-homeless-population-seeks-refuge-amid-bone-chilling-temperatures-n1258273>.

hotel accommodations ran out, OurCalling and other charities pooled their resources to provide additional hotel rooms. Once those funds were exhausted, OurCalling remained open through the night as a last resort. It did not provide beds; it simply extended its hours and continued its normal operations.

OurCalling has engaged in this practice since its first winter at its current location, when staff opened the facility one morning after a freezing night and discovered a homeless man had passed away outside the front gate. OurCalling’s religious beliefs require it to keep its doors open as a last resort during emergencies. Its faith does not allow it to close its doors during emergency circumstances (such as freezing weather) and send the people it serves out into the cold to risk frostbite, hypothermia, or even death while bidding them to “go in peace; keep warm and well fed.”³

TIWS Ordinances

In 2018, Dallas code compliance issued OurCalling a code violation alleging that OurCalling’s religious practice of remaining open 24 hours as necessary during emergencies constitutes an “illegal land use” in violation of Dallas City Code Division 51A-4.200.⁴ As a result, OurCalling worked with many city officials to develop a permitting program to allow churches and other entities to serve as temporary shelters during inclement weather. Pastor Wayne Walker, OurCalling’s Executive Director, spoke in support of the TIWS proposal at the November 11, 2020 City Council meeting.⁵ At that meeting, the City Council adopted two ordinances creating the TIWS permitting program⁶ and a TIWS accessory use,⁷ respectively.

However, the City Council passed the program with a late amendment—a “buffer zone” prohibiting the issuance of TIWS permits to entities located within one half mile of the Central Business District (“CBD”).⁸ Buffer zone proponents argued that it was necessary to avoid concentrating homeless services in the downtown area.⁹ OurCalling is located within this buffer

³ James 2:15–17 NIV (“Suppose a brother or a sister is without clothes and daily food. If one of you says to them, ‘Go in peace; keep warm and well fed,’ but does nothing about their physical needs, what good is it? In the same way, faith by itself, if it is not accompanied by action, is dead.”).

⁴ See Jason Wheeler, *Private showers, laundry service, and help center: Unorthodox approach to deal with homelessness*, WFAA (Mar. 20, 2018), <https://www.wfaa.com/article/news/local/dallas-county/private-showers-laundry-service-and-help-center-unorthodox-approach-to-deal-with-homelessness/287-530368331>.

⁵ The November 11, 2020, City Council Meeting video recording is available on the City website as a collection of individual videos listed by agenda item at a single internet link, <https://dallastx.swagit.com/play/11112020-747>. The City Council discussed the TIWS ordinances twice, generating two individual videos, which are both listed under the same title as Items PH3 and 62. For ease of reference, citations will identify the two videos chronologically as “TIWS Video 1” and “TIWS Video 2,” respectively, and provide the relevant time index. Pastor Walker’s remarks begin in TIWS Video 1 at 16:00.

⁶ Ordinance No. 31695 (Nov. 11, 2020), available at <http://citysecretary2.dallascityhall.com/resolutions/2020/11-11-20/20-1824.pdf> (codified as Dallas City Code § 45-1 et seq).

⁷ Ordinance No. 31705 (Nov. 11, 2020), available at <http://citysecretary2.dallascityhall.com/resolutions/2020/11-11-20/20-1843.pdf> (codified as Dallas City Code § 51A-4.217(b)(11.1)).

⁸ Codified as Dallas City Code § 51A-4.217(b)(11.1)(E)(iii). See TIWS Video 2.

⁹ TIWS Video 1 at 23:55–27:05; 26:15–32; 46:55–47:05; 48:25–30; 1:11:50–12:15.

zone and is thus ineligible to participate in the TIWS program it helped develop.¹⁰ Violations of the TIWS program ordinances carry combined fines of up to \$2,500.¹¹

TRFRA

TRFRA prohibits the City from substantially burdening OurCalling's religious practice unless the City can demonstrate that the burden furthers a compelling interest through the least restrictive means.¹² The City substantially burdens OurCalling's religious exercise¹³ of remaining open 24 hours as a last resort during emergencies by first misinterpreting this practice as a change in use that requires a TIWS permit and then excluding OurCalling from participating in the TIWS permitting program. These actions effectively communicate to OurCalling that it must either stop its religiously motivated efforts to save the homeless during emergencies or face fines of up to \$2,500. Dallas cannot demonstrate that imposing this substantial burden¹⁴ is the least restrictive means of serving a compelling government interest.¹⁵

"Because religious exercise is a fundamental right," a compelling interest "can only be found in 'interests of the highest order,' . . . only to avoid 'the gravest abuses, endangering paramount interest[s].'" *Barr v. City of Sinton*, 295 S.W.3d 287, 306 (Tex. 2009) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963)). Moreover, the City must demonstrate that its interest is compelling specifically as applied to OurCalling. See *Barr*, 295 S.W.3d at 306. "[B]roadly formulated interests justifying the general applicability of government mandates," such as "preserv[ing] the public safety, morals, and general welfare," will not suffice. *Barr*, 295 S.W.3d at 306 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (internal quotation marks omitted)). Courts applying TRFRA will "not assume that zoning codes inherently serve a compelling interest." *Id.* at 307 (quoting Douglas Laycock, *State RFRA's and Land Use Regulation*, 32 U.C. Davis L. Rev. 755, 784 (1999)).

