KARAGANIS, WHITE & MAGEL LTD.
ATTORNEYS AT LAW
414 NORTH ORLEANS STREET - SUITE 810
CHICAGO, ILLINOIS 60610
TELEPHONE
(312) 836-1177
TELEFAX
(312) 836-9083

JOSEPH V. KARAGANIS
A. BRUCE WHITE
BARBARA ANNE MAGEL
MARK D. ERZEN
JOHN W. KALICH
CHRISTOPHER W. NEWCOMB

September 6, 2005

VIA E-MAIL
Mr. Barry Cooper
Chicago Area Modernization Program Office
AGL-1CM
FAA Great Lakes Region
2300 E. Devon Avenue
Des Plaines, Illinois 60018

FAA letter of July 27, 2005 Religious Cemeteries

Dear Mr. Cooper:

This letter is in response to your letter of July 27, 2005 relating to FAA's constitutional and statutory responsibilities toward the religious cemeteries adjacent to O'Hare — *i.e.,* St. Johannes Cemetery and Rest Haven Cemetery.

As you acknowledge, we have been writing FAA officials for the "last several years" asking that FAA honor our rights under the First Amendment Free Exercise Clause and the federal Religious Freedom Restoration Act by refusing to approve or provide federal funds for that portion of Chicago's proposed "OMP" program. Until July 27, 2005 FAA had refused to answer our entreaties or our questions.

Sadly, your letter of July 27th illustrates why you have refused to answer our letters and inquiries over these last several years. Your letter — "based on the advice of legal counsel" — is little more than a legal brief to justify FAA's hell-bent determination to violate the constitutional and federal statutory rights of both the St. Johannes religious community and the Rest Haven religious community.

Let's examine your points one by one.

A. FAA refuses to acknowledge the targeted discriminatory treatment against these two religious cemeteries by the City of Chicago which triggers First Amendment protection. Further FAA and its officials propose to act as a joint constitutional tortfeasor with the City of Chicago in funding Chicago's destruction of St. Johannes Cemetery and the creation of an Orwellian nightmare around Rest Haven Cemetery.

As you well know, Chicago is not treating the religious cemeteries equally with other religious institutions in the State of Illinois. As you know, Chicago went down to Springfield and persuaded the State Legislature to pass a special amendment to the Illinois Religious Freedom Restoration Act, 775 ILCS 35/1 *et seq.*

Prior to the passage of the Chicago sponsored amendment every religious institution in the State of Illinois— including all religious cemeteries, among which were St. Johannes Cemetery and Rest Haven Cemetery — were entitled to the strong protections of the state RFRA statute.

In the amendment to Illinois RFRA Chicago persuaded the Legislature to single out two religious cemeteries for targeted exclusion separate and apart from every other religious institution in the State. After Chicago's 'successful visit to Springfield, the Illinois RFRA statute applied to still applied to every religious institution in the State — **save two**: St. Johannes Cemetery and Rest Haven Cemetery. The Illinois Religious Freedom Restoration Act now sported a new section 30:

> **The new section 30 to the Illinois Religious Freedom Restoration Act**
>
> "§ 30. O'Hare Modernization. Nothing in this Act **[the Illinois Religious Freedom Restoration Act]** limits the authority of the City of Chicago to exercise its powers under the O'Hare Modernization Act for the purposes of relocation of cemeteries or the graves located therein.
>
> 775 ILCS 35/30 (emphasis added)

After the passage of the new Section 30 of Illinois RFRA, the only religious institutions in the State not entitled to the protection of Illinois RFRA were our two religious cemeteries. Every other religious institution in the State — including all other religious cemeteries— still enjoyed the protection of the Illinois Religious Freedom Restoration Act.

Even a Sixth Grade Civics student would recognize this despicable discrimination for what it is – targeting two religious institutions and stripping away their religious legal rights simply to because we stood in the way of Chicago's political *hubris*. This narrow targeted stripping of our Illinois RFRA protections was not directed across the board or at all religious cemeteries or at secular properties. Chicago's actions in stripping away Illinois RFRA protections was targeted at only two religious institutions — St. Johannes Cemetery and Rest Haven Cemetery. There is no question here that this targeting and

discrimination triggers the application of our First Amendment Free Exercise of Religion rights.

But leave it to your ingenious counsel to try to hide rank religious discrimination under a patina of "neutrality". FAA's legal sophistry in your July 27th letter suggests that the religious cemeteries are not entitled to First Amendment protection because, according to you or your lawyer, :"the actions contemplated by the FAA and the City are determinations that are neutral on their face and of general applicability."

Given the targeted religious discrimination set forth above, how can you and your counsel claim neutrality and general application when your own staff has admitted that the only entities governed the stripping provisions of the new §30 of Illinois RFRA were St. Johannes and Rest Haven? FAA's blatant attempt to sweep these constitutional violations under rug is shameful.

Moreover, FAA is complicit in Chicago's First Amendment violations. FAA is proposing to fund Chicago's destruction of St. Johannes Cemetery and to fund Chicago's isolation of Rest Haven Cemetery in a se of blast fences, concrete, and a sea of jet wash from every compass direction. If FAA is assisting Chicago in a First Amendment violation by providing Chicago with the funds to inflict the constitutional injury, FAA and FAA officials are co-participants in the First Amendment violation.

