ATTACHMENT XVII

Notice of Intervenor/
Affected Party

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August 31, 2023

SENT VIA E-MAIL

Anand Balram, Planning Manager
Planning and Urban Design Division
City Of Hollywood
Hollywood, FL 33020

Douglas Gonzales, Esq.
City Attorney
City Of Hollywood
Hollywood, FL 33020

Re: Notice of Intervenor/Affected Party
Supplemental Support for Planning & Development Board's 7/11/23 Decision
Bet Midrash – 1720 Harrison Street – File 22-S-79
Planning & Zoning Board Meeting-August 22, 2023

Mr. Balram/Mr. Gonzales:

As you are aware, this firm represents, BOZ Hollywood Bread Holdings, LLC, Young Circle Property, LLC, and BTI Parcel B QOZB, LLC (collectively the "Party Intervenors"), which are the properties directly neighboring the subject application. Although the City of Hollywood (the "City") previously recognized our client's party intervenor status, as a result of Bet Midrash's appeal of the July 11, 2023 Planning & Development Board ("PDB") decision to deny its Special Exception, this letter serves to place the City on notice that the Party Intervenors are hereby filing as a party intervenor/affected person pursuant to Florida Statute § 286.0115 and the City's Land Development Code, for the *de novo* City Commission hearing relating to the Request for a Special Exception to establish a K-12 Educational School Facility[1]. As an intervenor/affected party, the Party Intervenors shall receive the same rights and privileges afforded to the applicant, including but not limited to, the right to make a reasonable presentation, introduce exhibits, and to cross-examine opposing witnesses.

This letter further serves to disclose experts who will be testifying on our client's behalf, and to provide supplemental support for the City Commission to uphold the PDB's decision.

The Party Intervenors remain steadfast in their opposition to the Special Exception sought by the applicant, Bet Midrash, to establish a K-12 Educational School Facility at the proposed location. The Party Intervenors are an adversely affected party who will suffer irreparable negative effects to a protected interest as a result of the quasi-judicial action sought by the applicant.

[1] The Bet Midrash application seeks to establish a K-12 Educational School Facility, but at the Planning & Development Board meeting the applicant advised that the school would be K-8.

Namely, the life and safety issues associated with Bet Midrash's inability to provide safe and adequate access to its school, the adverse traffic impacts, and the submittal of a flawed traffic study that inexplicably utilizes the Party Intervenor's property to access the school, provide ample evidence that the granting of this special exception will have a deleterious impact on the Party Intervenors that is distinct and independent from the general public at large. Accordingly, the Party Intervenors urge the City to uphold the denial of the Application.

Florida courts have uniformly held that "neighboring property owners affected by zoning changes have standing to challenge the changes." See *Rinker Materials Corp. v. Metropolitan Dade County*, 528 So.2d 904 (Fla. 3d DCA 1987), attached hereto as Exhibit "A". Courts have also held that affected parties must be given "a fair opportunity to be heard in accord with the basic requirements of due process, including the right to present evidence and to cross-examine adverse witnesses." *Bd. of County Comm'n of Hillsborough County*, 332 So.2d 651 (Fla. 2d DCA 1976), attached hereto as Exhibit "B". Lastly, in *Lee County v. Sunbelt Equities, IL Ltd. Partner*, 619 So.2d 996, 1002 (Fla. 2d DCA 1993), attached as Exhibit "C" the Court ruled, "in quasi-judicial proceedings, the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission' acts."

The rights of the public, particularly the rights of the Party Intervenors, as neighboring property owners, will be adversely affected by the Request for a Special Exception to establish a K-12 Educational School Facility at this location, and accordingly the Request should be denied.

In support of its opposition, the Party Intervenors submit as follows:

The property at issue is directly adjacent to major arterial roadways controlled by the Florida Department of Transportation ("FDOT"). In fact, State Road 820, known as Hollywood Boulevard, just received state funding for its expansion as one of the main evacuation routes from the barrier island. In 2001, a western portion of State Road 820 was designated by State Farm Insurance as "The Most Dangerous Intersection in America", registering over 357 vehicular accidents. The property in question has limited access, and no parking. Recognizing that the lack of parking could prevent the school from being approved, on February 1, 2023, it appears that the Applicant's wife, who goes by the name "Sloppy Seconds," inquired as to whether or not they could secure parking in one of the City's garages. The City responded that it could not reserve any spaces for the Applicant, and that it only had the ability to sell the Applicant 25 access cards. *See* email from Angela Kelsheimer to Sloppy Seconds attached hereto as Exhibit "D". As a result, the Applicant is well aware that it cannot provide the parking necessary to accommodate its proposed use.

Realizing that it lacked parking and that it had insufficient access, the applicant attempted to look at the nearby Hollywood Academy of Arts & Science ("HAAS School") in support of its application. The HAAS School, a Charter School, was approved in the early 2000's in conjunction with the development of the Block 58, generally known as Hollywood Bread. HAAS obtained an easement from Block 58 to ensure safe and adequate stacking for drop off and pick up, and it also secured ample parking in Block 58's parking garage. Although HAAS was built in accordance with the approved plans, shortly after it was constructed, the owner of Block 58 declared

bankruptcy and a federal bankruptcy court nullified the parking agreement forcing HAAS to find alternative parking locations. To support its application, the applicant has provided a traffic study that is woefully negligent in its findings. As it relates to safe and adequate traffic movement, the traffic study suggests that buses will drop off students in the front of the building. The study, however, overlooks the fact that an awning exists on the building that would completely impede bus access. The awning is a limited common element of the building and removal of same would require the supermajority vote of the unit owners. (*See* letter from Association counsel attached hereto as Exhibit "E"). In addition, the awning is partly on the Party Intervenor's property, and the Party Intervenor has already stated on the record that it will not allow the awning to be removed. The inability to utilize the front of the building for bus drop-off and pick up renders the applicant's traffic plan to be completely moot.

Further, the applicant's traffic plan fails to provide appropriate and safe stacking for drop off or pick up hours. The limited stacking shown is inexplicably located directly on the Party Intervenor's property. The Party Intervenor has already stated on the record that it will not allow the applicant to stack vehicles on its property, which further renders the applicant's traffic study and related traffic plans to be invalid. It is also important to note that since the applicant is located on FDOT's roadway, its consent will be required. Until or unless FDOT approves the applicant's plan, this matter is not ripe for the Commission's consideration. The inability to provide safe and adequate access to its property means that children will be dropped off and picked up within the arterial roadways, and will no doubt impede or inhibit access to the Party Intervenor's property. Not only does this pose a life safety concern for the children, but it also severely impacts the safety of emergency service providers utilizing State Road 820.

The Planning & Development Board's decision to deny the Special Exception as a result of the life safety concerns, adverse traffic impacts, and failure to provide a viable traffic report, finds support in both state and federal law.

At the July 11, 2023 Planning & Development Board meeting, it was argued that as a religious school, traffic and parking concerns do not constitute substantial government interests, and as such the application could not be denied. This argument was immediately refuted by the Party Intervenor who presented three cases supporting the government's interest in ensuring safe and efficient traffic movement.

Based upon the findings of these three cases and based upon the findings shown in the additional Florida Appellate and Supreme Court case law cited below, it is improbable that the applicant will be able to meet its burden under the Florida Religious Freedom Restoration Act (FRFRA) or the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) of showing that the applicable regulations constitute a substantial burden on its exercise of religion.

DISCUSSION

I. The Party Claiming that a Government Action Constitutes a Violation of FRFRA or RLUIPA Bears the Initial Burden, not the Government.

The Applicant claims that the City's denial of its application constitutes a violation of both FRFRA and RLUIPA meant to protect the free exercise of religion.

In light of their similarities, federal and state courts have applied the same analysis under FRFRA and RLUIPA. *See Christian Romany Church Ministries, Inc. v. Broward County*, 980 So.2d 1164 (Fla. 4th DCA 2008) (relying on cases applying RLUIPA in a case involving the FRFRA), attached hereto as Exhibit "F"; *Konikov v. Orange County*, 302 F.Supp.2d 1328, 1346 (M.D.Fla.2004), *rev'd in part on other grounds*, 410 F.3d 1317 (11th Cir.2005), attached hereto as Exhibit "G".

The party claiming that a government action constitutes a violation of FRFRA or RLUIPA "bears the initial burden of showing that a regulation constitutes a **substantial burden** on his or her **exercise of religion**." *Warner v. City of Boca Raton*, 887 So.2d 1023, 1034 (emphasis supplied) (Exhibit "H"); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1225 (11th Cir.2004) ("To invoke the protection ... of RLUIPA, plaintiffs bear the burden of first demonstrating that the regulation substantially burdens religious exercise.") (Exhibit "I").

The Florida Supreme Court defined this term for purposes of the FRFRA as "one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires." *Warner*, 887 So.2d at 1033. The District Court of Appeal of Florida, Fourth District has held that "the 'substantial burden' standard is the same under both" FRFRA and RLUIPA. *Christian Romany*, 980 So.2d at 1167.

The Applicant has not presented any evidence that the City is substantially burdening its religious practice in any way. Furthermore, no evidence, competent substantial or otherwise, has been put forth indicating that this is the only location at which the Applicant can operate this religious school, or that the applicable criteria are applied differently or more stringently to a religious school versus a non-religious or secular school. In fact, the Party Intervenors have demonstrated to the contrary.

The case of *First Baptist Church of Perrine v. Miami-Dade Cnty.*, 768 So. 2d 1114, 1117–18 (Fla. 3d DCA 2000), attached hereto as Exhibit "J", was presented at the Planning & Development Board hearing, and it is certainly the most factually relevant of any and all applicable cases involving claims brought by religious institutions under RUIPLA and FRFRA. As explained by the Third DCA, the fact that the Church could not show that the relevant zoning ordinance regulated belief instead of conduct was dispositive:

> In this case, the Church has not attempted to show, nor could it show, that the zoning ordinances here, which preclude its requested expansion, regulate belief instead of conduct. The record does not demonstrate that the County's zoning

> ordinances are aimed at impeding religion, that they are based on a disagreement with religious beliefs or practices, or that they negatively influence the pursuit of religious activity or expression of religious belief. *See* Grosz, 721 F.2d at 733-34.
>
> The burden on the County of altering the enforcement of its zoning ordinances to accommodate the Church's requests would be much greater than any burden placed on the Church's religious activity by requiring that it comply with the Zoning Board's decision in this matter., and the Application of the County's zoning ordinances to preclude expansion of First Baptist Church of Perrine's school does not prevent or seriously inhibit the Church's ability to provide a religious education. There are other less-traffic-sensitive locations within Miami-Dade County for the Church to expand in order to teach seventh and eighth grades, if its religion so requires.
>
> *Id.*

Based on the aforementioned analysis in *Perrine*, significant traffic concerns were a justifiable component of the decision to deny the Applicant's special exception. This application presented several serious traffic and safety issues in addition to the fact that students would be unloaded from school buses in the middle of a roadway. The fact that the existing HAAS school and the proposed school will be combined will compound the safety concerns as it relates to traffic and parking concerns. Additionally, the applicant's traffic study was incomplete and inaccurate as further explained above, and in the Staff Report.

Parking is not feasible given that there is no parking onsite, the buses do not fit under the awning/canopy at the proposed location, a portion of which is owned by the adjacent property owner/Party Intervenor, and the recommendation that requires an access agreement from the neighboring property owner, the Party Intervenor, cannot be obtained as the Party Intervenor has made it clear that it will not allow the Applicant to utilize any portion of its property. All of the aforementioned evidence demonstrates that the special exception sought is inconsistent with the applicable Zoning and Land Development criteria, coupled with the testimony from numerous nearby residents, originations in the immediate surrounding area, and tenants operating businesses at the proposed location all support the decision to deny the special exception.

II. The Cases Cited to Support the Applicant at the Planning & Development Board Hearing Do Not Stand for the Proposition that Traffic and Parking Concerns do not Constitute Substantial Government Interests.

The Applicant's claim that traffic and parking concerns do not constitute substantial government interests is incorrect as a matter of law. The cases cited to support the Applicant were mischaracterized and the holdings found in these cases did not involve claims brought as a result of a special exception sought by a religious school, and only one of which involved a claim under RLUIPA.

The cases cited to support the Applicant are: (1) *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007); *Whitton v. City of Gladstone*, Mo., 832 F. Supp. 1329 (W.D. Mo. 1993), aff'd in part, rev'd in part, 54 F.3d 1400 (8th Cir. 1995); and (3) *Love Church v. City of Evanston*, 896 F.2d 1082 (7th Cir. 1990) (attached as Exhibits "K", "L" and "M," respectively).

A. As to the case of *Westchester Day Sch. v. Vill. of Mamaroneck,* that case is both legally and factually inapplicable to the present matter. In this case, the Court of Appeals held that the Village zoning board's denial of the application for a special use permit, by which the private religious day school sought authorization to build a classroom building on its campus was arbitrary and did not comply with **New York law**, given that the board denied the application based in part on the **unsupported accusation** that the school made a willful attempt to mislead board, that board's allegations of deficiencies in school's traffic study were unsupported by evidence, that concern about adequacy of parking was based on board's own miscalculation, that board improperly relied on speculation about future expansion, **and that resolution drafted by the board's consultants, which would have approved the application subject to certain conditions, was not circulated to the entire board before the board issued a denial.**

Here, in contrast, the City's Staff Report plainly concluded that the special exception was inconsistent with three (3) of the seven (7) applicable land use and zoning criteria. There was also an abundance of evidence presented that the application was deficient, based on the incomplete traffic study, substantial traffic safety and parking concerns, and the inability to enact several of the recommendations by City Staff, including bussing students and establishing an access agreement with the Party Intervenor for the use of the Party Intervenor's private alley located south of the school for pick-up/drop-off as shown in the plans. Moreover, the holding in *Westchester* was specifically based on the finding that the Village zoning Board's denial did not comply with New York Law, which is neither relevant nor applicable to the special exception sought by the Applicant.

B. The case of *Whitton v. City of Gladstone* is equally dissimilar and inapplicable to the special exception sought by the Applicant and any potential RLUIPA and FRFRA claims that may be brought as a result of the Board's decision to deny the special exception. The District Court in *Whitton* held that imposing durational limits on political signs, prohibiting external illumination of such signs, and imposing vicarious liability on candidates for ordinance violations, were all invalid as **content-based restrictions** which were not narrowly tailored to city's aesthetic and traffic safety concerns. As mentioned above, traffic concerns are a valid reason to consider denial of an application supported by the *Perrine* case, which held that the County has a compelling interest in enacting and enforcing fair and reasonable zoning regulations. As such, this case is completely inapposite to the instant matter.

C. The last case cited in support of the Applicant is *Love Church v. City of Evanston*, 671 F. Supp. 515 (N.D. Ill. 1987), which was later appealed to the US Court of Appeals for the Seventh Circuit. In *Evanston*, a Church brought an action challenging a city zoning ordinance. It is strange that this case was cited as it did not involve claims under RLUIPA or the FRFRA, and the case was later dismissed for lack of standing. The District Court, while also recognizing that pedestrian safety is a compelling interest, ruled that although the interests the City said were rationally related to the ordinance, i.e. traffic congestion, pedestrian safety, and child safety, the City provided no evidence that churches pose any greater threats to those interests than do the similarly situated permitted uses of meeting halls, theatres, and schools. *Id.* at 520. The City appealed the decision of the District Court and The Court of Appeals held that church lacked Article III standing to challenge validity of ordinance. *Love Church v. City of Evanston*, 896 F.2d 1082 (7th Cir. 1990), attached hereto as Exhibit "N". In fact, the ruling of the Appeals Court actually supports the Board's decision to deny the application in that case. This case cited, like the others above, provided no support for the Applicant's position in this matter.

In summary, none of the three cases cited in support of the Applicant are relevant to the facts and circumstances surrounding the special exception sought by the Applicant here, and the potential claims that may be asserted under RLUIPA and the FRFRA. Further, none of these cases hold, as a matter of law, that traffic and parking concerns cannot be considered substantial government interests.

The decision by the Board to deny the Special Exception to establish a K-12 Educational School Facility sought by Bet Midrash, based on the applicable Zoning and Land Development Regulations, as well as the findings by City Staff, and other relevant evidence, was correct. The contention that traffic and parking concerns do not constitute substantial government interests is incorrect and inconsistent with the applicable Florida Appellate and Supreme Court case law. Furthermore, it is highly improbable that the applicant will be able to meet its burden under either the Florida Religious Freedom Restoration Act (FRFRA) or the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) of showing that the applicable regulations constitute a substantial burden on its exercise of religion.

In support of its position, the Party Intervenor Intends to call the following expert witnesses:

1. Jeffrey N. Katims, AICP, CNU-A who will testify as to the City's content-based neutral regulations for the approval of schools, CV attached as Exhibit "O"; and

2. Joaquin Vargas, P.E., who will provide testimony to invalidate the Applicant's traffic report, CV attached as Exhibit "P".

August 31, 2023
Anand Balram
Douglas Gonzales, Esq.

The Party Intervenors' presentation and additional materials will be provided to the City three (3) days prior to the hearing, in accordance with the City's Code. Please include this letter in the Commission backup and as part of the file.

Sincerely,

Keith M. Poliakoff, Esq.

EXHIBIT “A”

528 So.2d 904
District Court of Appeal of Florida,
Third District.

RINKER MATERIALS CORPORATION, Appellant,
v.
METROPOLITAN DADE COUNTY,
Inversiones Armadeni, S.A. and
Statewide Land Corporation, Appellees.

No. 86–3135.
|
Dec. 22, 1987.

Synopsis

Cement mill operator brought action challenging validity of ordinance under which adjacent property was rezoned. The Circuit Court, Dade County, Maria Korvick, J., upheld validity of ordinance, and mill operator appealed. The District Court of Appeal, Nesbitt, J., held that: (1) suit was original action, and as such, operator was entitled to present evidence to prove its contention that ordinance was unreasonable and arbitrary, and (2) error was reversible, as it deprived operator of opportunity to prove its allegation that it had standing.

Affirmed in part, reversed in part, and remanded.

West Headnotes (5)

[1] **Zoning and Planning** Admissibility of evidence

Proceeding by cement mill operator challenging validity of county ordinance approving rezoning of adjacent property was an original action, not an appeal from quasi-judicial action or petition for writ of certiorari from county commission's zoning action, and as such, mill operator was entitled to present evidence to prove its contention that ordinance was unreasonable and arbitrary.

2 Cases that cite this headnote

[2] **Zoning and Planning** Validity of regulations

Party challenging validity of zoning ordinance as unreasonable or arbitrary exercise of county's legislative power must show that zoning action adversely affects its legally recognizable interests.

3 Cases that cite this headnote

[3] **Zoning and Planning** Modification or amendment

In considering whether property owner has standing because its interests have been adversely affected, court is to consider proximity of property to area to be zoned or rezoned, character of neighborhood, and type of change proposed.

6 Cases that cite this headnote

[4] **Zoning and Planning** Admissibility of evidence

Zoning and Planning Harmless error

Error by trial court in preventing cement mill operator from presenting expert testimony concerning effect of rezoning ordinance on value of its interests was reversible, as it deprived mill operator of opportunity to prove its allegations that it had standing to pursue its suit challenging validity of ordinance.

[5] **Constitutional Law** Zoning, planning, and land use

Zoning and Planning Validity of Zoning Regulations

County code section establishing procedure for amending "Comprehensive Development Master Plan" is not unconstitutionally vague.