Change in Use

The 2018 code violation characterized OurCalling's religious practice of remaining open 24 hours when necessary in emergency circumstances, such as freezing weather, as an "illegal land use," but this practice does not constitute a change from OurCalling's permitted use. When emergency shelter space in the City fills up, OurCalling simply continues its normal operations

¹⁰ See Lori Brown, *Churches near Downtown Dallas Not Allowed to Apply as Emergency Homeless Shelters*, Fox4KDFW (Nov. 12, 2020), <https://www.fox4news.com/news/churches-near-downtown-dallas-not-allowed-to-apply-as-emergency-homeless-shelters>.

¹¹ The ordinance creating the TIWS permit program (Chapter 45) imposes a fine up to \$500, while the ordinance creating the TIWS accessory use imposes a fine up to \$2000. See Ordinance No. 31695, *supra* n.6 at Section 2; Ordinance No. 31705, *supra* n.7 at Section 4.

¹² Tex. Civ. Prac. & Rem. Code § 110.003.

¹³ Religious exercise encompasses "an act or refusal to act that is substantially motivated by sincere religious belief" regardless of whether it is central to or required by the person's religious beliefs. Tex. Civ. Prac. & Rem. Code § 110.001(a)(1).

¹⁴ See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720–21 (2014) (considering monetary fines a substantial burden); *Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972) (considering a \$5 fine a substantial burden on religious exercise).

¹⁵ Tex. Civ. Prac. & Rem. Code § 110.003.

rather than closing the doors and forcing people out into the cold or other emergency circumstances. Nothing in the church use ordinance limits operating hours, *see* Dallas City Code § 51A-5.204(4), and some houses of worship routinely remain open 24 hours.¹⁶ When OurCalling extends its operating hours during emergencies, it does not transform into a “lodging facility,” does not provide beds, and does not negotiate room and board; thus, OurCalling’s practice does not constitute a change to shelter use. *See* Dallas City Code § 51A-4.205(2.1) (defining shelter use). Moreover, the TIWS ordinances contain no descriptive definition of a temporary inclement weather shelter;¹⁷ and elements of the TIWS program, such as spacing requirements for designated sleeping areas, are not relevant to OurCalling’s practice.¹⁸ Therefore, OurCalling’s religious practice falls within its primary use; and, properly interpreted, the Code neither prohibits OurCalling’s religious practice nor requires OurCalling to obtain a TIWS permit.

Since 2018, when OurCalling received the code violation misinterpreting the Code to the contrary, nothing has indicated that the City has reevaluated its interpretation that OurCalling’s religious practice constitutes an illegal land use. Indeed, City Council discussions surrounding the buffer zone amendment assume the Code prohibits OurCalling’s practice.¹⁹ This misinterpretation imposes a substantial burden and serves no interest, compelling or otherwise. A city cannot maintain an interest in misinterpreting its code. But to the extent the City has health and safety concerns, OurCalling already possesses the required permits. OHS’s longstanding collaboration with OurCalling, especially its partnership with OurCalling to coordinate emergency sheltering as described above, demonstrates that the City has no concerns about the safety of OurCalling’s facility. In fact, forcing OurCalling to cease its religious practice would undermine health and safety by ejecting homeless individuals with no alternative shelter into emergency circumstances, such as dangerous cold, which could prove fatal.

Buffer Zone

Even if OurCalling’s religious practice is properly considered a change of use requiring a TIWS permit, the buffer zone excluding OurCalling from the TIWS program does not further a compelling interest by the least restrictive means. If necessary, OurCalling is willing to apply for a TIWS permit. After it received the 2018 code violation, OurCalling collaborated with Dallas to create the TIWS program, and Pastor Wayne spoke in favor of the program at the November 11, 2020 City Council Meeting.²⁰ The buffer zone that prevents OurCalling from applying for a TIWS permit serves no compelling interest. The buffer zone’s proponents explained in the City Council meeting that it is designed to avoid a concentration of homeless services in the CBD.²¹ These justifications fail, however, for many reasons.

¹⁶ *See, e.g.*, Achdut Israel Congregation, <https://www.achdutisraeldallas.org>; St. Pius Catholic Church, <https://spxdallas.org/events/midnight-mass> (offering a midnight Christmas mass).