Nor are we willing to stand idly by and let the perpetrator of the constitutional violation — the FAA— literally anoint itself as the judge or court to determine whether FAA and Chicago are violating our constitutional rights under the Free Exercise Clause. The existence of a constitutional violation and the determination of contested facts and law as to whether such a violation exists lies with an Article III Court — not with the constitutional tortfeasor.

Finally, we won't let FAA — like the biblical Pilate — wash its hands of its constitutional First Amendment responsibility by claiming that the decision and actions relating to the destruction of St. Johannes Cemetery and the isolation of Rest Haven Cemetery are solely those of Chicago. Chicago is seeking billions of dollars of AIP and PFC funding approvals from the FAA — in effect causing the religious injury with federal money. Without billions in FAA money, Chicago could not undertake the actions to destroy St. Johannes and isolate Rest Haven.

B. FAA's mischaracterization of our religious activities and beliefs.

We are pleased to see that FAA acknowledges the merit of our sincere and deeply held religious belief and practices that the co-religionist who are buries in St. Johannes Cemetery and Rest Haven Cemetery must rest undisturbed until Judgment Day. However, we are perplexed and angered by FAA's unfounded assertion that our religious beliefs — as to the religious duty and responsibilities of the living co-religionists to minister and care for the graves of the departed — are somehow simply "matters of personal preference" and not entitled to First Amendment or federal Religious Freedom Restoration Act protection. The religious obligation of the living to minister to the graves of the deceased buried in sacred ground is a very important element in the

religious belief system of those whose co-religionists are buried in St. Johannes Cemetery and Rest Haven Cemetery.

B. FAA has not and cannot demonstrate any compelling governmental need to destroy St. Johannes Cemetery and isolating Rest Haven Cemetery

FAA has failed to articulate and demonstrate exactly what the asserted "compelling governmental need" is to destroy St. Johannes Cemetery and isolate Rest Haven Cemetery in a sea of concrete and blast fences. Serving the cargo needs of United and Federal Express is certainly not a compelling governmental need but simply serves the private commercial interests of these companies.

Similarly, as described in the Objectors' September 6, 2005 discussion of demand management — a tool that will be required under the full build OMP-Master Plan as well as any lesser scale development of O'Hare — a runway system without 10C-28C can have whatever delay level FAA chooses. Indeed, a runway system with demand management but without 10C-28C will in a few years have delay levels less that the full build OMP-Master Plan without demand management. Clearly elimination of delays caused by overs-cheduling as private business decisions by airlines — particularly when such delays can be avoided through either private businesses choices by the airlines or demand management — is not a "compelling governmental need.

C. FAA has not demonstrated and cannot demonstrate that there are no less destructive alternatives that would avoid destruction.

Your July 27th letter sets up a series of straw men alternatives that you proceed to tear down with a series of so-called technical concerns. The September 6, 2005 affidavit of Dr. Ken Fleming, a national known expert on airport and airspace design from Embry-Riddle Aeronautical University, addresses each of these technical arguments.

But FAA ignores a blended alternative that Chicago and the FAA selected in 1984 — existing O'Hare with use of other airports. In 1984 Chicago and FAA concluded that the so-called unconstrained demand could only be addressed by adding two new runways in the southwest quadrant of land adjacent to the airport. This is the same area where Chicago wants to acquire land for much of the current proposal and is an area which would have required the acquisition of the cemeteries.

Instead of choosing to build the two new runways, Chicago and FAA in 1984 decided to address any governmental need through the use of the aviation facilities within the existing boundaries of the airport (no new runways) and would service excess demand through other airports. Indeed, a variant of this blended alternative is being implemented today at O'Hare — with excess traffic using other airports — through FAA's scheduling order.

Similarly, there are a variety of lesser runway developments at O'Hare — all of which could be used in conjunction with demand management— that FAA has agreed are "potentially feasible". (Alts L1, L2, M, and N) They were rejected by FAA without further analysis, principally because FAA has categorically and wrongfully rejected

blended alternatives. See September 6, 2005 affidavit of Dr. Brian Campbell. Each of these alternatives with demand management has the potential to have whatever level of delay FAA deems acceptable or desirable and would likely experience delay levels less than full build OMP-Master Plan (without demand management) within a few years after the scheduled opening date of the full build OMP-Master Plan. Each of these alternatives, like the blended alternative in chosen by Chicago and FAA at O'Hare in 1984

D. FAA cannot be the adjudicative body deciding contested issues of fact and law relating to the application of the First Amendment and the federal Religious Freedom Restoration Act to St. Johannes Cemetery and Rest Haven Cemetery.

FAA apparently believes it can serve as a non-Article III adjudicative body to render an adjudicative decision on the contested issues of fact and law relating to the application of the First Amendment and the federal Religious Freedom Restoration Act to St. Johannes Cemetery and Rest Haven Cemetery. The Religious Objectors strongly disagree.

Conclusion

The Religious Objectors are prepared to discuss these issues with you further. However, the FAA's long refusal to respond our pleas for enforcement of the Constitution and federal RFRA are clear evidence of a knowing and callous disregard by FAA and its individual officials of Religious Objectors' constitutional and federal RFRA rights.

Sincerely yours,

Joseph Karaganis