Attorneys and Law Firms

***904** John G. Fletcher, South Miami, Brigham, Moore, Gaylord, Schuster & Sachs, Miami, for appellant.

Robert A. Ginsburg, Co. Atty., and Scott D. Fabricius, Asst. Co. Atty., Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadows & Olin and Joel S. Perwin, Miami, for appellees.

Before HENDRY, NESBITT, and FERGUSON, JJ.

On Motion for Rehearing

NESBITT, Judge.

On rehearing, we withdraw the opinion filed November 3, 1987, and replace it with the following opinion.

Rinker Materials Corporation (Rinker) appeals from a final judgment upholding the validity of Dade County Ordinance number 85–49 and from a summary judgment holding that section 2–116.1 of the Metropolitan Dade County Code is not unconstitutionally vague. We affirm in part and reverse in part.

Rinker operates a rock-mining, rock-crushing, and cement mill plant in a relatively isolated portion of west Dade County. ***905** Rinker uses blasting in order to quarry. In 1984, Inversiones Armadeni, S.A. (Inversiones) and Statewide Land Development Corporation (Statewide) filed an application with the Dade County Commission requesting an amendment to the Dade County Comprehensive Development Master Plan. The application sought to have 267 acres of land adjacent to Rinker's operations reclassified from open land to low-density residential land. The Dade County Commission conducted public hearings, at which Rinker presented evidence. At the conclusion of the hearings, the commission enacted ordinance number 85–49, approving the application.

In 1985, Rinker filed an original action seeking declaratory and injunctive relief in Dade County Circuit Court. Rinker challenged Dade County Ordinance number 85–49 as an unreasonable and arbitrary exercise of the county's authority and section 2–116.1 of the Metropolitan Dade County Code, which establishes the procedure for amending the Comprehensive Development Master Plan, as unconstitutionally vague. [1] Rinker asserted that granting the amendment, which permitted the re-zoning of the land to low-density residential use, was unreasonable and arbitrary because such a usage was incompatible with the zoning of Rinker's adjacent property, which is used for blasting. Rinker is required to obtain permits to blast, Metropolitan Dade County, Fla.Code § 13–5 (1977), and its right to blast on its property is subject to termination or limitation even after it has obtained a permit, *see* Metropolitan Dade County, Fla.Code § 13–13(c) (1977). Rinker asserted, therefore, that the county's action, which would inevitably bring complaining residents who would have Rinker's blasting permits revoked or restricted, adversely affected the value of its operations. The trial court granted summary judgment in favor of the county, Inversiones, and Statewide, holding that section 2–116.1 of the Metropolitan Dade County Code is not unconstitutionally vague. The trial court held a trial on Rinker's claim that ordinance number 85–49 represents an unauthorized exercise of the county's power. After determining that it was acting in an appellate capacity, the trial court granted the county's motion to exclude Rinker's witnesses who had not appeared before the Dade County Commission.

In its final judgment the trial court held that Rinker failed to prove that the county's action affected its legally recognizable interests. The court concluded, therefore, that Rinker lacked standing to challenge the ordinance. The court went on, however, to hold that the ordinance was neither arbitrary nor unreasonable but was fairly debatable. Rinker appeals.

I. Posture of the Proceedings

[1] The trial court's ruling that witnesses who had not appeared before the commission could not testify at the trial was erroneous. The trial court's ruling appears to be predicated upon its improper assessment of the posture of the case. The trial court incorrectly treated the case as either an appeal from quasi-judicial action taken by the commission, or a petition for a writ of certiorari from a commission's zoning action. The case before the circuit court was neither. Instead, it was an original action properly mounting a direct attack on an ordinance. As such, Rinker was entitled to present evidence to prove its contention that the ordinance was unreasonable and arbitrary. *See Coral Gables Federal Savs. & Loan v. City of Lighthouse Point,* 444 So.2d 92 (Fla. 4th DCA 1984); *Graham v. Talton,* 192 So.2d 324 (Fla. 1st DCA 1966); *compare Graham,* (writ of certiorari improper method of challenging re-zoning ordinance on the basis that it was unreasonable; proper method is a direct challenge in circuit court) *with Albright v. Hensley,* 492 So.2d 852, 856 (Fla. 5th DCA 1986) (writ of certiorari proper remedy to challenge county's grant of variance where record in the circuit court limited solely to the record of proceedings before the board) *and Eastside Properties, Inc. v. Dade County,* 358

So.2d 873 (Fla. 3d DCA 1978) (when reviewing zoning action of the county commission on petition for writ of certiorari the circuit court is to consider only the ***906** record of proceedings before the commission).

In enacting the ordinance amending the Dade County Comprehensive Development Master Plan the county commission was performing a legislative function.[2] *City of Coral Gables v. Carmichael,* 256 So.2d 404, 408 (Fla. 3d DCA), *cert. discharged,* 268 So.2d 1 (Fla.1972); *see Florida Land Co. v. City of Winter Springs,* 427 So.2d 170, 174 (Fla.1983); *Schauer v. City of Miami,* 112 So.2d 838, 839 (Fla.1959); *Machado v. Musgrove,* 519 So.2d 629, 631 (Fla. 3d DCA 1987); *see also Coral Reef Nurseries, Inc.,* 410 So.2d at 653 n. 10. Rinker was therefore entitled to not only oppose the passage of the ordinance at the county commission hearing but it also had every right to challenge the legality of the ordinance in an original action in circuit court. In an original action Rinker was not limited to presenting only the record developed before the commission but could introduce admissible evidence whether it had been considered by the commissioners or not. *See Coral Gables Federal Savings & Loan,* 444 So.2d at 92. Consequently, the trial court's ruling, which precluded Rinker from presenting additional evidence to prove that the ordinance was unreasonable, arbitrary, and not fairly debatable, was erroneous.

II. Standing to Challenge the Ordinance

[2] Whether a party has standing to challenge the zoning action or inaction of a county depends on the nature of the challenge the party seeks to bring. *See Renard v. Dade County,* 261 So.2d 832 (Fla.1972). A party challenging the validity of a zoning ordinance as an unreasonable or arbitrary exercise of the county's legislative power must show that the zoning action adversely affects its legally recognizable interests. *Renard,* 261 So.2d at 838; *Citizens Growth Management Coalition, Inc. v. City of West Palm Beach,* 450 So.2d 204, 206 (Fla.1984); *Exchange Invs., Inc. v. Alachua County,* 481 So.2d 1223, 1225 (Fla. 1st DCA 1985); *see Albright,* 492 So.2d at 855; *Carlos Estates, Inc. v. Dade County,* 426 So.2d 1167 (Fla. 3d DCA 1983); *Jones v. First Virginia Mortgage & Real Estate Inv. Trust,* 399 So.2d 1068 (Fla. 2d DCA 1981). Since the subject of the final judgment is Rinker's challenge of the ordinance as being unreasonable, arbitrary, and not fairly debatable, Rinker had to show that its legally recognizable interest had been adversely affected in order to enjoy standing to maintain its challenge.

[3] **[4]** In considering whether a property owner has standing because its interests have been adversely affected, a court is to consider "the proximity of [its] property to the area to be zoned or rezoned, the character of the neighborhood, ... and the type of change proposed." *Renard,* 261 So.2d at 837; *see Paragon Group, Inc. v. Hoeksema,* 475 So.2d 244, 246 (Fla. 2d DCA 1985), *review denied,* 486 So.2d 597 (Fla.1986). If Rinker could have demonstrated that the commission's action had adversely affected the value of its property interests, which surely represents a legally recognizable interest, *cf. Yarbrough v. Villeneuve,* 160 So.2d 747 (Fla. 1st DCA 1964) (although revocable license confers no vested rights in a constitutional sense, it does amount to property in a commercial sense), it would have established that it had standing to pursue its suit. *Cf. Renard,* 261 So.2d at 832 (re-zoning of petitioner's neighbor's adjoining property from industrial to residential use conferred standing upon petitioner to challenge validity of zoning action as unreasonable because it adversely affected her legally recognizable interests by increasing her setback requirements); *Hoeksema,* 475 So.2d at 244 (owner of single family home directly across from land re-zoned for apartment and condominium buildings had been affected by zoning and hence had standing to bring action questioning interpretation of zoning ***907** ordinance); *Elwyn v. City of Miami,* 113 So.2d 849 (Fla. 3d DCA) (property owners whose property values would be adversely affected by variance granted to adjacent property owner had standing to challenge the validity of the granted variance), *cert. denied,* 116 So.2d 773 (Fla.1959), *approved Renard,* 261 So.2d at 832. Since the trial court improperly prevented Rinker from presenting expert testimony concerning the effect the ordinance had on the value of its interests, its decision that Rinker's legally recognizable property interests were not adversely affected and, therefore, that Rinker lacked standing, was erroneous.

[5] We affirm the trial court's order granting the appellees' motion for summary judgment on the issue of whether section 2–116.1 of the Metropolitan Dade County Code is unconstitutionally vague. *See Wolff v. Dade County,* 370 So.2d 839 (Fla. 3d DCA), *cert. denied,* 379 So.2d 211 (Fla.1979).

Because the trial court's erroneous evidentiary rulings effectively deprived Rinker of its opportunity to prove its allegations that it has standing and the ordinance is invalid, we reverse the trial court's final judgment, and we remand this cause for a new trial consistent with this opinion.

All Citations

528 So.2d 904, 13 Fla. L. Weekly 11

Footnotes

1 In its amended complaint, Rinker asserted other claims which it has abandoned on appeal.

2 As the county correctly pointed out on rehearing, although an ordinance amending the Comprehensive Development Master Plan is legislative in nature, proceedings on applications for zoning changes, variances, or special exceptions and which provide interested parties with procedural due process are generally considered quasi-judicial. *Coral Reef Nurseries, Inc. v. Babcock Co.,* 410 So.2d 648, 653 (Fla. 3d DCA 1982); *see City of New Smyrna Beach v. Barton,* 414 So.2d 542 (Fla. 5th DCA) (Cowart, J., concurring), *review denied,* 424 So.2d 760 (Fla.1982).

EXHIBIT “B”

332 So.2d 651
District Court of Appeal of Florida, Second District.

The BOARD OF COUNTY COMMISSIONERS OF HILLSBOROUGH COUNTY, a political subdivision of the State of Florida, Appellant,
v.
CASA DEVELOPMENT LTD., II, et al., Appellees.

No. 75—1383.
|
May 28, 1976.
|
Rehearing Denied June 18, 1976.

Synopsis

Applicants for water and sewer franchise filed notice of appeal from denial of application by the Hillsborough board of county commissioners. Subsequently the applicants filed a petition for writ of certiorari. The Circuit Court for Hillsborough County, Victor O. Wehle, J., overturned the denial, and the Board appealed. The District Court of Appeal, Grimes, J., held that Special Act authorizing an appeal to circuit court from denial of water and sewer franchise was ineffective to confer jurisdiction on the circuit court to hear an appeal from the order, that since action of the Board was clearly quasi-legislative in character review could not be had by way of certiorari but that the court would not dismiss the action but would remand with direction for the pleadings to be recast and case to be retried as if applicants had filed an original suit for declaratory and injunctive relief.

Reversed and remanded with direction.

Procedural Posture(s): On Appeal.

West Headnotes (8)

[1] **Counties** Appeals from decisions

Administrative Procedure Act did not authorize review of denial by Hillsborough board of county commissioners of application for issuance of a water and sewer franchise since the board is not an agency covered by the Act.

[2] **Municipal Corporations** Establishment in general

Water Law Proceedings to obtain franchises

Special Act authorizing Hillsborough County to issue water and sewer franchises and providing for review by way of appeal to circuit court does not constitute a "general law" within meaning of circuit court jurisdictional statute and, hence, such Act was ineffective to confer jurisdiction on circuit court to hear appeal from commission order denying application for issuance of a water and sewer franchise. West's F.S.A.Const. art. 5, § 5; Sp.Acts 1959, c. 1352; c. 1352, § 7.

3 Cases that cite this headnote

[3] **Certiorari** Judicial nature of proceedings in general

Administrative Law and Procedure Substantial evidence

Administrative Law and Procedure Questions of law or fact in general

Traditionally, review of the actions of commissions and boards acting in a quasi-judicial capacity has been by certiorari in which the reviewing court examines the record to determine whether the action taken below was in accord with essential requirements of law and supported by competent substantial evidence. West's F.S.A.Const. art. 5, § 2.

[4] **Administrative Law and Procedure** Nature and Form of Remedy

Declaratory Judgment Officers and official acts in general

Where agencies and boards have acted in a quasi-executive or quasi-legislative capacity, the proper method of attack is a suit in circuit court for declaratory or injunctive relief on grounds that the action taken is arbitrary, capricious, confiscatory or violative of constitutional guarantees.

9 Cases that cite this headnote

[5] **Certiorari** Judicial nature of proceedings in general

Before an administrative proceeding can be characterized as quasi-judicial and, hence, subject to review by way of petition for certiorari, there must be a requirement for a hearing to be held on notice at which the affected parties are given a fair opportunity to be heard in accord with basic requirements of due process, including the right to present evidence and to cross-examine adverse witnesses, and the judgment of agency or board should be contingent on the showing made at the hearing. West's F.S.A.Const. art. 5, § 2.

2 Cases that cite this headnote

[6] **Declaratory Judgment** Counties and municipalities and their officers

Action of Hillsborough Board of County Commissioners in denying application for water and sewer franchise was quasi-legislative in character and, hence, subject to attack by way of suit in circuit court for declaratory or injunctive relief, rather than by way of petition for certiorari, since governing Special Act contains no criteria requiring issuance of a franchise under specified circumstances, although there was a public hearing on notice no quasi-judicial type of hearing was either contemplated or conducted and board voted to deny application because applicant was unwilling to meet conditions imposed by the county. West's F.S.A.Const. art. 5, § 5; Sp.Acts 1959, c. 1352, § 7.

5 Cases that cite this headnote

[7] **Administrative Law and Procedure** Further Judicial Review

In review of quasi-judicial board action, the circuit court acts as a court of original jurisdiction for purposes of the right to appeal its ruling to the district court of appeal. West's F.S.A.Const. art. 5, § 2.

1 Case that cites this headnote

[8] **Municipal Corporations** Establishment in general

Water Law Proceedings to obtain franchises

Where applicants for issuance of water and sewer franchise improvidently sought review of denial of their application by way of appeal and/or certiorari the District Court of Appeal was loath to dismiss their action, particularly in view of fact that they utilized a procedure specifically set forth in Special Act authorizing issuance of a franchise; hence, court would reverse and remand with directions that the pleadings be recast and the case tried as if applicants had filed an original suit in circuit court for declaratory and injunctive relief. West's F.S.A.Const. art. 5, §§ 2, 5; Sp.Acts 1959, c. 1352; c. 1352, § 7.

2 Cases that cite this headnote

Attorneys and Law Firms

***653** John W. McWhirter, Jr., of Cason, McWhirter, Henderson & Stokes, Tampa, for appellant.

John R. Bush of Macfarlane, Ferguson, Allison & Kelly, Tampa, for appellees.

Opinion

GRIMES, Judge.

This is an appeal from an order overturning the Hillsborough Board of County Commissioners' denial of an application for issuance of a water and sewer franchise.

In 1973, appellees obtained an appropriate zoning classification for the construction of a residential development on 820 acres in northwest Hillsborough County. In 1975, appellees filed an application for water and sewer franchises under the provisions of Chapter 59—1352, Laws of Florida, Special Acts of 1959, whereby Hillsborough County is authorized to issue water and sewer franchises to parties in the unincorporated areas of the county desiring to render

public water and sewer service. At its regular meeting of February 5, 1975, the Board denied the application.

Appellees first filed a notice of appeal in the circuit court. They later filed a petition for writ of certiorari in the same action, characterizing it as an amendment to their appeal. The action thereafter proceeded as if it were certiorari, except that the court permitted a limited supplementation of the record with respect to matters that were directly brought to the commissioners' attention at the time of the meeting in which the application was denied. The court ultimately rejected the Board's action in denying the application and ordered the Board to issue water and sewer franchises to the appellees for periods of twenty-five years.

[1] **[2]** There is immediately apparent a serious question concerning the nature and scope of judicial review which was available to attack the action of the Board in denying the application. The Administrative Procedure Act does not pertain because the Board of County Commissioners is not an agency covered by the Act. Sweetwater Utility Corp. v. Hillsborough County, Fla.App.2d, 1975, 314 So.2d 194. However, the Special Act which authorized Hillsborough County to issue water and sewer franchises contains a provision of its own relating to review of board action under that law. Thus, Section 7 of the Special Act states:

> 'Section 7. Within fifteen (15) days from the effective date of any action, rule or regulation adopted or promulgated by said board of county commissioners, any person, firm or corporation aggrieved thereby may appeal such action of said board to the circuit court of said county, and it shall be the duty of said board to cause to be prepared and certified at the cost of appellant a transcript of all proceedings taken and had before said board, and said court shall hear and determine the cause on such record. In the event the action of said board is not sustained, the court shall tax the cost of preparing the transcript against said board.'

Relying upon this provision, the court concluded that he had the authority to 'hear and determine' the cause pursuant to appellees' notice of appeal.

Despite its clear language, we hold that the Special Act was ineffective to confer jurisdiction on the circuit court to hear an appeal from the commission order. Cf. Codomo v. Shaw, Fla.1958, 99 So.2d 849. The jurisdiction of the circuit court is specifically set forth in Article V, Section 5 of the 1968 Constitution of Florida as follows:

's 5. Circuit courts
(a) Organization. There shall be a circuit court serving each judicial circuit.
(b) Jurisdiction. The circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general ***654** law. They shall have the power to issue writs of mandamus, quo warranto, certiorari, prohibition and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction. Jurisdiction of the circuit court shall be uniform throughout the state. They shall have the power of direct review of administrative action prescribed by general law.'

Consistent with the spirit of Article V to provide a uniform court system throughout the state, circuit courts have jurisdiction of appeals and the power of direct review of administrative action only when provided by 'general law.' Obviously, the Special Act in question does not qualify as a 'general law.'

Since Article V, Section 5 does grant circuit courts the power to issue writs of certiorari, the next question to be considered is whether the court could properly review the county board's action by way of certiorari. The answer to this question turns upon whether the action of the Board was quasi-judicial or quasi-legislative in nature.

[3] **[4]** Traditionally, the review of the actions of commissions and boards acting in a quasi-judicial capacity has been by certiorari in which the reviewing court examines the record to determine whether the action taken below was in accord with essential requirements of law and supported by competent substantial evidence. Harris v. Goff, Fla.App.1st, 1963, 151 So.2d 642. Where agencies and boards have acted in a quasi-executive or quasi-legislative capacity, the proper method of attack is a suit in circuit court for declaratory or injunctive relief on grounds that the action taken is arbitrary, capricious, confiscatory or violative of constitutional guarantees. Harris v. Goff, supra.

When determining whether certain action was quasi-judicial in nature as contrasted to quasi-legislative, the district court of appeal stated in Bloomfield v. Mayo, Fla.App.1st, 1960, 119 So.2d 417:

> 'It seems clear from the decision of the Supreme Court that the test of a quasi-judicial function turns on whether or not the statutory tribunal had exercised a statutory power given it to make a decision having a judicial character or attribute, and consequent upon some notice or hearing to be had before it as a condition for the rendition of the particular decision made. . . .'

[5] Before an administrative proceeding can be quasi-judicial in character, there must be a requirement for a hearing to be held upon notice at which the affected parties are given a fair opportunity to be heard in accord with the basic requirements of due process, including the right to present evidence and to cross-examine adverse witnesses, and the judgment of the agency or board should be contingent upon the showing made at the hearing. De-Groot v. Sheffield, Fla.1957, 95 So.2d 912; Harris v. Goff, supra.