¹⁷ *Compare* Dallas City Code § 45-2(5) (defining temporary inclement weather shelter as “a facility operating as a temporary inclement weather shelter as defined in Sections 51-4.217 and 51A-4.217 and in accordance with this chapter”) *with* Dallas City Code § 51A-4.217(11.1)(A) (defining temporary inclement weather shelter as “A facility that offers shelter during times of inclement weather in compliance with Chapter 45”).

¹⁸ *See* Dallas City Code § 45-5.

¹⁹ *See, e.g.*, TIWS Video 1 at 49:10–55, 54:00–22, 54:55–55:05; TIWS Video 2 at 16:00–16:52.

²⁰ TIWS Video 1 at 16:00–17:00.

²¹ TIWS Video 1, *supra* n. 10.

First, reducing homeless services in the downtown area bears no relation to serving the needs of individuals experiencing homelessness. At most, it amounts to a generalized preference that homeless services relocate out of certain areas. In fact, interim-director of OHS Kevin Oden criticized the buffer zone amendment by emphasizing the need to “serve people where they are,” while City Manager T.C. Broadnax and his Chief of Staff Kim Tolbert noted that OHS works best in partnership with charities, like OurCalling.²² Second, the buffer zone does not actually further this purported interest. Prohibiting temporary emergency shelters in the downtown area does not change the concentration of permanent homeless services.²³ Rather, all the buffer zone does is require the homeless to trek long distances in search of shelter when emergency circumstances arise, such as the recent February snowstorm.²⁴ Forcing homeless persons to travel long distances only during emergency circumstances serves no rational interest, let alone a compelling one.

And if the buffer zone’s purpose is not compelling in general, it certainly cannot be compelling specifically as to OurCalling. The buffer zone would only force OurCalling to eject homeless individuals from its facility into emergency circumstances, such as dangerous cold. Forcing the homeless into danger is the fundamental opposite of a compelling interest.

Notably, the City Council did not assert a health and safety interest in the buffer zone.²⁵ But to the extent the City has any health and safety interests that OurCalling’s existing permits do not already serve,²⁶ allowing OurCalling to apply for a TIWS permit serves those interests. The ordinance itself provides a less restrictive means to accomplish such interests.²⁷

In sum, TRFRA prohibits the City from misinterpreting the use ordinances to require OurCalling to obtain a TIWS permit to continue its religious practice. Misinterpreting a law is not a legitimate government interest, let alone a compelling one. But even if the use ordinances properly require a TIWS permit, TRFRA prohibits the City from excluding OurCalling from the TIWS program.

Federal Law

Federal laws also prohibit the above-described substantial burden on OurCalling’s religious practice. The Religious Land Use and Institutionalized Persons Act (“RLUIPA”) prohibits the imposition of a substantial burden on religious exercise through a system of land use regulation that involves individual assessments unless the government makes the same strict scrutiny showing that TRFRA requires.²⁸ In addition, because City Council members specifically

²² TIWS Video 1 at 30:38–31:16; 31:30–32:13; 53:00–23.

²³ In addition, the City Counsel pointed to no evidence indicating that Dallas’s downtown area has an unusual concentration of homeless services in comparison to other cities.

²⁴ Notably, even though buffer zone proponents argued that the City could best care for the downtown homeless population in a weather emergency, *see* TIWS Video 1 at 58:58–59:01, 59:28–30, Ms. Tolbert explained that the City would need help from private organizations to staff City-provided emergency shelters, *see id.* at 55:45–53. This proved true during the historic February 2021 snowstorm, when OurCalling had to staff the Kay Bailey Hutchison Convention Center to provide emergency shelter.

²⁵ *See* TIWS Video 1 at 23:55–27:05.

²⁶ A proposition we do not concede, as explained in the previous section.

²⁷ *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 730 (2014).

²⁸ 42 U.S.C. § 2000cc.

noted that the buffer zone amendment targeted OurCalling,²⁹ the buffer zone amendment is not a neutral, generally applicable law;³⁰ and, therefore, the First Amendment imposes strict scrutiny as well.

Conclusion

OurCalling greatly values its longstanding partnership with the City to serve those in need. OurCalling welcomes the opportunity to collaborate with the City to arrive at an agreeable accommodation, such as either 1) a written statement confirming to code compliance that OurCalling's religious practice of extending its operating hours during emergencies is consistent with its primary use and does not require a TIWS permit, or 2) an exemption from the buffer zone to allow OurCalling to apply for a TIWS permit.³¹ We look forward to discussing this matter further with you within the next sixty days. You can reach me by phone at 972-941-4444 or by email at [REDACTED].

Sincerely,



Lea Patterson
Counsel

²⁹ See, e.g., TIWS Video 1 at 54:00–22.

³⁰ See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531–32 (1993).

³¹ See Tex. Civ. Prac. & Rem. Code § 110.006(c) (providing governments the opportunity to accommodate the substantially burdened religious practice); see also TIWS Video 1 at 1:12:50–13:05 (raising possibility of a process to provide exemptions to the buffer zone).