[6] Measured by this test, the action of the Board of County Commissioners of Hillsborough County was clearly quasi-legislative in character. The Special Act contained no criteria which required the issuance of a franchise under specified circumstances. While there was a public hearing upon notice, a quasi-judicial type of hearing was neither contemplated nor conducted. About all that happened was that appellees' representative made some unsworn statements in support of the application and the county attorney responded with opinions of his own. It was obvious from the discussion that the appellees had been negotiating with the county for some time concerning the issuance of a franchise upon certain conditions. Appellees were unwilling to meet these conditions, so the Board voted to deny the application. Therefore, a review by certiorari was an inappropriate remedy. Town of Belleair v. Moran, Fla.App.2d, 1971, 244 So.2d 532.

***655** **[7]** The appellees' reliance upon State v. Furen, Fla.1960, 118 So.2d 6, as authority for the procedure followed below is misplaced. First, that case was decided before the adoption of the new Constitution, and the constitutional jurisdiction of the circuit court at that time was substantially different. Moreover, the board action taken in that case was ultimately considered to be quasi-judicial in nature. The net effect of the Furen cases was that in the review of quasi-judicial board action, the circuit court acts as a court of original jurisdiction for purposes of the right to appeal its ruling to the district court of appeal. See Alliance for Conservation of Nat. Resources v. Furen, Fla.App.2d, 1960, 122 So.2d 51.

The confusion generated by the posture of the case below was manifested by the decision to admit some but not all of the testimony proffered with respect to the Board's recent change of policy on the issuance of water and sewer franchises in view of ecological demands and the development of its own regional waste treatment facility. In essence, the proceeding was neither 'fish nor fowl.' The record of the hearing before the County Commission was inadequate in the sense that it was not the record of a quasi-judicial hearing. Therefore, the court allowed the record to be supplemented in a limited manner but severely curtailed the Board's effort to present testimony tending to show that its action was not arbitrary, capricious, confiscatory or violative of constitutional guarantees.

[8] While it appears that the appellees improvidently sought a review of the denial of their application for a franchise by way of appeal and/or certiorari, we are loath to dismiss their action when they have not yet had their day in court. This is particularly true in view of the fact that they followed a procedure specifically set forth in the Special Act which authorized the issuance of the franchises. Therefore, we hereby reverse the judgment and remand the case with directions for the pleadings to be recast and the case to be tried as if the appellees had filed an original suit in circuit court for declaratory or injunctive relief. This will also permit a full-blown consideration in the proper forum of the appellees' contention that the County Board was estopped to refuse to issue the requested franchises. We believe our determination to remand is consistent with the constitutional mandate that no cause should be dismissed because an improper remedy has been sought. Fla.Const. art. V, s 2 (1968). See State v. Johnson, Fla.1974, 306 So.2d 102.

HOBSON, Acting C.J., and BOARDMAN, J., concur.

All Citations

332 So.2d 651

EXHIBIT “C”

619 So.2d 996
District Court of Appeal of Florida,
Second District.

LEE COUNTY, a political subdivision
of the State of Florida, Petitioner,
v.
SUNBELT EQUITIES, II, LIMITED PARTNERSHIP,
a Pennsylvania limited partnership, Respondent.

No. 92–03948.
|
May 14, 1993.
|
Rehearing Denied June 16, 1993.

Synopsis

Property owner sought to have property currently zoned for agricultural use rezoned for purposes of constructing commercial/office development. Although proposal was apparently consistent with future land use projections as embodied in county comprehensive plan, county commission overruled recommendation of planning staff and hearing examiner and denied rezoning. Owner sought judicial review. The Circuit Court for Lee County, James R. Thompson, J., granted certiorari and found that denial of application was not supported by evidence. County sought further certiorari review. The District Court of Appeal held that: (1) site-specific, owner-initiated rezoning request was sufficiently judicial in character that final administrative order was appropriate for appellate review, and (2) it was not sufficient for property owner to show that proposed use was consistent with comprehensive plan, and decision to deny could be sustained if record reflected substantial competent evidence favoring continuation of status quo.

Petition granted, order quashed, case remanded.

Procedural Posture(s): On Appeal.

West Headnotes (14)

[1] Zoning and Planning Finality; ripeness

Site-specific, owner-initiated rezoning requests are sufficiently judicial in character that final administrative orders are thereafter appropriate for appellate review.

1 Case that cites this headnote

[2] Zoning and Planning Modification or amendment

Any party adversely affected by rezoning decision is entitled to some form of direct appellate review.

[3] Zoning and Planning Grounds for grant or denial in general

All zoning and development permitting must be consistent with comprehensive plan of city or county in question. West's F.S.A. § 163.3161(5).

1 Case that cites this headnote

[4] Administrative Law and Procedure Review for arbitrary, capricious, unreasonable, or illegal actions in general

Administrative Law and Procedure Wisdom, judgment, or opinion in general

Administrative Law and Procedure Substantial evidence

At circuit level of judicial review of local government administrative action, questions to be asked are whether due process was afforded, whether administrative body applied correct law, and whether body's findings are supported by competent substantial evidence, i.e., whether record contains necessary quantum of evidence, and circuit court is not permitted to go farther and reweigh evidence or to substitute its judgment about what should be done for that of administrative agency. U.S.C.A. Const.Amend. 14.

7 Cases that cite this headnote

[5] Administrative Law and Procedure Review for arbitrary, capricious, unreasonable, or illegal actions in general

Following judicial review at circuit level of local government administrative action, questions to be asked on further review by certiorari in District Court of Appeal are whether due process was afforded and whether circuit court applied incorrect principle of law. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[6] **Zoning and Planning** Zoning and planning distinguished

Comprehensive planning and zoning are interrelated but different functions of local government.

[7] **Zoning and Planning** Validity of regulations in general

Zoning and Planning Regulations in general

Both comprehensive zoning plan and zoning classification are presumptively valid, and one seeking change in either has burden of showing its invalidity.

[8] **Zoning and Planning** Conformity of change to plan

Zoning and Planning Classification of property; size and boundary of zones

When zoning classification is challenged, comprehensive plan is relevant only when suggested use is inconsistent with that plan; where any of several classifications is consistent with plan, applicant seeking change from one to the other is not entitled to judicial relief absent proof that status quo is no longer reasonable, and proposed change cannot be inconsistent and will be subject to strict scrutiny.

5 Cases that cite this headnote

[9] **Zoning and Planning** Modification or amendment; rezoning

On judicial review of denial of rezoning request, which is quasi-judicial decision, after applicant has met initial burden of showing that proposal is consistent with comprehensive plan, local government must show by substantial competent evidence that existing zoning classification was enacted in furtherance of some legitimate public purpose and that public interest is legitimately served by continuing that classification; if ordinance was constitutional from outset and remains constitutional in face of changes prompting applicant to request rezoning, rezoning may be refused provided local government can justify such conclusion with evidence on the record, and burden shifts back to applicant to prove that ordinance is confiscatory.

3 Cases that cite this headnote

[10] **Zoning and Planning** Validity of regulations in general

Land use restrictions must substantially advance some legitimate state interest or they are invalid.

[11] **Zoning and Planning** Deprivation of property

Zoning and Planning Nonconforming Uses

Land use restrictions cannot be so intrusive as to deprive landowner of reasonable economic use of property, and previously permissible or grandfathered uses should not be incautiously rescinded.

[12] **Municipal Corporations** Public safety and welfare

Assuming regulation is necessary for welfare of public, and is not physically invasive or confiscatory of some existing property right, it is probably within government's police power to enact it.

[13] **Zoning and Planning** Modification or amendment; rezoning

In reviewing rezoning application, court should not presume that landowner does or can assert enforceable property right that triggers application of clear and convincing evidence standard of proof to zoning body every time more intensive use of property is sought; instead, landowner must prove existence of such right, not just consistency with comprehensive plan, before so rigorous a burden will be imposed upon zoning body.

3 Cases that cite this headnote

[14] **Zoning and Planning** Agricultural uses, woodlands and rural zoning

Zoning and Planning Modification or amendment; rezoning

On judicial review of denial of application to rezone property from agricultural to allow for construction of commercial/office development, it was not sufficient for applicant to show that rezoning would be consistent with future land use projections embodied in county comprehensive plan; rather, it was sufficient to sustain county's decision to deny application that record reflect substantial competent evidence favoring continuation of status quo.

1 Case that cites this headnote

Attorneys and Law Firms

***998** James G. Yaeger, County Atty., and Thomas L. Wright, Asst. County Atty., Fort Myers, for petitioner.

Steven C. Hartsell, Pavese, Garner, Haverfield, Dalton, Harrison & Jensen, Fort Myers, for respondent.

Opinion

PER CURIAM.

We review Lee County's petition for writ of certiorari pursuant to *Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals,* 541 So.2d 106 (Fla.1989) and *City of Deerfield Beach v. Vaillant,* 419 So.2d 624 (Fla.1982). Finding that the circuit court did not apply the correct law to the facts and issues presented in this case, we grant the petition.

I. BACKGROUND

This action stems from a request for rezoning submitted by respondent Sunbelt Equities II (hereafter "Sunbelt"). Sunbelt owns a parcel currently zoned for agricultural use, upon which it wishes to construct a commercial/office development. Apparently the proposal is consistent with future land use projections as embodied in the Lee County comprehensive plan. However, opponents of the proposal have asserted that continuing the present zoning classification is preferable, at least for the time being. [1] Although county planning staff and a hearing examiner recommended approval of the ***999** proposal with changes, the county commission overruled that recommendation and denied the rezoning. In so doing the commission issued a written resolution which made three separate findings of fact: [2]

> (1) The proposal is inconsistent with the site location standards for Neighborhood Commercial Development as set forth in ... the Lee County Comprehensive Land Use Plan ... which requires Neighborhood Commercial Developments to be located at the intersection of a collector and arterial or an arterial and arterial road so as to allow access to two roads.
>
> (2) The proposal would result in unreasonable development expectations which may not be achievable because of commercial acreage limitations on the "Year 2010 Overlay [map]" for the subdistrict in question in violation of.... the Lee County Comprehensive Land Use Plan.
>
> (3) The proposal would permit a commercial development to locate in such a way as to open new areas to premature, scattered, or strip development....

Sunbelt then sought relief in circuit court via a proceeding the county aptly describes as a "hybrid." [3] The circuit court granted certiorari, "find [ing] that there was no substantial, competent evidence to support the decision of the Lee County Board of County Commissioners in ... denying [Sunbelt]'s application for rezoning." The county now asks us to review that decision.

II. REZONING: LEGISLATIVE OR JUDICIAL PROCEEDING?

[1] The circuit court, in asserting its power to review the matter via certiorari, appears to have relied upon *Snyder v. Board of County Commissioners of Brevard County,* 595 So.2d 65 (Fla. 5th DCA 1991), *jdn. accepted,* 605 So.2d 1262 (Fla.1992), which states that owner-initiated, site-specific rezoning proceedings are quasi-judicial in nature. The county had moved to dismiss Sunbelt's petition because, in its view, all zoning decisions are legislative rather than judicial. The difference between these concepts affects both the accepted method of subsequent judicial review and the scope of that review.

(a) Is there conflict between *Snyder v. Brevard County* and prior holdings of this court?

The county contends that *Snyder* conflicts with cases from this court describing rezoning as a legislative activity. *See, e.g., Lee County v. Morales,* 557 So.2d 652 (Fla. 2d DCA), *rev. denied,* 564 So.2d 1086 (Fla.1990); *Hirt v. Polk County Board of County Commissioners,* 578 So.2d 415 (Fla. 2d DCA 1991). [4] Sunbelt disputes that conflict exists, and notes that our court has employed certiorari review in settings factually similar to the present case. *Manatee County v. Kuehnel,* 542 So.2d 1356 (Fla. 2d DCA), *rev. denied,* 548 So.2d 663 (Fla.1989).

We agree that no material conflict arises between *Lee County v. Morales* and *Snyder. Morales* involved a comprehensive downzoning of an environmentally sensitive barrier island initiated by the county, and did not involve an owner-initiated zoning change. Moreover, any conflict between *Snyder* and *Hirt v. Polk County* exists only in dicta. *Hirt* was not a rezoning, but rather a neighboring property owner's challenge to approval of a Planned Unit Development. The case was disposed of on procedural grounds—the circuit court had dismissed Hirt's certiorari petition, and ***1000** this court, finding the county's construction of applicable rules to have been a "judicial" undertaking, ordered the petition reinstated and decided on its merits.

In *Hirt* Judge Scheb engaged in a functional analysis of the underlying administrative proceedings quite similar to that in *Snyder* (and which was cited with approval in *Snyder). Hirt* states that the legislative *versus* judicial determination turns on (1) the nature of the challenge; and (2) the manner in which the zoning authority went about making its decision. *Snyder,* Sunbelt urges, is "the logical culmination of [this] functional analysis." However, Judge Scheb did remark in passing that rezonings were "legislative." 578 So.2d at 417. He did not distinguish between a county-initiated, broad-based rezoning, as in *Morales,* and a site-specific, owner-initiated rezoning as in *Kuehnel.*

(b) When, if ever, is rezoning a "judicial" matter?

Florida's appellate courts are neither unanimous nor consistent on the question whether rezonings are legislative or quasi-judicial. [5] Neither are they consistent about the method or scope of review. For example, in *St. Johns County v. Owings,* 554 So.2d 535 (Fla. 5th DCA 1989), *rev. denied,* 564 So.2d 488 (Fla.1990), and *Palm Beach County v. Tinnerman,* 517 So.2d 699 (Fla. 4th DCA 1987), *rev. denied,* 528 So.2d 1183 (Fla.1988), the courts applied the "fairly debatable" standard appropriate for legislative decisions, but reviewed the proceedings by certiorari as if they were judicial in nature.

"A judicial inquiry investigates, declares, and enforces liabilities as they stand on present facts and under laws supposed already to exist ... Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." *Prentis v. Atlantic Coast Line Co.,* 211 U.S. 210, 226, 29 S.Ct. 67, 69, 53 L.Ed. 150, 158 (1908), quoted in *Jennings v. Dade County,* 589 So.2d 1337, 1343 (Fla. 3d DCA 1991), *rev. denied,* 598 So.2d 75 (Fla.1992) (Ferguson, J., concurring). A judicial decision involves a controversy over how *existing* law affects a set of facts—what Judge Scheb called "enforcing" the current ordinance. 578 So.2d at 417. Placed in the zoning/code enforcement context, the court or agency asks: "Has the party done something in violation of the law?" or "Will the law allow the party to do what it wants?" By contrast, legislation *changes* the existing law. Arguably, it is immaterial whether such change stems from the fiat of the governing body (*e.g.* a comprehensive rezoning) or from an individual request to "change the law for me" (the *Snyder*/Sunbelt rezonings).

Snyder, in concluding that owner-initiated rezoning proceedings are nevertheless quasi-judicial in character, borrows heavily from two sources. One, *Coral Reef Nurseries, Inc. v. Babcock Co.,* 410 So.2d 648, 652 (Fla.3d DCA 1982), declares that "it is the character of

the administrative hearing leading to the action of the administrative body that determines the label to be attached to the action....” The court in *Coral Reef* was deciding whether “administrative *res judicata*” operated to bar a second rezoning application; though they eventually determined that the nature of these rezoning hearings made them “judicial,” the court went on to afford considerable deference to the local government in deciding whether circumstances had sufficiently changed to defeat application of the *res judicata* principle.

Another source is the widely-cited opinion of the Oregon Supreme Court, *Fasano v. Board of County Commissioners of Washington County,* 264 Or. 574, 507 P.2d 23 (1973). The plaintiffs in *Fasano* had unsuccessfully opposed a zoning change before their county commission, but prevailed at all levels of the Oregon court ***1001** system because the rezoning was not shown to be consistent with the local comprehensive plan. The supreme court began its analysis by stating, “Any meaningful decision as to the proper scope of judicial review of a zoning decision must start with a characterization of the nature of that decision.” 507 P.2d at 25–26. Most jurisdictions, including Oregon itself, heretofore had “state[d] that a zoning ordinance is a legislative act and is thereby entitled to presumptive validity.” 507 P.2d at 26. This approach, however, may have been “ignoring reality.” *Id.*

> Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review and may only be attacked upon constitutional grounds for an arbitrary use of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority and its propriety is subject to an altogether different test.

Id. [6]

It is notable that *Fasano,* like most of the “consistency” cases we will discuss, involved a challenge to a rezoning that (initially) was successfully obtained despite a claim it was not only bad policy but not in compliance with the law. That is, *Fasano* (like *Hirt*) asked the question, unarguably judicial in character, “Does the existing law permit it?”

> The fact remains, however, that many rezoning decisions *are* properly reviewable by certiorari. While legislative authority (that is, the discretion to determine what the law should be) may not be delegated, a legislative body may delegate to a board or official the authority to apply the law if sufficient standards and procedural safeguards are adopted to ensure a proper application of legislative intent. Most zoning ordinances delegate, with standards, the authority to decide such things as variances or conditional use approvals, and these quasi-judicial determinations are reviewable by certiorari. Similarly, the authority to decide what zoning district to apply to each property could, with adequate standards, become a delegated, quasi-judicial determination. Far more often, however, rezoning decisions are held to be reviewable by certiorari merely because a zoning ordinance, charter or special act provides that they shall be.

LaCroix, *The Applicability of Certiorari Review to Decisions on Rezoning,* Fla.B.J., June 1991, at 105 (*footnotes omitted*).

We believe a fair and workable solution is to adopt the functional analysis of *Snyder,* which is consistent procedurally with our prior decision in *Manatee County v. Kuehnel.* That is, we agree that site-specific, owner-initiated rezoning requests are sufficiently judicial in character that final administrative orders are thereafter appropriate for appellate review.

(c) What Does It Mean to Label a Proceeding “Judicial”?

Our decision to adopt this portion of the *Snyder* opinion will measurably affect those local governments who, in continuing to regard *Snyder*-type rezonings as purely legislative, may utilize overly informal procedures when considering such requests. "When acting in a truly legislative function, a legislative body ... is not required to make findings of fact and statement of reasons supporting its decision as is necessary in order for the courts to effectively review governmental action for compliance with constitutional and statutory rights and limitations." *Snyder,* 595 So.2d at 68.

The effect of labeling rezoning decisions as quasi-judicial is to refer them to an independent forum that is isolated as far as is possible from the more politicized activities of local government, much as the judiciary is constitutionally independent of the legislative and executive branches. Because ***1002** these decisions today are inextricably linked with property rights-related claims, we view this shift toward enforced neutrality as salutary. The evolving law of property rights, exemplified by *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), does not augur well for local governments who are reluctant to justify their decisions with explicit references to evidence and public policy. If reached under a veil of silence, even honest land-use decisions are vulnerable to charges of arbitrariness or improper motive.

Moreover, it is debatable whether the new procedural requirements implicit in our adoption of *Snyder* should be viewed either as onerous or as infringing upon powers traditionally reserved for local elected officials.

> [W]e note that the quality of due process required in a quasi-judicial hearing is not the same as that to which a party to a full judicial hearing is entitled. Quasi-judicial proceedings are not controlled by strict rules of evidence and procedure. Nonetheless, certain standards of basic fairness must be adhered to in order to afford due process.... A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard. In quasi-judicial zoning proceedings, the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts.

Jennings v. Dade County, 589 So.2d at 1340.

III. THE SCOPE OF REVIEW AT THE CIRCUIT AND D.C.A. LEVELS

[2] It necessarily follows that any party adversely affected by a rezoning decision is entitled to some form of direct appellate review. Therefore, we turn to the standard of review that should be employed by the circuit and district courts when presented with such cases. At the outset we acknowledge the existence of several terms of art which warrant (and may sometimes lack) clear definition, among them "fairly debatable," "substantial competent evidence," and, in the wake of mandatory statewide comprehensive planning, "consistency" and "strict scrutiny." All come into play in *Snyder* and in the present case.

(a) "Fairly debatable" and "substantial competent evidence"

The terms "fairly debatable"—generally applied to sustain actions thought of as legislative—and "substantial competent evidence"—which must exist to support quasi-judicial determinations—may in fact be more similar than some decisional and textual authorities suggest.

> The "fairly debatable" rule is a rule of reasonableness; it answers the question of whether, upon the evidence presented to the municipal body, the municipality's action is reasonably based. The primary purpose of the "fairly debatable" test is to allocate decision-making authority over zoning matters between the legislative municipal body and the judiciary. The test purports to prevent the court from substituting its judgment *with regard to zoning ordinance enactments* for that of the zoning authority. In other words, the

> "fairly debatable" test was created to review the *legislative*-type enactments of zoning ordinances.

Town of Indialantic v. Nance, 400 So.2d 37, 39 (Fla.5th DCA 1981), *approved,* 419 So.2d 1041 (Fla.1982) (*citations omitted; emphasis in original*).

> At issue in *DeGroot [v. Sheffield,* 95 So.2d 912 (Fla.1957),] was the proper method and scope of review of a quasi-judicial county board determination. The *DeGroot* court held that where ... notice and hearing are required and the judgment of the board is contingent on the showing made at the hearing, the action is judicial or quasi-judicial ... The court then explained that "competent substantial evidence" was evidence a reasonable mind would accept as adequate to support a conclusion. The *DeGroot* "competent substantial evidence" standard of review of quasi-judicial action effectively provides the same standard the "fairly debatable" test provides for review of legislative municipal zoning action: For ***1003** the action to be sustained, it must be reasonably based in the evidence presented."

400 So.2d at 40 (*citations omitted*). [7]

(b) "Consistency" and "Strict Scrutiny"

[3] In Florida, all zoning and development permitting must now be consistent with the comprehensive plan of the city or county in question. *See* § 163.3161(5), Fla.Stat. (1991). The comprehensive plan has been likened to a "constitution" and has been described as "a limitation on a local government's otherwise broad zoning powers." *Machado v. Musgrove,* 519 So.2d 629, 632 (Fla.3d DCA 1987), *rev. denied,* 529 So.2d 693 (Fla.1988). [8] *See also, Hillsborough County v. Putney,* 495 So.2d 224 (Fla.2d DCA 1986). *And cf. City of Cape Canaveral v. Mosher,* 467 So.2d 468, 471 (Cowart, J., concurring specially).

According to *Machado,* "where a zoning action is challenged as violative of the comprehensive land use plan, the burden of proof is on the one seeking a change to show by competent and substantial evidence that the proposed development conforms strictly to the comprehensive plan and its elements." *Id.* Thus arises the term "strict scrutiny." Apparently there is conflict, between *Machado* and *Southwest Ranches Homeowners Association, Inc. v. Broward County,* 502 So.2d 931 (Fla.4th DCA), *rev. denied,* 511 So.2d 999 (Fla.1987), as to when "strict scrutiny" should be employed. *See* Mitchell, "In Accordance With a Comprehensive Plan: The Rise of Strict Scrutiny in Florida," 6 Fla.St.U.J.Land Use & Envtl.L. 79 (1990). [9]

(c) Scope of judicial review

The standards for judicial review of local government administrative actions were established by our supreme court in *Education Development Center v. West Palm Beach* and *Deerfield Beach v. Vaillant.*

[4] At the circuit level, three questions are asked: whether due process was afforded, whether the administrative body applied the correct law, and whether its findings are supported by competent substantial evidence. This last requirement is susceptible to misunderstanding. It involves a purely legal question: whether the record contains the necessary quantum of evidence. The circuit court is not permitted to go farther and reweigh that evidence (*e.g.,* where there may be conflicts in the evidence), or to substitute its judgment about what should be done for that of the administrative agency. *Bell v. City of Sarasota,* 371 So.2d 525 (Fla.2d DCA 1979).

[5] On further review by certiorari in the District Courts of Appeal, only the first two questions are considered. Where (as in the present case) there is no suggestion of a due process violation in the initial appeal, the district court determines only whether the circuit court "applied an incorrect principle of law." *Education Development Center,* 541 So.2d at 108. We may not exceed these extremely restrictive parameters and "disagree[ ] with the circuit court's evaluation of the evidence." 541 So.2d at 108–9. Thus, if the correct rule of law for a circuit court to apply were the "substantial competent evidence" standard, ***1004** and the court did apply that

standard, its decision should be sustained. Our power of review would entitle us to quash the circuit court's decision only if it imposed a *different* standard upon the parties than that required by law. *Kuehnel.*

Our reading of *Snyder* convinces us that the district court in that case, having reached a supportable conclusion that site-specific rezonings are quasi-judicial proceedings, thereafter embarked upon a considerable departure from prior holdings in the realm of land use law. We decline to adopt the remainder of the *Snyder* decision, for reasons we will explain in due course. Accordingly, by imposing upon Lee County certain burdens of proof required by *Snyder,* the circuit court did apply the incorrect law to the dispute between the county and Sunbelt, justifying our issuance of a writ of certiorari.

IV. WHERE *SNYDER* HAS DEPARTED FROM PRECEDENT

(a) What Must Be Shown Under *Snyder*

After a lengthy discussion of related legal issues ranging from the legislative/judicial distinction to private property rights, the *Snyder* court stated its conclusions, beginning with the statement that "[t]he initial burden is on the landowner to demonstrate that ... the use sought is consistent with the applicable comprehensive zoning plan." 595 So.2d at 81. Assuming this can be done,

> the landowner is presumptively entitled to use his property in the manner he seeks unless the opposing governmental agency asserts and proves *by clear and convincing evidence* that a specifically stated public necessity requires a specified, more restrictive use. After such a showing the burden shifts to the landowner to assert and prove that such specified more restrictive land use constitutes a taking of his property for public use for which he is entitled to compensation....

Id. (*emphasis ours; footnote omitted*).

(b) The Distinction Between Zoning and Comprehensive Planning

[6] Perhaps we read too much into the use, in *Snyder,* of the term "comprehensive zoning plan," but it gives us pause. As is made clear in *Machado* and other "consistency" cases, comprehensive planning and zoning are interrelated but different functions of local government. "As the court in [*Jacksonville Beach v.*] *Grubbs* noted, the purpose of a comprehensive plan is to set general guidelines for future development, and not necessarily to accomplish immediate land use changes." *Southwest Ranches,* 502 So.2d at 936. A comprehensive plan might accommodate a range of permissible zoning categories for a given area. In a case decided after the advent of comprehensive planning but before the 1985 Growth Management Act mandated such planning statewide, the Third District Court of Appeal held that it is within the discretion of a local government to impose a zoning category at the low end of that range. *Dade County v. Inversiones Rafamar, S.A.,* 360 So.2d 1130 (Fla.3d DCA 1978). Until *Snyder* there was no reason to suspect this was not still a correct statement of law. [10]

In contrast to *Inversiones Rafamar, Snyder* seems to place little credence in zoning classifications, as opposed to the broader land use projections embodied in a comprehensive plan, particularly where the zoning in question would allow only low-intensity uses of the land. Perhaps this skepticism might be supportable based on record evidence presented in the *Snyder* hearings and circuit court proceedings, but we find the district court's pronouncements unacceptably overbroad if intended for general application to all jurisdictions statewide:

> Most communities in actual practice have zoned their undeveloped land under a highly restrictive classification such as ***1005** "general use" and agriculture.... The original intent was not to permanently preclude more intensive development but to adopt a "wait and see attitude toward the direction of future development. Most government officials have little motivation to incur the "wrath of neighbors by zoning vacant land for industrial, commercial, or intensive residential development in advance of an actual proposal for development."
>
> In reality, therefore, at the inception of zoning most land was zoned according to its then use, exceptions were grandfathered in and most vacant land was under-

> zoned or "short-zoned." In order for development to proceed, rezoning becomes not the exception, but the rule ... [R]ezoning is granted not solely on the basis of the land's suitability to the new zoning classification and compatibility with the use of surrounding acreage, but, also and perhaps foremost, on local political considerations including who the owner is, who the objectors are, the particular and exact land improvement and use that is intended to be made and whose ox is being fattened or gored by the granting or denial of the rezoning request.

595 So.2d at 72–3 (*citations omitted*). [11]

It has long been the law that when the applicant makes a threshold showing that existing zoning is unreasonable, the local government must prove otherwise. *See, e.g., City of St. Petersburg v. Aikin,* 217 So.2d 315 (Fla.1968); *City of Jacksonville Beach v. Grubbs,* 461 So.2d 160 (Fla.1st DCA 1984), *rev. denied,* 469 So.2d 749 (Fla.1985). However, absent the assertion of some enforceable property right, an application for rezoning appeals at least in part to local officials' discretion to accept or reject the applicant's argument that change is desirable. The *right* of judicial review does not *ipso facto* ease the burden on a party seeking to overturn a decision made by a local government, and certainly does not confer any property-based right upon the owner where none previously existed.

[7] An old saying has it, "If you bought a swamp, there is some presumption you wanted a swamp." Put another way, there must be some presumption, even if only an easily rebuttable one, that land zoned for agricultural use is best suited for that purpose. This does not mean that comprehensive planners, with an eye toward conditions years hence, might not expect that same land someday to be crowded with houses, industrial plants, or commercial establishments. Nor does it mean that zoning authorities, during their initial (and truly "legislative") attempts to classify properties, always act wisely or fairly in designating low-intensity uses. However, implicit in *Snyder* is a suggestion that the future-oriented comprehensive planning process [12] always will result in a more accurate and appropriate use designation than will the more immediate act of zoning a specific parcel. We believe that *both* a comprehensive plan and a zoning classification are presumptively valid, and that one seeking a change in either has the burden of showing its invalidity.

[8] Moreover, when it is the zoning classification that is challenged, the comprehensive plan is relevant only when the ***1006** suggested use is inconsistent with that plan. Where any of several zoning classifications is consistent with the plan, the applicant seeking a change from one to the other is not entitled to judicial relief absent proof the *status quo* is no longer reasonable. It is not enough simply to be "consistent"; the proposed change cannot be *inconsistent,* and will be subject to the "strict scrutiny" of *Machado* to insure this does not happen.

(c) "Clear and Convincing Evidence"

[9] The use, in *Snyder,* of the term "clear and convincing evidence" (as opposed to "substantial competent evidence") is derived from *Department of Law Enforcement v. Real Property,* 588 So.2d 957 (Fla.1991), and numerous other cases, all of which involve a clear and acknowledged deprivation of property or other fundamental legal rights. *See* 595 So.2d at 81 n. 70. Heretofore it has never been a requirement in zoning cases that an existing classification be substantiated to this degree. [13] We believe this shift in the burden of proof derives from an incorrect assumption about the nature and extent of a landowner's property rights.

[10] **[11]** **[12]** It has never been the law that a landowner is always entitled to the "highest and best" use of his land. *See Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). This is not to suggest that a local government, in enacting land use codes, may disregard the landowner's rights. First of all, land use restrictions must substantially advance some legitimate state interest, or they are invalid. *Nollan v. California Coastal Commission,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). Second, they cannot be so intrusive as to deprive the landowner of reasonable economic use of the property, nor should previously permissible or "grandfathered" uses be incautiously rescinded. *Lucas.* However, assuming a regulation is necessary for the welfare of the public, and is not physically invasive or confiscatory of some existing property right, it is probably within the government's "police power" to enact it. *Village of Euclid, Ohio v. Ambler Realty Co.,* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

It must be remembered that zoning ordinances, comprehensive plans, and similar enactments are (or should be) debated in a public forum with all affected parties having the right to be heard. Thereafter, the dissatisfied landowner

has several avenues of redress, including injunctive relief against the enforcement of the offending ordinance or a suit for inverse condemnation. Even the landowner who is temporarily satisfied with the *status quo* is not without options when conditions change and undercut what once were reasonable expectations of fruitful use. This is the occasion for the *Snyder*-type individualized rezoning application, which we now declare to be quasi-judicial and therefore subject to procedural safeguards.

That such a system is not flawless is to be expected —repairing the errors that sometimes occur may expend resources and judicial labor. The alternative, however, is to reject or at least fundamentally undercut the power of local governments to superintend the use of real property. The Supreme Court, whose most "conservative" statement may have come in *Lucas,* has never interpreted the Fifth Amendment ***1007** "just compensation" clause (the source of "takings jurisprudence") as demanding this. In the wake of *Lucas, Nollan,* and related cases, those favoring land use restrictions may find their activities the subject of heightened scrutiny into their reasonableness and intrusiveness. However, and despite the apprehensions (or hopes) of some observers, more fundamental change than this did not occur in *Lucas*. [14]

(d) Reconciling Our Views with the Procedure Adopted in *Snyder*

[13] The courts, reviewing a rezoning application, should not presume the landowner does or can assert an enforceable property right, one which triggers application of the "clear and convincing evidence" standard, every time a more intensive use of the property is sought. Instead, the landowner must prove the existence of such a right, not just consistency with a comprehensive plan, before so rigorous a burden will be imposed upon the local government. The question arises, however, just how much the landowner must prove before the burden shifts.

In this regard, we have no quarrel with the procedure adopted in *Snyder* up to a point. *Snyder* accepts, for example, that the initial burden is still upon the applicant, who must demonstrate something more than that a rezoning is subjectively desirable. Before the advent of mandatory statewide comprehensive planning, that "something" was whether "the existing ordinance was confiscatory in effect." *St. Petersburg v. Aikin,* 217 So.2d at 317. For the most part *Snyder* can be interpreted as easing this burden without actually changing the law. Its emphasis on "consistency" means that wherever planners have determined a particular use is *someday* acceptable, the local government must now prove that the present zoning *is not* confiscatory rather than requiring the landowner to prove it *is* confiscatory.

So far this shifting of burdens, which emphasizes that governments must bear some responsibility to act carefully when restricting property rights, can be accommodated without abandoning traditional notions about the "police power" that underlies all zoning ordinances. It is at this point that *Snyder* most clearly departs from precedent. According to *Snyder,* once a rezoning proposal is shown to be "consistent," the local government must prove *by clear and convincing evidence,* that "public necessity requires a ... more restrictive use." Instead, we believe that the local government is required only to show *by substantial competent evidence* that the existing (obviously more restrictive) zoning classification was enacted in furtherance of some legitimate public purpose and that the public interest is legitimately served by continuing that classification. If the zoning ordinance was constitutional *ab initio,* and it remains constitutional in the face of whatever changes have prompted the landowner to request rezoning, the rezoning may be refused provided the local government can justify this conclusion with evidence on the record. Assuming it can do that, *Snyder* thereafter correctly shifts the burden back to the landowner "to assert and prove ... a taking"—that is, that the ordinance is confiscatory.

V. RESOLVING THE SUNBELT REZONING APPLICATION

[14] Implicit in the circuit court's holding is an acceptance of Sunbelt's argument that its design is consistent with the Lee County comprehensive plan. There is evidence to support this argument, albeit contradicted by the county commission ordinance. Although Sunbelt's property is currently zoned "agricultural," a Future Land Use Map depicts the surrounding area as "suburban." Such a designation limits commercial development to "neighborhood centers," which in turn are limited to a maximum of 100,000 square feet. Sunbelt ***1008** has projected only 65,000 square feet of commercial space. [15] A hearing officer did find that a final development order cannot be issued until after certain amendments are made to the Sunbelt application; Sunbelt "is fully aware of this impediment," and the mere acts of rezoning

and approval of the "master concept plan" do not *ipso facto* "bestow or vest any development rights."

However, if (as we believe) *Snyder* is incorrect, it is not enough that Sunbelt's proposal is consistent with what Lee County planners envision as the eventual buildout of this area. One must also look to the *present* character of the area, which is reflected in the existing zoning classification. This aspect of the comprehensive plan represents, in effect, a future ceiling above which development should not proceed. It does not give developers *carte blanche* to approach that ceiling immediately, or on their private timetable, any more than a city or county is entitled to view its planning and zoning responsibilities as mere make-work.

Nothing in this opinion is intended to imply that Sunbelt, after remand, cannot establish a present right to the rezoning it desires. However, the mere fact of consistency with the comprehensive plan, even if undisputed by the county, would not mandate such a result. To sustain the county's decision to deny, it is sufficient that the record reflect substantial competent evidence favoring continuation of the *status quo*. [16] This decision likely will require analysis of the reasons underlying the present zoning classification—whether it represents a considered belief that agriculture is the most appropriate use, or was idly chosen as the court suggested had occurred in *Snyder*.

The petition for writ of certiorari is hereby granted, the order of the circuit court is quashed, and this case is remanded for further proceedings consistent with this opinion.

HALL, A.C.J., and THREADGILL and BLUE, JJ., concur.

All Citations

619 So.2d 996, 18 Fla. L. Weekly D1260

Footnotes

1 A collateral issue in the proceedings below was Sunbelt's contention that "the real reason the application was denied" was the vocal opposition of residents of a neighboring development. Clearly, such opposition, to the extent it reflects a subjective "polling" rather than a discrete legal argument, is not a valid basis for denying a permit or rezoning application. *Pollard v. Palm Beach County,* 560 So.2d 1358 (Fla.4th DCA 1990). However, accepting the notion that rezonings are quasi-judicial does not operate to exclude the public from those proceedings where such applications are considered on their merits. The need to allow such public access, which includes the right to voice objections (at least on the part of those claiming to be substantially affected by the pending action), points out the difficulty in completely depoliticizing such proceedings. The requirement of providing specific reasons for a ruling, in accord with the characterization of such proceedings as quasi-judicial, should diminish (if not altogether eliminate) the likelihood those mandatory findings will only mask the "real reason [an] application was denied."

2 Sunbelt attempts to depict all three of these findings as "erroneous." It may be that the circuit court agreed with Sunbelt's evaluation. If this were the only issue before us, we would be compelled to uphold the circuit court so long as it otherwise applied the correct principle of law. That is, we would not reweigh the circuit court's determination whether or not adequate evidence was presented.

3 In addition to a petition for certiorari, Sunbelt filed an original action pursuant to § 163.3215, Fla.Stat. (1991). The county claims that certain statutory prerequisites were overlooked which require dismissal of the civil action. Because the circuit court addressed the certiorari petition on its merits, the second case is not before us at this time.

4 *But see Grady v. Lee County,* 458 So.2d 1211 (Fla.2d DCA 1984) (discussing the effect of a Lee County zoning ordinance which prescribes review by certiorari).

5 If, indeed, such distinction can be clearly drawn. As one commentator concluded, after a lengthy analysis of the functional approach of *Fasano v. Washington County, infra,* "some zoning decisions are difficult to characterize as distinctly legislative or quasi-judicial." Peckingpaugh, "Burden of Proof in Land Use Regulation: A Unified Approach and Application to Florida," 8 Fla.St.U.L.R. 499 (1980).

6 *Fasano* is not universally accepted as a correct statement of law or desirable judicial policy. One commentator, comparing decisions from "major comprehensive planning states," notes that California continues to adhere to the "legislative" option, and describes *Fasano* as "significantly discredited." Gougelman, *The Death of Zoning As We Know It,* Fla.B.J., March 1993, at 31 n. 35.

7 In fact the terms were employed virtually interchangeably in *Shaughnessy v. Metropolitan Dade County,* 238 So.2d 466, 469 (Fla.3d DCA 1970), wherein the court found "competent, substantial evidence that the granting of the unusual or special use was at least fairly debatable."

8 *But see* § 163.3161(8), Fla.Stat. (1991): "It is the intent of the legislature that [this Act] shall not be interpreted to limit or restrict the powers of municipal or county officials, but shall be interpreted as a recognition of their broad statutory and constitutional powers to plan for and regulate the use of land."

9 In *Southwest Ranches,* neighbors of a proposed solid waste facility objected that the rezoning which permitted the facility was more intensive than, and therefore inconsistent with, the comprehensive plan. The district court held that "[w]here the zoning authority approves a use *more intensive than that proposed by the plan* ... the decision must be subject to stricter scrutiny than the fairly debatable standard contemplates." 502 So.2d at 936 (*emphasis ours*). *See also Jacksonville Beach v. Grubbs,* 461 So.2d 160, 163 n. 2 (Fla.1st DCA). By contrast, *Machado* holds that strict scrutiny applies "to [all] cases addressing the consistency of a development order with a comprehensive plan, regardless of the direction of the change." Mitchell, at 89.

10 For example, § 163.3164(22), Fla.Stat. (1991), defining "land development regulations," implies the persistence of legislative recognition of the separate concept of zoning.

11 Contrast such timid politics as described in *Snyder* with the reaction of the *Fasano* court to suggestions that "planning authorities be vested with the ability to adjust more freely to changed conditions": "[H]aving weighed the dangers of making desirable change more difficult against the dangers of the almost irresistible pressures that can be asserted by private economic interests on local government, we believe that the latter dangers are more to be feared." 507 P.2d at 29–30. And see *Machado* at 519 So.2d 634: "[T]he opponents, neighboring landowners, contend that conditions change in rapid and uncontrolled fashion in Dade County, increasing the need for costly public services and facilities, due to loose enforcement of the land use planning scheme." As we have elsewhere implied, most "strict scrutiny" cases prior to *Snyder* have invoked "consistency" to place brakes on development some thought too intensive, rather than to enforce a right to more intensive development than has been allowed. Reassessing site-specific rezonings as quasi-judicial should help place limits both on questionable runaway development *and* on intransigent, unrealistic under-zoning of developable property.

12 *See, e.g.,* §§ 163.3167(1), 163.3177(1), and 163.3177(6)(a), Fla.Stat. (1991), all of which are distinctly future-oriented.

13 Definitions of "clear and convincing evidence" abound. For example, the supreme court, in *The Florida Bar v. Rayman,* 238 So.2d 594 (Fla.1970), appears to have contemplated something stronger than the "preponderance of evidence" standard ordinarily seen in civil cases, but less than the criminal "reasonable doubt" standard. Perhaps the best-known attempt to define the term occurs in *Slomowitz v. Walker,* 429 So.2d 797, 800 (Fla.4th DCA 1983), wherein the court spoke of evidence or testimony that is "credible," "distinctly remembered," "precise," and "explicit"—evidence which "must be of such weight that it produces

in the mind of the trier of fact a firm belief and conviction, without hesitancy, as to the truth of the allegation sought to be established." This would appear to us to be considerably more rigorous a standard of proof than the relatively deferential "competent substantial evidence" test applied to the quasi-judicial decisions of administrative bodies. This test requires "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *DeGroot v. Sheffield,* 95 So.2d 912, 916 (Fla.1957).

14 This portion of our opinion analyzes the tension between regulation and property rights in light of decisions interpreting relevant portions of the United States Constitution. The test for "takings" under the Florida Constitution is substantially the same. *See Graham v. Estuary Properties,* 399 So.2d 1374 (Fla.), *cert. denied sub nom. Taylor v. Graham,* 454 U.S. 1083, 102 S.Ct. 640, 70 L.Ed.2d 618 (1981).

15 Sunbelt also wants to construct an additional 85,000 square feet for offices. Opponents of the project argued that the office space should be counted when calculating the total square footage, but a hearing officer found that the county's planning policy clearly dictates otherwise.

16 Though the circuit court's order states that no such evidence was presented to support denial of the rezoning, the record suggests that the court did hold the county to the more rigorous burden of proof required by *Snyder.* There appears to have been no examination or consideration of the reasonableness of the existing zoning classification.

End of Document

EXHIBIT “D”

From: SLOPPY SECONDS israelrazla3@gmail.com
Subject: Fwd: [EXT]Van Buuren Parking Garage
Date: Feb 1, 2023 at 1:24:55 PM
To: My Hubby ravrazla@gmail.com

---------- Forwarded message ---------
From: **Angela Kelsheimer**
<AKELSHEIMER@hollywoodfl.org>
Date: Tue, Jan 31, 2023 at 2:17 PM
Subject: RE: [EXT]Van Buuren Parking Garage
To: Israel Razla <israelrazla3@gmail.com>

Good Afternoon.

As previously advised, we would not be able to reserve any spaces for your business, we would only be able to sell you up to 25 access cards, which may be used to access the garage. Parking is not guaranteed and is only provided on a first come, first serve basis.

We do have our garage staff in/out of the garage throughout the day as well as a security company in/out throughout the evening, night. There is no security that exclusively patrols the garage at all times. I'm not sure what you mean about security within the garage to get to the parking spaces,

Angi Kelsheimer
Parking Operations Manager
City of Hollywood, Parking Division
954-921-3535

EXHIBIT “E”

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August 29, 2023

Keith Poliakoff, Esq.
Government Law Group, LLC
200 S. Andrews Ave
Suite 601
Fort Lauderdale, FL 33301

Re: Home Tower Condominium

Dear Keith:

It was a pleasure speaking with you today. As we discussed, my firm represents Home Tower Condominium, Inc., the condominium association which operates at 1720 Harrison Street in Hollywood. As to the awning in the front of the building, and its potential removal or alteration, the awning is part of the common area of the Association. Thus, pursuant to the Declaration of Condominium for Home Tower and The Florida Condominium Act, Chapter 718 Florida Statutes, removal or relocating the existing awning would be a material alteration to condominium common area/property which would require the affirmative vote of a super majority of all unit owners within Home Tower.

Before such a vote could take place, the Association's Board of Directors would first have to vote to approve the proposed change and accompanying amendment to the Declaration of Condominium. Then, the proposed changed would be sent to all unit owners and a meeting and vote (with at least 30 days' notice) would be scheduled. This process has not even been started, let alone concluded.

On July 27, 2023, the Board of Directors did discuss the possibility of altering the awning at a Board of Directors' meeting. The corporate representative of the owner of the first four floors, Rabbi Alon Nuriel Razla was present. I and the Board explained all of the above to him, but there has been no further action taken by the Board or unit owners of Home Tower since that time. I hope the above answers your questions. If there is anything else I can answer for you, please do not hesitate to reach out to me.

Very truly yours,

Edward F. Holodak

Edward F. Holodak
Attorney at Law

CC: Board

EXHIBIT “F”

980 So.2d 1164
District Court of Appeal of Florida,
Fourth District.

CHRISTIAN ROMANY CHURCH MINISTRIES, INC., Appellant,
v.
BROWARD COUNTY, a political subdivision of the State of Florida and Security Bank, N.A., Appellees.

No. 4D07–3139.
|
April 9, 2008.
|
Rehearing Denied May 30, 2008.

Synopsis

Background: County sought condemnation of property owned by church, so that county could expand its existing substance-abuse facility. The Circuit Court, Seventeenth Judicial Circuit, Broward County, Robert Lance Andrews, J., entered judgment for county. Church appealed.

[Holding:] The District Court of Appeal, Stone, J., held that condemnation would not place substantial burden on free exercise of religion, and thus, condemnation would not violate Florida Religious Freedom Restoration Act.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (9)

[1] **Eminent Domain** Necessity for appropriation
Eminent Domain Extent of appropriation

Reasonable necessity, as element for a taking, includes both the amount and the location of the land to be condemned. West's F.S.A. § 73.021.

[2] **Eminent Domain** Necessity for appropriation

Condemnation of church property, for expansion of county's existing substance-abuse facility, was reasonably necessary; county considered the church property a desirable location for expanded facility because the property was accessible by public transportation, was centrally-located, and was close to other social service agencies and a medical center. West's F.S.A. § 73.021.

[3] **Eminent Domain** Necessity for appropriation
Eminent Domain Evidence as to right to take

Generally, once there is a finding of reasonable necessity for a taking, based on competent, substantial evidence, the landowner must then either concede the existence of a necessity or be prepared to show bad faith or abuse of discretion as an affirmative defense. West's F.S.A. § 73.021.

[4] **Appeal and Error** Statutory or legislative law
Appeal and Error Constitutional Rights, Civil Rights, and Discrimination in General

Appellate court reviews de novo the trial court's legal conclusions regarding the Florida Religious Freedom Restoration Act (FRFRA), and reviews for competent, substantial evidence the factual findings. West's F.S.A. § 761.03.

[5] **Civil Rights** Particular cases and contexts
Civil Rights Evidence

The party claiming a violation of the Florida Religious Freedom Restoration Act (FRFRA) bears the initial burden of showing that a regulation constitutes a substantial burden on his or her exercise of religion. West's F.S.A. § 761.03(1).

2 Cases that cite this headnote

[6] **Civil Rights** Particular cases and contexts

Under the Florida Religious Freedom Restoration Act (FRFRA), a "substantial burden" on the free exercise of religion is one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires. West's F.S.A. § 761.03(1).

1 Case that cites this headnote

[7] **Civil Rights** Particular cases and contexts

Inquiry regarding substantial burden on free exercise of religion, in action alleging violation of Florida Religious Freedom Restoration Act (FRFRA), is inherently fact-specific, with the court analyzing whether the adherent's religious practice is obligatory or forbidden. West's F.S.A. § 761.03(1).

2 Cases that cite this headnote

[8] **Civil Rights** Property rights

Condemnation of land owned by church, so that county could expand its existing substance-abuse facility, would not place substantial burden on free exercise of religion, and thus, such condemnation would not violate the Florida Religious Freedom Restoration Act (FRFRA); while church would have to relocate, there was nothing about current location of church that was unique or integral to the conduct of the religion. West's F.S.A. § 761.03(1).

1 Case that cites this headnote

[9] **Civil Rights** Evidence

Church's proffered rebuttal testimony from pastor, outlining the services that church provided at its existing location, was not relevant to showing that condemnation of the church property, so that county could expand its existing substance-abuse facility, would place substantial burden on free exercise of religion, as element of church's defense under Florida Religious Freedom Restoration Act (FRFRA); such testimony did not relate to whether the taking would preclude the church from engaging in any conduct mandated by the Romany religion. West's F.S.A. § 761.03(1).

Attorneys and Law Firms

***1165** Lauri Waldman Ross of Ross & Girten, and Brian P. Patchen of Law Offices of Brian P. Patchen, P.A., Miami, for appellant.

Jeffrey J. Newton, County Attorney, Andrew J. Meyers, Chief Appellate Counsel, and James D. Rowlee, Assistant County Attorney, Fort Lauderdale, for Appellee–Broward County.

Steven Geoffrey Gieseler, Stuart, for amicus curiae-Pacific Legal Foundation.

Opinion

STONE, J.

The church appeals an order allowing the county to condemn the church property through eminent domain. Although the church does not dispute that the taking would serve a public purpose, it asserts that the county has failed to show a reasonable necessity for the taking and is in violation of the Florida Religious Freedom Restoration Act (FRFRA). We affirm.

The county seeks to expand a substance abuse facility (BARC), requiring the church's relocation to a new site. The ***1166** county plans to use two parcels of land for the BARC project; the other is owned by the county. The rest of the city block on which these two parcels are situated is also owned by the county. On that remaining, county-owned land, the county plans to build a sexual assault center.

There was testimony as to why the county needs to expand the BARC and the possible alternatives that were considered and rejected. The county considers the church property a desirable location for the BARC because the property is accessible by public transportation, is centrally-located, and close to other social service agencies and a medical center. Arguing against reasonable necessity, the church submits that the adjacent county-owned property would be large enough for the BARC if not used for the other planned purpose.

Addressing the FRFRA defense, the church claims that the condemnation amounts to a substantial burden on its

exercise of religion. The church also argues that the trial court erroneously precluded the pastor's rebuttal testimony with regard to the substantial burden of the taking of the church. The pastor testified that he did not know where they will go if the church is taken, and he has no other place for holding religious education. Citing the *Warner v. City of Boca Raton,* 887 So.2d 1023 (Fla.2004) definition of "substantial burden" under FRFRA, the trial judge sustained the county's relevance objection. The church then proffered the pastor's testimony that outlined the services the church provides and repeated how he did not know where to go if the taking occurs.

In its order of taking, the trial court first found reasonable necessity for condemning the church property, concluding:

> that the County has shown a reasonable necessity for the condemnation of this site. "Once a reasonable necessity is shown, the exercise of the condemning authority's decision should not be disturbed in the absence of bad faith or gross abuse of discretion." *Canal Authority v. Miller,* 243 So.2d [131, 135 (Fla.1970) (per curiam)]. The Church has not come forth with any evidence of bad faith or gross abuse of discretion. While the Church argues that the County failed to properly consider alternative locations and consider the safety of nearby schools which may be affected by this project, there is no evidence to support this argument. The County did put forth evidence that they considered alternatives to this site.

In considering whether the taking substantially burdens the exercise of religion, the trial court found no FRFRA violation:

> The acquisition of this property through eminent domain will not force the Church's congregation to engage in any conduct that their religion would forbid, nor will it forbid them from engaging in any conduct their religion requires. While it may be inconvenient for the church to have to move its location, it will not present a substantial burden on the exercise of religion.

We conclude that the trial court did not err or abuse its discretion in finding reasonable necessity for the taking and no FRFRA violation.

[1] **[2]** The reasonable necessity finding includes both the amount and the location of the land to be condemned. *See Canal Auth. v. Miller,* 243 So.2d 131, 133 (Fla.1970); *see also City of Jacksonville v. Griffin,* 346 So.2d 988, 990 (Fla.1977); *Jones v. City of Tallahassee,* 266 So.2d 382, 383 (Fla. 1st DCA 1972). The trial court's finding that the county has demonstrated a reasonable necessity for condemning the church's property is supported ***1167** by competent, substantial evidence. *See, e.g., Hillsborough County v. Sapp,* 280 So.2d 443, 445 (Fla.1973) ("When the trial court approves the determination of reasonable necessity and finds no abuse of discretion, a reviewing court is then limited to deciding whether or not there was competent substantial evidence to support the decision of the trial court."). *See generally* § 73.021, Fla. Stat. (2006) (requiring that the contemplated property be "necessary for that [asserted] public use or purpose").

[3] Generally, once there is a finding of reasonable necessity, based on competent, substantial evidence, "the landowner must then either concede the existence of a necessity or be prepared to show bad faith or abuse of discretion as an affirmative defense." *Miller,* 243 So.2d at 133. Here, the church does not assert any bad faith or gross abuse of discretion defenses, but insists only that the county lacks necessity for the taking. We note that there is no evidence of bad faith or gross abuse of discretion by the county.

[4] Next, the church contends that even if the trial court correctly ruled on the reasonable necessity issue, the condemnation would violate FRFRA. This court reviews *de novo* the trial court's legal conclusions regarding FRFRA, and reviews for competent, substantial evidence the factual findings. *Cf. Thiry v. Carlson,* 78 F.3d 1491, 1495 (10th Cir.1996) (explaining the mixed standard of review of a claim under the federal RFRA).

[5] Modeled after the federal RFRA, FRFRA states that:

> The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:
>
> (a) Is in furtherance of a compelling governmental interest; and

(b) Is the least restrictive means of furthering that compelling governmental interest.

§ 761.03(1), Fla. Stat. The party claiming a FRFRA violation "bears the initial burden of showing that a regulation constitutes a substantial burden on his or her exercise of religion." *Warner v. City of Boca Raton,* 887 So.2d 1023, 1034 (Fla.2004).

[6] **[7]** In *Warner,* our supreme court surveyed the federal case law and adopted a "narrow definition of substantial burden ... [that] is most consistent with the language and intent of the FRFRA." *Id.* at 1033. Thus, under FRFRA, "a substantial burden on the free exercise of religion is one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires." *Id.* This inquiry is inherently fact-specific, analyzing whether the adherent's religious practice is obligatory or forbidden.

In *Hollywood Community Synagogue v. City of Hollywood,* 430 F.Supp.2d 1296 (S.D.Fla.2006), the synagogue claimed that denial of a permit to operate out of single family houses in a residential neighborhood violated FRFRA and RLUIPA (Religious Land Use and Institutionalized Persons Act). *Id.* at 1318 (noting that the "substantial burden" standard is the same under both statutes). The synagogue argued that the city's requiring that it shut down the synagogue constituted a substantial burden, as doing so "would adversely impact its ability to continue providing religious teaching and worship to the community." *Id.* at 1318.

The federal district court relied on the Eleventh Circuit opinion in *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1225 (11th Cir.2004), where that court "found that the fact that the congregations ***1168** may be unable to find suitable alternative space did not create a substantial burden within the meaning of RLUIPA." *City of Hollywood,* 430 F.Supp.2d at 1318. The court also noted that the synagogues' current location in each case held no particular or unique "religious significance," especially because the synagogues did not prove that no other property was available to accommodate such practices. *Id.* at 1322.

In *Men of Destiny Ministries, Inc. v. Osceola County,* 20 Fla. L. Weekly Fed. D314, 2006 WL 3219321 (M.D.Fla.2006), the county refused to issue a permit and sought to evict MDM for a land development code violation. MDM provided services to men addicted to drugs or alcohol, and challenged the action as placing a substantial burden on its exercise of religion. *Id.* at *1–7. The court first found that MDM's services constituted a religious exercise under FRFRA. *Id.* at *7.

> However, the County has not placed a substantial burden on that religious exercise, either through the Code itself or through their denial of the [permit]. The County's regulations do not preclude MDM from engaging in this religious exercise. MDM is free to run its rehabilitation program in the other areas of the County that are zoned for the sort of facility it currently operates. And MDM may attempt to rehabilitate these individuals in other ways, such as by operating through counseling rather than by operating an in-patient facility. So long as MDM remains able to attempt to rehabilitate drug addicts and alcoholics, its religious exercise has not been substantially burdened under the FRFRA.

Id.

[8] The church's insistence that a specific church building for holding worship services is fundamental to religious exercise under the statute is unpersuasive. Our supreme court expressly rejected any definition of substantial burden other than that compelling conduct or that forbidding conduct. By no stretch does an otherwise valid condemnation fall within these limits. There is nothing about this location that is unique or integral to the conduct of the religion.

[9] We also conclude, with regard to the trial court's sustaining the county's relevance objection to the pastor's rebuttal, that the trial court did not abuse its discretion. The proffered testimony did not relate to whether the taking would meet the definition of substantial burden by precluding the church from engaging in any conduct mandated by the Romany religion. The proffer simply outlined the services the church provides at its existing location.

We recognize that if the church had met its obligation to prove that there was a substantial burden, within the *Warner*

parameters, the government would then bear the burden of establishing that the taking was the least restrictive means of furthering a compelling interest. *See Warner,* 887 So.2d at 1034 (citing § 761.03(1), Fla. Stat. (2003)); *see also City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (classifying the test as "the most demanding test known to constitutional law"). However, here, we do not need to reach this issue, as, applying the *Warner* test, the condemnation does not substantially burden the exercise of religion. After properly concluding that the church failed to satisfy its threshold burden, the trial court correctly did not reach this second part of FRFRA analysis.

Therefore, the order is affirmed.

WARNER and GROSS, JJ., concur.

All Citations

980 So.2d 1164, 33 Fla. L. Weekly D974

EXHIBIT “G”

302 F.Supp.2d 1328
United States District Court,
M.D. Florida,
Orlando Division.

Joseph KONIKOV, Plaintiff,
v.
ORANGE COUNTY, FLORIDA, Joel D. Hammock, Jim Powers, Robert Burns, Robert High, Defendants.

No. 6:02–CV–376–ORL–28–JGG.
|
Jan. 2, 2004.

Synopsis

Background: Rabbi sued county and members of county's code enforcement board, claiming that his right to practice his religion was violated by county's enforcement of land use code. Defendants moved for summary judgment.

Holdings: The District Court, Antoon, J., held that:

[1] code requirement that religious organizations obtain permit before holding services in specified residential zone did not violate free exercise of religion clause;

[2] provision did not violate Religious Land Use and Institutionalized Persons Act (RLUIPA);

[3] provision did not violate equal protection rights of rabbi;

[4] provision did not violate establishment of religion clauses of federal and state constitution;

[5] provision did not violate rabbi's freedom of speech rights;

[6] provision did not violate federal or state constitutional freedom of privacy rights of rabbi;

[7] provision was not void for vagueness; and

[8] members of board did not conspire to violate equal protection rights of rabbi.

Judgment for defendants.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (12)

[1] **Constitutional Law** Religious organizations

Zoning and Planning Churches and religious uses

County land use code provision of general applicability, barring use of land by religious organization in specified zone, except when special exception was granted, did not violate free exercise clause on its face or as applied, when used to force rabbi to stop holding religious services in his residence; there was insubstantial burden on exercise of religion, as rabbi could continue exercise his religion by establishing worship center in one of many areas of city where such use was permitted, and even if burden was deemed substantial, code provision furthered compelling government objective of encouraging peaceful and safe residential areas, and was least restrictive means of furthering objective. U.S.C.A. Const.Amend. 1.

1 Case that cites this headnote

[2] **Civil Rights** Zoning, building, and planning; land use

County land use code provision of general applicability, barring use of land by religious organization in particular zone, except when special exception was granted, did not violate Religious Land Use and Institutionalized Persons Act (RLUIPA), when used to force rabbi to stop holding religious services in his residence; there was insubstantial burden on exercise of religion, as rabbi could continue exercise of religion by establishing worship center in one of many areas of city where such use was permitted, and even if burden was deemed substantial, code provision furthered compelling government objective of encouraging peaceful and safe residential areas, and was least restrictive means of furthering objective. Religious Land Use and

Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

2 Cases that cite this headnote

[3] **Constitutional Law** Zoning and Land Use
Zoning and Planning Churches and religious uses

County land use code provision, requiring permit to conduct religious services in specified zone, did not on its face violate equal protection rights of rabbi conducting services in his home located within zone, despite claim that commercial activities, including model homes, home occupations, and day care centers were allowed without permit; model homes created only temporary traffic problem, terminating when houses in development were all sold, and other uses were allowed, permit free, only under restrictions obviating traffic congestion problems caused by rabbi's planned religious services. U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1, § 2.

[4] **Constitutional Law** Zoning and Land Use
Zoning and Planning Churches and religious uses

County land use code provision, requiring permit to conduct religious services in specified zone, did not as applied violate equal protection rights of rabbi, wishing to conduct religious services in his home, despite claim that church activity groups held meetings in members' home without being required to obtain permit; meetings were held only once a week, while services in question were held more often, and in one instance person holding meetings took steps in minimize congestion caused by on-street parking. U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1, § 2.

[5] **Constitutional Law** Zoning and Land Use

In addition to *Lemon v. Kurtzman* test for determining whether zoning law violates establishment clause of federal constitution and its Florida constitution counterpart, requiring secular legislative purpose, principal or primary effect neither advancing or inhibiting religion, and absence of entanglement with religion, Florida constitution additionally requires that no public monies be used, directly or indirectly, in aid of any secular institution. U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1, § 3.

[6] **Constitutional Law** Permits and variances
Zoning and Planning Churches and religious uses

Establishment of religion clause of federal and Florida constitutions was not violated by county land use code provision requiring that permit be obtained prior to holding religious services in specified zone; provision had secular purpose, protection of public health and welfare, and had only secondary effect on religion involving neither advancement or inhibition, ordinance did not cause government entanglement with religion, and no public monies were spent for religions purposes. U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1, § 3.

[7] **Constitutional Law** Zoning and Land Use
Zoning and Planning Churches and religious uses

For purposes of determining whether county land use code provision requiring religious organizations to obtain permit to conduct services in specified zone violated free speech rights of rabbi holding services in his home, provision would be deemed content neutral, as it applied to other uses not strictly residential in nature, and considered religious meeting as land use problem rather than considering religious nature of any gathering. U.S.C.A. Const.Amend. 1.

[8] **Constitutional Law** Zoning and Land Use
Zoning and Planning Churches and religious uses

Content neutral county land use code provision, requiring religious organizations to obtain permit before conducting services in specified residential zone, did not violate First Amendment freedom of speech rights of rabbi conducting services in his home located within zone; provision furthered legitimate government objective of maintaining residential character of area, permit requirement was narrowly tailored to serve objective, and rabbi was left with many alternative channels of communication for his religious services, through worship sites available elsewhere in city. U.S.C.A. Const.Amend. 1.

[9] **Constitutional Law** Relation between state and federal rights

Right to privacy under the Florida Constitution embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution. U.S.C.A. Const.Amend. 1; West's F.S.A. Const. Art. 1, § 23.

[10] **Constitutional Law** Particular Issues and Applications

Zoning and Planning Churches and religious uses

County land use code provision, requiring religious organizations to obtain permit before conducting services in specified zone, did not violate federal or state constitutional freedom of privacy rights of rabbi conducting services from home within zone; rabbi had waived his privacy interest by advertising services on Internet and by way of signage on home. U.S.C.A. Const.Amend. 1; West's F.S.A. Const. Art. 1, § 23.

[11] **Constitutional Law** Particular issues and applications

Zoning and Planning Churches and religious uses

County land use code provision prohibiting religious organization from conducting services on property in specified residential zone, without first obtaining permit, was not void for vagueness in violation of due process provisions of federal and state constitutions, despite definitions of religious institution subject to requirement as one used "primarily" for religious worship and "related" religious activity; despite presence of those words in provision, it was clear that activities being carried out in suing rabbi's home were religious and violated ordinance. U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1, § 9.

1 Case that cites this headnote

[12] **Conspiracy** Civil rights conspiracies

Evidence did not establish that members of county code enforcement board conspired to violate equal protection rights of rabbi, operating religious meetings in his home in area zoned for strictly residential purposes, when they demanded that rabbi obtain permit while allowing commercial uses in residential property without permit; transcript of meeting showed discussion of issues presented by rabbi's use and that of others, rather than collaboration to perform illegal act. U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1, § 2.

Attorneys and Law Firms

***1331** John T. Stemberger, Law Offices of John Stemberger, Orlando, FL, Frederick H. Nelson, Law Offices of Frederick H. Nelson, P.A., Altamonte Springs, FL, for plaintiff.

Gary M. Glassman, Rebecca S. Smith, Orange County Attorney's Office Litigation Section, Orlando, FL, for defendants.

I. William Spivey, II, Greenberg Traurig, P.A., Orlando, FL, for movant.

ORDER

ANTOON, District Judge.

Rabbi Joseph Konikov ("Plaintiff") has sued Orange County, Florida ("the County") and several members of the County's Code Enforcement Board ("the Individual Defendants"), alleging that his right to practice his religion has been violated by the County's enforcement of its land use code. Plaintiff contends that the code—both on its face and as applied against him—infringes on his federal and state constitutional rights and violates the provisions of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc to 2000cc–5, and Florida's Religious Freedom Restoration Act of 1998 ("Florida RFRA"), Sections 761.01–05, Florida Statutes.

This case is currently before the Court on the Defendants' Alternative Motion for Summary Judgment (Doc. 203). Defendants maintain that the provisions of the Orange County Code at issue are constitutionally sound both on their face and as applied. Defendants further assert that the Code and its application satisfy both RLUIPA and Florida RFRA, but that in the event they do not, these statutes are unconstitutional. [1] Having considered the parties' submissions and arguments, the Court agrees that Defendants' Alternative Motion for Summary Judgment must be granted as to all counts of the Complaint.

I. Background

It is undisputed that "Plaintiff holds sincere religious beliefs compelling him to share his religious message with other persons." (Statement of Facts Admitted, Joint Pretrial Statement, Doc. 235). Indeed, "Plaintiff's religious beliefs and mandates compel him to meet with other persons in order to share his religion," and "[i]n Plaintiff's religious tradition, a minimum of ten (10) persons over the age of thirteen must be able to pray together." (Statement of Facts Admitted, Joint Pretrial Statement, Doc. 235).

Plaintiff is the current owner of the real property at 6756 Tamarind Circle in Orlando, Florida ("the Property"). The Property, which is located in a residential neighborhood in the Sand Lake Hills Section Two subdivision ("the Subdivision"), consists of a quarter-acre lot and a single-family residence thereon. Plaintiff purchased the property on March 7, 2002, after having leased the Property and lived there as a tenant since at least July 31, ***1332** 2001. The Property and the Subdivision are in an "R–1A" zone under Chapter 38 (Zoning) of the Orange County Code ("OCC" or "the Code").

Chapter 38 of the Code provides that land and buildings shall be used only as permitted in the district where they are located. *See* OCC § 38–3(a). Uses fall into one of three categories: those that are permitted as of right, those that are permitted only if a special exception is obtained, and those that are prohibited altogether. *See* OCC § 38–74. The uses for each type of district are set forth in the "Use Table" contained in Section 38–77; criteria for special exceptions are contained in Section 38–78; and "Conditions for Permitted Uses and Special Exceptions" are codified in Section 38–79.

Use of land as a single-family home is a permitted use in an R–1A zone. However, use of land as a "religious organization" in an R–1A zone, like many other uses, is permitted only if a special exception is obtained. OCC § 38–77. Among the criteria for the granting of a special exception are that "[t]he use ... be similar and compatible with the surrounding area," that "[t]he use ... be consistent with the pattern of existing development," and that "[t]he use ... not act as a detrimental intrusion into an existing area." OCC § 38–78(4), (5), & (6). It is undisputed that Plaintiff never sought a special exception to operate a religious organization on the Property.

"Religious organization" is not defined in the OCC, but the list of definitions does include an entry for "religious Institution," providing, "Religious Institution shall mean a premises or site which is used primarily or exclusively for religious worship and related religious activities." OCC § 38–1. Religious organizations are permitted without the need for obtaining a special exception in six types of zones, and such organizations are allowed as special uses in all but six other types of zones. OCC § 38–77, Use Table, at 2843. While "religious organizations" and many other uses are allowed to operate in an R–1A zone if a special exception is obtained, hundreds of other specific uses are prohibited in R–1A zones; i.e., those uses are not allowed even by special exception. *See* Use Table, OCC § 38–77.

Sometime in 2000 or 2001, the Orange County Code Enforcement Division ("the Enforcement Division") began to receive complaints from residents of the Subdivision that religious services were being conducted at the Property and that traffic problems had resulted. (Ex. 1 to Doc. 205, at 26). The Enforcement Division conducted an investigation into these complaints.

On March 9, 2001, Officer George LaPorte of the Enforcement Division issued a Code Violation Notice to Plaintiff and the then-owners of the Property, Carl and Danae

Hall ("the Halls"). (Ex. 2 to Doc. 205, at 74). The notice stated that the Property was in violation because "operating a synagogue or any function related to synagogue and or church services is not a permitted use in residential zoned area." (Ex. 2 to Doc. 205, at 74). A hearing regarding that violation notice was scheduled for June 20, 2001; however, that hearing was cancelled. (*See* Joint Pretrial Statement, Statement of Admitted Facts ¶¶ 16–17).

Several months later, on February 4, 2002, Officer Edward Caneda of the Enforcement Division issued another Code Violation Notice to Plaintiff and the Halls. (Ex. 2 to Doc. 205, at 65). The notice described the violation as "Religious organization operating from a residential property without special exception approval." (Ex. 2 to Doc. 205, at 65). Plaintiff and the Halls were given seven days to bring the Property into compliance. (Ex. 2 to Doc. 205, at 65).

***1333** The County determined that the Property was not brought into compliance within the seven-day period, and on March 20, 2002, a hearing was held before the Code Enforcement Board during which evidence was presented and witnesses testified[2] (Ex. 1 to Doc. 205). Plaintiff was represented at the hearing by an attorney. (Ex. 1 to Doc. 205, at 2). Code Enforcement Officer Caneda described the code enforcement investigation and presented evidence obtained during that investigation. (Ex. 1 to Doc. 205, at 23–24).

The investigation began on or about July 13, 2001 and continued through March 19, 2002. (Ex. 1 to Doc. 205, at 72). The investigators did not check the Property every day during that time period; rather, they observed the Property on sixty-eight days and noted activity on forty-nine of those days. On the other nineteen visits, no activity was observed. (Ex. 1 to Doc. 205, at 25). The investigation included the taking of photographs at and near the Property and an activity study of the Property. The photographs revealed numerous vehicles parked near the Property, including on the grass toward the sidewalk rather than on the street. On the forty-nine days on which activity was noted, the Enforcement Division observed a total of 510 people enter the Property and 373 cars (other than Plaintiff's cars) parked at or near the Property from which people went to the Property. (Ex. 1 to Doc. 205, at 24). Caneda also submitted into evidence an activity report and information obtained from an Internet website regarding the services on the Property.[3] (Ex. 1 to Doc. ***1334** 205, at 25; Ex. 2 to Doc. 205, at 24–26; *see also* Ex. 1 to Doc. 205, at 36).

The Internet printout, which is from a website beginning with "www.jewishorlando.com," lists the address of Plaintiff's Property directly beneath a logo for the "Chabad of South Orlando," and Plaintiff is listed as "Rabbi Yosef Konikov, Director." (Ex. 2 to Doc. 205, at 24). In addition to the website printout, a brochure for the "Chabad of South Orlando" is contained in the written record that was before the Code Enforcement Board. (Ex. 2 to Doc. 205, at 29–29c). That brochure provides in part that the "Chabad's Services are open to all Jews." (Ex. 2 to Doc. 205, at 29a). The brochure lists times and places of services, some of which were to be held at a local school and a hotel. (Ex. 2 to Doc. 205, at 29b). Additionally, however, the brochure invites attendance at scheduled Shmini Atzeret and Simchat Torah services on Plaintiff's Property. (Ex. 2 to Doc. 205, at 29c). Brochure readers are advised in large print to call "Rabbi Yosef or Chani Konikov" for more information, and the phone number provided is the same as the one listed on the website. (Ex. 2 to Doc. 205, at 24, 29b).

Several of Plaintiff's neighbors also testified at the Code Enforcement Board hearing. Ted McDonald testified that the Subdivision consists of single-family dwellings and is not a commercial or business environment. (Ex. 1 to Doc. 205, at 35–36). McDonald stated that "[a] high traffic business is being run out of a single-family dwelling" and "[t]he business is being advertised on the internet." (Ex. 1 to Doc. 205, at 36). McDonald noted that according to the Internet, there were eleven scheduled meetings per week at the Property—including some type of meeting each day of the week—and eight additional "possible" meetings per week. (Ex. 1 to Doc. 205, at 57; Ex. 2 to Doc. 205, at 23).

McDonald also testified that there was a sign on the front door of the Property that stated, "[K]indly use the side entrance for the shul." (Ex. 1 to Doc. 205, at 37). A photograph of this sign was submitted into the record. (Ex. 2 to Doc. 205, at 27). The activities at the Plaintiff's Property and the resulting traffic had affected McDonald's peaceful enjoyment of his property, which he had owned for twenty-five years. (Ex. 1 to Doc. 205, at 38, 40). McDonald also presented "nearly 300 petitions" in support of enforcement of the ordinances. (Ex. 1 to Doc. 205, at 41).

Another neighbor, Peter Nee, testified that he walks, jogs, or bicycles in the neighborhood every day and that "it's getting to be a problem with a lot of the cars." (Ex. 1 to Doc. 205, at 46). Daniel Brads, who lives directly across the street from the Property, testified that he had replaced eight sprinkler heads

nearly four feet from the street, almost at the sidewalk. (Ex. 1 to Doc. 205, at 112). Brads spoke to Plaintiff about the sprinkler heads, but Plaintiff told Brads that Brads could not prove that the broken sprinkler heads were caused by vehicles related to the activities at the Property. (Ex. 1 to Doc. 205, at 111–12). Brads stated that "[t]he issue is the fact that those cars are getting on my property line" and "[t]he fact that they run over my sprinkler heads," cause damage, park in front of the fire hydrant, and double-park. (Ex. 1 to Doc. 205, at 113). Brads concluded by explaining, "I bought my house four years ago. I did not buy my house next to a chabad or a synagogue or anything else. I bought my house in a residential neighborhood four years ago. And now it's become changed. That's the issue." (Ex. 1 to Doc. 205, at 114).

Other witnesses testified in favor of Plaintiff. Jeffrey Lessel, who had been attending prayer services at the Property ***1335** for a year and a half prior to the hearing, testified that he did not know of anyone being ticketed for parking illegally during that time, nor had he noticed any adverse effects on the neighborhood from the prayer services. (Ex. 1 to Doc. 205, at 101–03). According to Lessel, fifteen or eighteen people prayed there on Friday night and twenty-five people prayed there on Saturday mornings. (Ex. 1 to Doc. 205, at 104). Occasionally there is a Bible study on Wednesday. (Ex. 1 to Doc. 205, at 104).

The affidavit of a neighbor, Edward Lerman, was read into the record at the hearing. (Ex. 1 to Doc. 205, at 58; Ex. 2 to Doc. 205, at 18). Lerman lives two houses down from Plaintiff and stated that he was "shocked" by the "unfounded claims" regarding "traffic and parking disruptions and ... noise from [Plaintiff's] home." (Ex. 2 to Doc. 205, at 18). Lerman had "never heard any noise or disruption coming from [Plaintiff's] home," that he had "never observed traffic problems or parking disruptions" during the prayer meetings, that his lawn had not been destroyed by parked cars, and that "[t]he cars parked in front of the [Plaintiff's] home are no different than any of the other cars parked in front of my other neighbor [sic] homes when they hold parties or other social gatherings." (Ex. 2 to Doc. 205, at 18).

In addition to these witnesses, several local religious leaders testified at the Code Enforcement Board hearing. Kevin Urichko, the pastor at Northland Community Church in Longwood, Florida, testified that his church has 7,000 worshipers on weekends and 200 small groups that meet in homes. (Ex. 1 to Doc. 205, at 50). Urichko's church has a website, and the individual homes that have prayer groups are listed on the website. (Ex. 1 to Doc. 205, at 52). Most of those home groups meet weekly. (Ex. 1 to Doc. 205, at 53). The most that the prayer groups get together is two or three times a week. (Ex. 1 to Doc. 205, at 53). The average number of people in a group is twelve, but some groups consist of as few as six or as many as thirty-five. (Ex. 1 to Doc. 205, at 54). In an affidavit that was read into the record at the hearing, another pastor of Northland Church stated that Northland Church has 200 home groups that meet weekly throughout central Florida. (Ex. 1 to Doc. 205, at 55; Ex. 2 to Doc. 205, at 9–10). [4]

Ken Bogel, associate pastor at Trinity Baptist Church in Apopka, testified that his church has a website that lists its weekly activities, including "some Bible studies and groups meeting in homes." (Ex. 1 to Doc. 205, at 105). The study groups meet once per week and consist of twenty-five to thirty people each. (Ex. 1 to Doc. 205, at 106). Bogel expressed concern about ambiguity in the ordinance and how frequently groups could permissibly meet. (Ex. 1 to Doc. 205, at 105–06). In an affidavit that was submitted into the record, Pastor Wayne Brooks of Metro Life Church stated that his church has 18 home groups that meet weekly throughout Central Florida, including 10 groups in Orange County. (Ex. 1 to Doc. 205, at 57; Ex. 2 to Doc. 205, at 15–16).

Rabbi Sholem Dubov testified that he is the executive director of the Chabad of Greater Orlando and the founder of Chabad Organizations of Central Florida. (Ex. 1 to Doc. 205, at 100). According to Rabbi Dubov, there are six such organizations, and Plaintiff "is one of our organizations." (Ex. 1 to Doc. 205, at 100).

***1336** After considering this evidence, on March 21, 2002 the Code Enforcement Board issued its "Findings of Fact, Conclusions of Law, and Order." (Ex. 2 to Doc. 205, at 4). Based on the record before it, the Code Enforcement Board concluded Plaintiff was operating a religious organization from a residential property without special exception approval and thus was in violation of Sections 38–3, 38–74, and 38–77 of the Orange County Code. (Ex. 2 to Doc. 205, at 4). The corrective action required by the Board was for Plaintiff to "[o]btain special exception approval or cease religious organization operations." (Ex. 2 to Doc. 205, at 4). Plaintiff did not take either of these actions, and eventually a per diem fine was imposed for Plaintiff's continued violation.

Shortly thereafter, Plaintiff filed this lawsuit against the County and four members of its Code Enforcement Board —Joel Hammock, Jim Powers, Robert Burns, and Robert High. (Doc. 1). In his Complaint, Plaintiff alleges nine counts: Count I—Violation of the Right to Free Exercise of Religion Under the United States and Florida Constitutions; Count II—Violation of the Right to Equal Protection Under the United States and Florida Constitutions; Count III—Violation of the Establishment Clause of the United States and Florida Constitutions; Count IV—Violation of Free Exercise of Religion Under RLUIPA; Count V—Violation of Free Exercise of Religion Under Florida RFRA; Count VI—Violation of Free Speech and Assembly Under the United States and Florida Constitutions; Count VII—Violation of Right to Privacy Under the United States and Florida Constitutions; Count VIII—Violation of Right to Due Process Under the United States and Florida Constitutions; and Count IX—Civil Conspiracy.

In their summary judgment motion (Doc. 203), Defendants seek entry of judgment in their favor on all nine counts. [5] The instant motion is the second summary judgment motion that Defendants have filed in this case. In response to Defendants' first motion (Doc. 125), Plaintiff argued that the Defendants had improperly relied on evidence—particularly, deposition transcripts—that the Code Enforcement Board did not have before it, and which did not exist, at the time of the hearing. (*See* Doc. 168 at 15). Defendants relented and filed their second motion (Doc. 203) without reference to evidence not considered by the Board. At oral argument the parties agreed that the second motion superseded the first motion and is the operative motion before the Court. [6] (*See* Tr. of Hr'g on Mot. for Summ. J., Doc. 223 at 95–96).

II. Discussion

A. Summary Judgment Standards

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the burden of establishing that no genuine issues of material fact remain. ***1337** *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In ruling on a motion for summary judgment, the Court construes the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). However, summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322, 106 S.Ct. 2548. Moreover, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson,* 477 U.S. at 249, 106 S.Ct. 2505.

B. The Merits of Defendants' Motion

1. Free Exercise (Count I)

[1] In Count I of the Complaint, Plaintiff alleges that the Orange County zoning provisions on their face and as applied against him violate his right to the free exercise of his religion under the First Amendment to the United States Constitution [7] and Article I, Section 3 of the Florida Constitution. [8] However, Plaintiff's claim is not well-founded. The Orange County zoning ordinances comprise a valid system of land use regulation that does not infringe on Plaintiff's constitutional rights.

Over the years, the principles applicable to free exercise challenges have evolved in United States Supreme Court jurisprudence. In *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), the Court held that South Carolina could not apply its unemployment compensation statute in a manner that excluded a worker from eligibility based on her religion-based objection to working on Saturday. The Court found that the disqualification from benefits burdened the free exercise of the worker's religion and that no compelling state interest justified the infringement of the worker's free exercise rights. In *Wisconsin v. Yoder,* 406 U.S. 205, 214, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), the Court again applied a rigid standard in the free exercise context, speaking of the necessity of "a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."

Eighteen years later, the Supreme Court decided *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990),

revisiting the principles espoused in *Sherbert.* At issue in *Smith* was whether two Native Americans who were fired from their jobs for ingesting peyote for sacramental purposes at a religious ceremony were entitled to unemployment benefits. The Court found that Oregon did not violate the Free Exercise Clause by denying benefits to the workers, noting that the Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." 494 U.S. at 878–79, 110 S.Ct. 1595. In declining to apply the *Sherbert* "compelling interest" test to generally applicable laws like the one at issue in ***1338** *Smith,* the Court noted that "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' " *Id.* at 885, 110 S.Ct. 1595 (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 451, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988)). Thus, in *Smith,* the Supreme Court limited the types of cases in which strict scrutiny would be applied.

Three years after *Smith,* the Court decided *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) ("*Lukumi*"). In *Lukumi,* the Court addressed the constitutionality of city ordinances that prohibited animal sacrifices for ritual purposes. In finding the ordinances unconstitutional, the Court concluded that the laws were not neutral and had been passed specifically for the purpose of stopping certain activities of one religious group; thus, the laws did not satisfy *Smith.* The facts of *Lukumi* were quite extreme—the evidence was overwhelming that in enacting the ordinances the City had intentionally targeted the practices of one religion throughout the City; zoning was not involved. The ordinances at issue plainly "regulate[d] or prohibit[ed] conduct because it [wa]s undertaken for religious reasons." *Id.* at 532, 113 S.Ct. 2217.

The Court stated that "[a]lthough a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id.* at 533, 113 S.Ct. 2217 (citations omitted). Finding that the ordinances at issue were not laws of "general applicability" like the one at issue in *Smith,* the *Lukumi* Court nevertheless declined to "define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights." *Id.* at 543, 113 S.Ct. 2217. The Court held that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny[,] ... must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Id.* at 546, 113 S.Ct. 2217. The Court recognized that "[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Id.* The *Lukumi* Court thus clarified that notwithstanding *Smith's* holding regarding laws of general applicability, laws that are not generally applicable and which burden the practice of religion are still subject to strict scrutiny.

Although courts have wrestled with the issue of how to apply *Smith* and *Lukumi*—particularly in the context of zoning—this Court is assisted by controlling precedent that dictates the proper course to be taken in this case. Even before the *Smith* Court had refined the standards of *Sherbert,* the Eleventh Circuit had decided *Grosz v. City of Miami Beach,* 721 F.2d 729 (11th Cir.1983), a decision which remains the law of this circuit and which governs the resolution of Plaintiff's free exercise claim.

The facts of *Grosz* are strikingly similar to those of the instant case. The plaintiffs lived in a single-family residence in the City of Miami Beach in an "RS–4" zone—a zone for single-family residential use. A Miami Beach ordinance had been construed by the City to prohibit churches, ***1339** synagogues, and similarly organized religious congregations in RS–4 zones. One of the plaintiffs was "a Rabbi and the leader of an orthodox Jewish sect." *Id.* at 731. His religion required him "to conduct religious services twice daily in a congregation of at least ten adult males." *Id.* One of the plaintiffs "ha[d] referred to the congregation as a shul, and a witness, who is a neighbor of plaintiffs, has testified that persons have come to her house asking for directions to the 'Grosz shul.' " *Id.* at 731–32.

The Groszes held religious services in their home at least twice each day. *Id.* at 732. Although the services "usually cause[d] no substantial disturbance to the neighborhood, ... well-attended services have disturbed neighbors as a result of persons seeking directions to the Grosz shul, as a result of chanting and singing during the services, and as a result of the occasionally large congregations of worshippers at the

property." *Id.* The Groszes were given a "notice of violation" of the zoning ordinance by the City. "The City did not and would not prosecute plaintiffs for praying in their home with ten friends, neighbors, and relatives, even on a regular basis." *Id.* However, the notice of violation "was issued because of the City's view that [the Groszes'] twice daily performance of religious ceremonies on their property conflict[ed] with [the] use restrictions [in the ordinance]. This conclusion stems from the City's position that religious ceremonies conducted on the Grosz property occasionally constitute[d] organized, publicly attended religious services." *Id.* (footnote omitted). Churches, synagogues, and other religious institutions were permitted to operate in all other zoning districts except the RS–4 district, and at least half of the City's area was zoned such that religious uses were permitted. *Id.* Thus, it was possible for the plaintiffs to conduct the services "in many other areas within the City of Miami Beach, including an area within four blocks of their home." *Id.* at 731.

The Groszes brought suit in federal district court, contending that the ordinance was facially unconstitutional as overbroad and vague, as well as unconstitutional as applied against them. On cross-motions for summary judgment, the district court found the ordinance facially constitutional but that it was unconstitutional as applied to the Groszes because it burdened their free religious exercise and the City's interest in enforcement of its zoning laws was not "a compelling state interest." *Id.* at 733.

The Eleventh Circuit reversed, concluding that the zoning ordinance did not violate free exercise. The court began by noting that the Miami Beach ordinance passed two threshold tests—it regulated conduct rather than beliefs, and it had both a secular purpose and effect. The court then proceeded to balance the interests of the government against the plaintiffs' religious interests, noting that "the balance depends upon the cost to the government of altering its activity to allow the religious practice to continue unimpeded versus the cost to the religious interest imposed by the government activity. This principle marks the path of least impairment of constitutional values." *Id.* at 734.

The Eleventh Circuit discussed the burden on the government:

> The City of Miami Beach asserts a governmental interest in enforcing its zoning laws so as to preserve the residential quality of its RS–4 zones. By so doing the City protects the zones' inhabitants from problems of traffic, noise and litter, avoids spot zoning, and preserves a coherent land use zoning plan. The Supreme Court has acknowledged the importance of zoning objectives, stating that segregation of residential from nonresidential neighborhoods "will increase the safety and security of home life, ***1340** greatly tend to prevent street accidents, especially to children by reducing traffic and resulting confusion, ... decrease noise ... [and] preserve a more favorable environment in which to raise children." **The City asserts a significant governmental objective in the case at bar**.
>
> Gatherings for organized religious services produce, as do other substantial gatherings of people, crowds, noise and disturbance. In fact, the parties' stipulations reveal that the City was acting pursuant to neighbors' complaints to end the disturbance caused by Appellees' conduct. Given this total inconsistency between the accomplishment of the City's policy objectives and the continuance of Appellees' conduct, **the government action in this case easily passes the least restrictive means test**.
>
> Doctrine also requires that we consider the impact of a religious based exemption to zoning enforcement. In that regard we find that granting an exception would defeat City zoning policy in all neighborhoods where that exception was asserted. Maintenance of the residential quality of a neighborhood requires zoning law enforcement whenever that quality is threatened. Moreover, no principled way exists to limit an exception's costs just to the harm it would create in this case. Crowds of 500 would be as permissible as crowds of 50. Problems of administering the exception such as distinguishing valid religious claims from feigned ones, therefore, need not even be considered. A religion based exception would clearly and substantially impair the City's policy objectives. **Together, the important objectives underlying zoning and the degree of infringement of those objectives caused by allowing the religious conduct to continue place a heavy weight on the government's side of the balancing scale**.

Id. at 738–39 (emphasis added) (citations omitted). [9]

Turning to the burden on the Groszes' religious interests, the Eleventh Circuit noted that Naftali Grosz's religion "requires him to conduct religious services twice daily in the company of at least ten adult males." *Id.* at 739. Although the court found that the solicitation of persons to attend the services and participation of groups larger than ten were "not integral to [Grosz's] faith," the court assumed "that the nonessential practices further the religious conduct [and] ... that [the

Groszes] suffer some degree of burden on their free exercise rights." *Id.*

In measuring the degree of the Groszes' burden, the Eleventh Circuit noted that the city had not prohibited religious conduct but instead "prohibit[ed] acts in furtherance of this conduct in certain geographical areas." *Id.* at 739. Indeed, ***1341** "publicly attended religious activities" were permitted in all but the RS–4 single family zoning districts. *Id.* The court thus concluded that the Groszes could "conduct the required services in suitably zoned areas, either by securing another site away from their current house or by making their home elsewhere in the city" and that "[i]n comparison to the religious infringements analyzed in previous free exercise cases the burden here stands towards the lower end of the spectrum." *Id.*

In assessing the "final balance" between the government interest and the religious interest at issue, the *Grosz* court concluded that in light of "the substantial infringement of the City's zoning policy that would occur were the [Groszes'] conduct allowed to continue ... the burden upon government to allow [the Groszes'] conduct outweighs the burden upon the [Groszes'] free exercise interest." *Id.* at 741. Thus, the Eleventh Circuit determined that the city was entitled to enforce its zoning ordinance notwithstanding the limitations the ordinance imposed on the Groszes' religious activities.

Grosz is indistinguishable from the instant case and is therefore controlling. Like the City of Miami Beach, Orange County has a legitimate interest in enacting and enforcing its zoning laws, [10] and like the burden on the Groszes' interest, the incidental burden on Plaintiff's religious exercise is not sufficient to outweigh these important government interests. Under this binding Eleventh Circuit precedent, the Orange County zoning scheme simply does not violate Plaintiff's free exercise rights either on its face or as applied. [11]

Plaintiff argues that the *Grosz* court did not apply the strict scrutiny required here. ***1342** Under such an analysis, a government action that substantially burdens religious exercise is permissible only where that action furthers a compelling government interest through the least restrictive means. However, it is far from clear that in *Grosz* the Eleventh Circuit did not in essence apply such scrutiny. Although the court did not use the term "strict scrutiny" in its opinion, it specifically stated that the burden on the Groszes "stands toward the lower end of the spectrum," that the city's zoning scheme served a "significant governmental objective," and that "the government action in this case easily passes the least restrictive means test," 721 F.2d at 738–39. Notably, the *Grosz* district court had determined that the city's interest was not a "compelling interest," and the appellate court's reversal of the district court's ultimate finding of a free exercise violation means that either the standard or the application of that standard was not correct; either way, in light of the holding of *Grosz,* any difference between the Eleventh Circuit's analysis in *Grosz* and the strict scrutiny analysis urged by Plaintiff is of no consequence. It is important to note that although *Grosz* was decided before *Lukumi,* it was decided at a time when strict scrutiny was the prevailing standard for free exercise claims in non-zoning contexts. And, significantly, the Eleventh Circuit has since reaffirmed *Grosz's* validity and has expressly rejected the argument that it was overruled by *Lukumi*. In *First Assembly of God of Naples, Florida, Inc. v. Collier County,* 20 F.3d 419, 423 n. 4 (11th Cir.1994), the court specifically stated: "First Assembly argues that *Grosz* can no longer be considered good law because the district court relied on *Grosz* in deciding [*Lukumi*] and was reversed. We disagree. The Supreme Court [in *Lukumi*] reversed the application of *Grosz,* not the holding of *Grosz* itself or the reasoning behind it. Therefore, the *Grosz* case, correctly applied, still has precedential value in this circuit." (Citations omitted). Thus, regardless of how the *Grosz* analysis is characterized, *Grosz* is binding on this court notwithstanding *Lukumi* and is factually indistinguishable, and Plaintiff's complaints that in *Grosz* the Eleventh Circuit employed the "wrong" analysis are unavailing.

In any event, Plaintiff's claim that the zoning ordinance or the Defendants' enforcement thereof violated the Free Exercise Clause would fail under a "straight" strict scrutiny analysis because Plaintiff has not presented evidence that the ordinance substantially burdens the free exercise of his religion. First, Plaintiff did not even bother to apply for a special exception from the zoning restrictions as allowed by the ordinance. The mere requirement that one apply for a special exception from an ordinance restricting the use of property is not a substantial burden. In *Hale O Kaula Church v. Maui Planning Comm'n,* 229 F.Supp.2d 1056, 1074 (D.Haw.2002), the district court concluded that strict scrutiny was the pertinent test to apply to a dispute involving a church's right to operate in an agricultural zone but determined that it was premature to apply that standard because the church had not submitted an application for permission to hold church services on the property. A similar result was reached by the Supreme Court of Washington in a case in which it held that a church must exhaust its administrative remedies, including

applying for a conditional use permit, and that the church could not merely predict that it would be denied such a permit. *Open Door Baptist Church v. Clark County,* 140 Wash.2d 143, 995 P.2d 33, 42 (2000).

Had Plaintiff applied for and been denied a special use permit, the denial of that permit would not constitute a substantial ***1343** burden on his religious exercise. The facts here are indistinguishable from those of *Grosz,* where the Eleventh Circuit "assumed some degree of burden" due to the zoning restriction but ultimately determined that the burden on free exercise was "towards the lower end of the spectrum." 721 F.2d at 739; *see also Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston,* 250 F.Supp.2d 961, 986 (N.D.Ill.2003) ("The City asserts that the Ordinance restricts nothing more than the *location* of religious practice and conduct and therefore does not substantially burden Vineyard's free *exercise* of religion. There is substantial case law which supports the City's proposition.") (emphasis in original). [12]

Moreover, had Plaintiff established the existence of substantial burden, the County has in turn satisfied its burden on the compelling interest and least restrictive means prongs of strict scrutiny. In *Grosz,* the Eleventh Circuit noted that Miami Beach had asserted a "significant governmental objective," 721 F.2d at 738, and rejected the district court's ultimate finding of a free exercise violation, which was based in part on the district court's conclusion that the government interest was not "compelling," 721 F.2d at 733. A government's interest in zoning is indeed compelling. *See Murphy v. Zoning Comm'n of the Town of New Milford,* 289 F.Supp.2d 87, 108–09 (D.Conn.2003) (finding that zoning commission had established "a compelling interest in 'enforcing the town's zoning regulations and ensuring the safety of residential neighborhoods' ') (quoting its prior preliminary injunction order); *First Baptist Church of Perrine v. Miami–Dade County,* 768 So.2d 1114, 1117 (Fla. 3d DCA 2000) ("[E]ven assuming that the Church has demonstrated a substantial burden on its free exercise of religion, the County clearly has a compelling interest in enacting and enforcing fair and reasonable zoning regulations.") (citation omitted); *cf. Elsinore Christian Ctr. v. City of Lake Elsinore,* 291 F.Supp.2d 1083, 1093–95 (C.D.Cal.2003) (noting that "concerns regarding the vitality of city life are of paramount importance in land use planning" and "assuming, without deciding, that curbing urban blight is a 'compelling interest' "). And, in *Grosz,* the Eleventh Circuit found that "[g]iven [the] total inconsistency between the accomplishment of the City's policy objectives and the continuance of Appellees' conduct, the government action in this case easily passes the least restrictive means test." 721 F.2d at 738. Thus, the Orange County zoning scheme survives strict scrutiny.

In sum, *Grosz* is controlling here, and no matter what test is applied, the Orange County zoning scheme is constitutionally sound and does not violate the Free Exercise Clause of the United States or Florida constitutions. Thus, Defendants are entitled to summary judgment on Count I.

2. RLUIPA (Count IV)

[2] In Count IV, Plaintiff alleges that the Orange County zoning laws violate the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc to cc–5. Defendants, however, contend that Plaintiff cannot establish that the Defendants have violated ***1344** RLUIPA, and in the alternative, they maintain that RLUIPA is unconstitutional.

RLUIPA was enacted in 2000, three years after the United States Supreme Court in *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), held a broader religious protection statute, the Religious Freedom Restoration Act of 1993 ("federal RFRA"), unconstitutional as beyond the scope of Congress's enforcement power under Section 5 of the Fourteenth Amendment. RLUIPA provides in pertinent part that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution ... is in furtherance of a compelling governmental interest ... and is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1). Under RLUIPA, the plaintiff bears the burden of persuasion on the issue of whether a governmental action imposes a substantial burden on religious exercise, but the government bears the burden as to "compelling interest" and "least restrictive means." 42 U.S.C. § 2000cc–2(b).

Defendants assert that Plaintiff has not demonstrated that his religious exercise has been substantially burdened by the requirement of the ordinance that Plaintiff seek a special exception. Defendants maintain that even if Plaintiff had presented evidence of such a substantial burden, the ordinance and the enforcement thereof do further a compelling government interest through the least restrictive means. As

discussed in connection with Count I above, the Defendants are correct on all of these points.

As was the case with respect to Plaintiff's free exercise claim in Count I, Plaintiff has not established that his religious exercise has been substantially burdened, and the same result obtains under RLUIPA. Although RLUIPA does not define "substantial burden," it does provide as part of its definition of "religious exercise" that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. § 2000cc–5(7)(B). This broad definition of "religious exercise" does not, however, render the denial of a special exception under a zoning code a "substantial burden" on religious exercise.

As the Seventh Circuit recently held in *Civil Liberties for Urban Believers v. City of Chicago,* 342 F.3d 752, 761 (7th Cir.2003):

> Application of the substantial burden provision to a regulation inhibiting or constraining *any* religious exercise, including the use of property for religious purposes, would render meaningless the word "substantial," because the slightest obstacle to religious exercise incidental to the regulation of land use—however minor the burden it were to impose—could then constitute a burden sufficient to trigger RLUIPA's requirement that the regulation advance a compelling governmental interest by the least restrictive means. We therefore hold that, in the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable.

***1345** (Emphasis in original). The *Civil Liberties* court went on to emphasize that while the procedural requirements of a special exception scheme, as well as scarcity of available land, "may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city, they do not render impracticable the use of real property in [the city] for religious exercise, much less discourage churches from locating or attempting to locate in [the city]." *Id.* Additionally, the mere fact that zoning provisions might make religious exercise more expensive does not amount to a substantial burden under RLUIPA; "[o]therwise, compliance with RLUIPA would require municipal governments not merely to treat religious land uses on an equal footing with nonreligious land uses, but rather to favor them in the form of an outright exemption from land-use regulations. Unfortunately for Appellants, no such free pass for religious land uses masquerades among the ... protections RLUIPA affords to religious exercise." *Id.* at 762; *see also Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston,* 250 F.Supp.2d 961, 991 (N.D.Ill.2003) ("Vineyard's claim under Section (a)(1) of the RLUIPA fails, however, for the same reasons its free exercise claim failed. The history of the statute demonstrates that Congress did not intend to change traditional Supreme Court jurisprudence on the definition of substantial burden."); 146 Cong. Rec. S7774–01, S7776 ("The Act does not include a definition of the term 'substantial burden' because it is not the intent of this Act to create a new standard for the definition of 'substantial burden' on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence.... The term 'substantial burden' as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden."). [13] Thus, because Plaintiff has not established a substantial burden on free exercise, his RLUIPA claim fails.

Assuming Plaintiff had established that he had been substantially burdened, under RLUIPA the County would then have to show that the zoning scheme serves a compelling interest though the least restrictive means. Because the County has made these showings as noted above, Plaintiff's RLUIPA claim would fail at this later stage of analysis as well.

The conclusion that no violation of RLUIPA has been established on the facts of the instant case is also consistent

with the text of RLUIPA as a whole and the statute's legislative history. For example, in addition to its "substantial burdens" provisions RLUIPA also proscribes "impos[ition] or implement[ation of] a land use regulation that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). The Orange County zoning scheme treats nonreligious assemblies and religious assemblies alike—no place of assembly is permitted as of right in an R–1A zone—and thus, this provision has been satisfied. Additionally, RLUIPA bars governments from "impos[ing] or implement[ing] a land use regulation that—(A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 2000cc(b)(3). This provision suggests that Congress contemplated that ***1346** religious assemblies could be reasonably limited within a jurisdiction, as Orange County has done through its zoning scheme, and religious assemblies clearly are not totally excluded from Orange County.

The legislative history of the statute also reflects that although Congress was concerned with discrimination against religious organizations, it did not intend to relieve such organizations from zoning ordinances or from special permit requirements. A joint statement issued by the sponsors of the legislation, Senators Orrin Hatch and Ted Kennedy, specifically explains that "[t]his Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay." 146 Cong. Rec. S7774–01, at *S7776. Clearly, it was not the intent of Congress to force municipalities to allow their residents to operate a religious institution in a residential subdivision.

In light of the Court's conclusion that no RLUIPA violation has been established, the Court need not reach the question of RLUIPA's constitutionality. It is " '[a] fundamental and long-standing principle of judicial restraint ... that courts avoid reaching constitutional questions in advance of the necessity of deciding them.' " *See, e.g., Elsinore Christian Center v. City of Lake Elsinore,* 291 F.Supp.2d 1083, 1087–88 (C.D.Cal.2003) (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 445, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988)).

3. Florida RFRA (Count V)

In Count V, Plaintiff asserts that the zoning laws violate Florida's Religious Freedom Restoration Act ("Florida RFRA"), Sections 761.01–.05, Florida Statutes. Defendants make the same arguments as to Florida RFRA as they do with regard to RLUIPA—that it has not been violated and that it is unconstitutional.

Florida RFRA was enacted in 1998, one year after the Supreme Court decided *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), holding federal RFRA unconstitutional. Like RLUIPA, Florida RFRA provides that the "government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (a) [i]s in furtherance of a compelling governmental interest; and (b) [i]s the least restrictive means of furthering that compelling governmental interest." § 761.03(1), Fla. Stat. As discussed earlier in connection with the Free Exercise and RLUIPA counts, Plaintiff has not established a claim under these standards. *See also First Baptist Church of Perrine v. Miami–Dade County,* 768 So.2d 1114, 1117 (Fla. 3d DCA 2000) (rejecting Florida RFRA claim, noting that "the burden on the County of altering the enforcement of its zoning ordinances to accommodate the Church's requests would be much greater than any burden placed on the Church's religious activity by requiring that it comply with the Zoning Board's decision" and that "even assuming that the Church has demonstrated a substantial burden ..., the County clearly has a compelling interest in enacting and enforcing fair and reasonable zoning regulations") (citation omitted). Hence, Plaintiff has not presented evidence supporting a claim under Florida RFRA, and the Court need not reach the issue of the constitutionality of Florida RFRA.

4. Equal Protection (Count II)

[3] Plaintiff alleges in Count II that the zoning laws, both on their face and as ***1347** applied to him, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution [14] and Article I, Section 2 of the Florida Constitution. [15] The essence of equal protection is "that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

Plaintiff argues that the OCC zoning provisions on their face violate equal protection because they treat religious uses of property differently from similar secular uses. Specifically, Plaintiff contends that three secular uses—

model homes, home-based occupations, and day care centers —are allowed in R–1A zones even though they are "commercial activity." (*See* Doc. 168 at 7). Plaintiff asserts that the allowance of these three uses as permitted uses—without the need for a special exception—in R–1A zones violates the Equal Protection Clause.

The OCC does allow model homes as a permitted use in R–1A zones, (*see* OCC § 38–77, Use Table, at 2826), and it provides a condition on them: "Model homes ... shall only be [permitted] in conjunction with an approved preliminary subdivision plan." (OCC § 38–79(125); *see also* OCC § 38–77, Use Table, at 2826 (listing this condition on model homes in use table)). Although Plaintiff contends that the allowance of model homes as a permitted use in R–1A zones violates equal protection, model homes are different in character from religious institutions. Model homes are designed to facilitate sales of residences in the neighborhood and are temporary in nature. Although model homes would, for a time, bring traffic and visitors into a neighborhood, once the homes are sold the traffic would cease. The people who live in such a neighborhood likely had visited the model home before they bought their own homes in that neighborhood, were aware of the presence of the model home, and have no colorable basis to complain about its presence in their neighborhood. They are on notice of such traffic when they purchase in that neighborhood, and they can anticipate that when the area has been bought out that traffic will cease. By contrast, people who purchase a home in a residential area would not expect to have to deal with traffic from a religious institution in their neighborhood indefinitely. Model homes simply are not analogous to religious institutions or to nonreligious places of assembly. The difference between these types of uses lies in part in the reasonable expectations of residents, and the allowance of model homes in R–1A zones does not violate equal protection.

"Home occupations" are also allowed as a permitted use in R–1A zones. (*See* OCC § 38–77, Use Table, at 2825). The OCC defines "home occupation" as follows:

> *Home occupation* shall mean any use conducted entirely within a dwelling or accessory building and carried on by an occupant thereof, which use is clearly incidental and secondary to the use of the dwelling for dwelling purposes and ***1348** does not change the character thereof; and provided, that all of the following conditions are met:
>
> > Only such commodities as are made on the premises may be sold on the premises. However, all such sales of home occupation work or products shall be conducted within a building and there shall be no outdoor display of merchandise or products, nor shall there be any display visible from outside the building. No person shall be engaged in any such home occupation other than two (2) members of the immediate family residing on the premises. No mechanical equipment shall be used or stored on the premises in connection with the home occupation, except such that is normally used for purely domestic or household purposes. Not over twenty-five (25) percent of the floor area of any one (1) story shall be used for home occupation purposes. Fabrication of articles such as commonly classified under the terms "arts and handicrafts" may be deemed a home occupation, subject to the other terms and conditions of this definition. Home occupations shall not be construed to include barber shops, beauty parlors, plant nurseries, tearooms, food processing, restaurants, sale of antiques, commercial kennels, real estate offices, or insurance offices.

OCC § 38–1, at 2810.1 (emphasis in original). This definition of "home occupation" is very limited and minimizes the chances of parking or traffic problems resulting therefrom. Occupations likely to draw patrons into the residential area are not within the definition; instead, "home occupations" are those that involve activity of an occupant of the home, within the home. Allowance of such a use is consistent with the residential character of the R–1A zone and is not likely to disrupt neighbors, and Plaintiff's equal protection challenge based on this permitted use also fails.

The final "commercial activity" upon which Plaintiff relies in his facial Equal Protection challenge is "daycare." Although Plaintiff uses only the word "daycare" in his memorandum (*See* Doc. 168 at 7), not all types of "daycare" facilities are allowed as of right in R–1A zones. "Family day care homes" are permitted (*see* OCC § 38–77, Use Table at 2826), but "day care centers" require a special exception (*see* OCC § 38–77, Use Table at 2843), as do "Adult/child day care homes" and "adult/child day care centers" (*see* OCC § 38–77, Use Table at 2826). The "family day care homes" that are permitted without a special exception in an R–1A zone are defined in the Code as follows:

> Family day care home, as defined in [Florida Statute] § 402.302(5), shall mean a residence in which child

> care is regularly provided for no more than ten (10) children. This shall include a maximum number of five (5) preschool children plus the elementary school siblings of the preschool children including the caregiver's own.

OCC § 38–1, at 2810. This is a very limited definition and one that plainly is designed to minimize traffic; a maximum of five outside families would employ the services of such a center, and hence a maximum of five cars would be brought into the neighborhood for drop-off and pick-up.

By contrast, a "day care center"—which, like a religious organization, requires a special exception to operate in an R–1A zone—is defined as "a structure in which the owner or operator, for compensation, provides supervision and temporary care for more than ten (10) persons, who are not related by blood or marriage and not the legal wards or foster children of the owner or operator." OCC § 38–1, at 2808. Additionally, in order for a "day care center" ***1349** to operate within an R–1A zone even with a special exception, "permanent parking" must be provided for its patrons. OCC § 38–79(26)c.1.; OCC § 38–1476(a); OCC § 38–77, Use Table, at 2843 (providing for conditions on day care centers in R–1A zones). The permanent parking required for such centers consists of "1 space for each 10 children, plus a pickup and dropoff area equal to 1 space for each 10 children." OCC § 38–1476(a). The differences between "family day care homes," which are permitted in R–1A zones, and "day care centers," which, like religious organizations, require a special exception to operate in such zones, are obvious.

In sum, none of the three secular uses identified by Plaintiff is similar to a "religious organization" use for an R–1A zone. Like other places of assembly that would likely result in traffic and congestion, religious organizations are not permitted as a matter of right in such zones. Moreover, there are hundreds of other uses that are not allowed in an R–1A zone even with a special exception. Thus, Plaintiff's facial Equal Protection challenge fails.

[4] Plaintiff also argues that the OCC violates equal protection as it has been applied against him because other, similarly situated persons have received more favorable treatment. "[I]n order to maintain an equal protection claim with any significance independent of the free exercise count which has already been raised. [Plaintiff] must also allege and prove that [he] received different treatment from other similarly situated individuals or groups." *Brown v. Borough of Mahaffey,* 35 F.3d 846, 850 (3d Cir.1994). Plaintiff has failed to do so.

Plaintiff contends that other religious groups received more favorable treatment because they have been permitted to meet in residences without being cited. However, the evidence presented before the Board regarding Bible study groups showed that those groups were not similarly situated to Plaintiff. First, those groups met once a week. Although one pastor did make a vague statement at the hearing that his church's prayer groups meet at most 2–3 times per week (Ex. 1 to Doc. 205, at 53), no evidence was presented that any other group met with a frequency similar to that of the assemblies occurring at Plaintiff's property. Additionally, aside from the difference in frequency, the overwhelming evidence regarding the advertising, signage, and the manner in which Plaintiff's property was held out to the public distinguish it from the once-a-week in-home Bible study groups. Thus, Plaintiff has not presented evidence that, based on what was presented at the Code Enforcement Board hearing, the Defendants treated him less favorably than they treated similarly situated persons.

On his as-applied equal protection challenge, Plaintiff urges this Court to consider evidence that was not before the Code Enforcement Board. As noted earlier, in their first summary judgment motion Defendants had relied on this type of evidence and Plaintiff objected, contending that the only evidence germane to the as-applied challenge [16] is that evidence presented to and considered by the Code Enforcement Board. Defendants agreed and modified their argument accordingly. Notwithstanding Plaintiff's assertions, to which the Defendants have now acquiesced, that the only relevant evidence before this Court is the evidence that was before the Board at the March 2002 hearing, ***1350** as to his as-applied equal protection claim Plaintiff now contends that the Court should consider facts that arose after that hearing. Defendants maintain that this evidence should not be considered. Plaintiff's as-applied challenge fails whether this evidence is considered or not, but this evidence upon which Plaintiff so heavily relies will briefly be discussed.

Plaintiff contends that the Defendants treated Paul Bosch, another county resident who has a regular prayer group in his home, more favorably. However, it is clear that Bosch and Plaintiff are not similarly situated. In his December 2002

deposition, Bosch testified that he is a member of Bay Hill Baptist Church ("Bay Hill"). (Dep. of Paul Bosch, Ex. 16 to Doc. 125, at 10). Bay Hill does not have a sanctuary, but its congregation meets for Sunday services at an elementary school. (Ex. 16 to Doc. 125, at 10). On Wednesday evenings, a youth fellowship group meets at Bosch's home. (Ex. 16 to Doc. 125, at 11). Although the youth fellowship group is listed on Bay Hill's website, it does not list Bosch's residence as the location for the group or mention the Wednesday night meetings specifically; those interested in the fellowship group are directed to the main Bay Hill telephone number for further information. (Ex. 16 to Doc. 125, at 12–14).

In addition to the Wednesday night youth fellowship meetings at Bosch's home, Bay Hill has three or four youth-related Bible studies and four or five adult Bible study groups that are conducted in other members' homes once a week. (Ex. 16 to Doc. 125, at 15–17). None of Bay Hill's in-home groups have met or intend to meet more frequently than once a week. (Ex. 16 to Doc. 125, at 140). Other than the youth meetings at Bosch's house on Wednesdays, Bosch stated that he and his wife "constantly have youth at our house," meaning that "[y]outh come to our house to visit with my sons ... or to watch TV," and while they are there Bosch talks to them and sometimes they pray. (Ex. 16 to Doc. 125, at 36). Additionally, Mrs. Bosch formerly hosted a women's Bible study group in the home on Thursday evenings; those meetings occurred during the same time period that Bosch was having the Wednesday night meetings. (Ex. 16 to Doc. 125, at 38). The Bay Hill bulletin lists Bosch and his wife as "Youth Leaders," and the bulletin contains a listing of "Weekday [small group] Opportunities—7 pm" which includes "Wednesday—'Youth Gathering' (Bosch's home)." (Ex. 2A to Bosch Dep.). Additionally, at one time the in-home Bosch Bible study was listed in the "community bulletin board" section of a local community newspaper, although Bosch was not sure who provided the information to the newspaper. (Ex. 16 to Doc. 125, at 70–71).

On May 2, 2002, Code Enforcement Officer George LaPorte wrote the Bosches a letter advising them that a code violation had been observed at their property. (Ex. 2D to Bosch. Dep.; Ex. 16 to Doc. 125, at 45). Someone had made a complaint that there were a lot of cars parked on the street, and Bosch look steps to alleviate that problem by having people park in his driveway and by making arrangements with neighbors for people to be able to park in the neighbors' driveways. (Ex. 16 to Doc. 125, at 52–55). After receiving the letter from LaPorte, Bosch did not stop having the Bible study in his home on Wednesdays, nor did he apply for a variance. (Ex. 16 to Doc. 125, at 68–69). However, Bosch did make "a conscious effort not to have the cars parked on the street for the Wednesday night service." (Ex. 16 to Doc. 125, at 139).

On June 21, 2002, the manager of the County's Code Enforcement Division sent the Bosches a letter informing them that "[a] re-inspection [of their property] took ***1351** place on or about May 14, 2002, and a determination was made not to proceed with the violation." (Ex. 2B to Bosch Dep., at 1). The letter stated that the division's determination had been based on (1) the fact that the parking problems had been resolved and (2) the division's conclusion that Bosch was not "operating a 'religious institution' as that term is used in [the] zoning regulations." (Ex. 2B to Bosch Dep., at 1). The June 21 letter included a nonexclusive list of fourteen factors that the division considers in determining whether a homeowner is operating a religious institution. (Ex. 2B to Bosch. Dep., at 1–2). Among the fourteen factors are: the frequency of the activity; whether the leaders of the activity hold themselves out to be religious clergy; whether the property is held out to the public as a church, synagogue, or other place of worship; and whether the property is the primary site of worship for the participants. (Ex. 2B to Bosch. Dep., at 1–2).

This evidence does not support Plaintiff's as-applied equal protection claim. Although Plaintiff contends that "[i]n addition to the Bosch home, numerous people associated with Bay Hill Baptist Church utilize their homes in Orange County for religious activities once or more per week on a regular and ongoing basis," (Doc. 168 at 7), the evidence upon which Plaintiff relies shows that the activities in other homes occur at most once per week—not more. The activities at Plaintiff's home occurred much more often than once per week, and the difference in frequency is very significant. Moreover, Bosch's testimony reflects significant differences in the manner in which the Bosch property, and Bosch himself, were held out to the public. Thus, Plaintiff and Bosch are not similarly situated, and even considering the evidence relied upon by Plaintiff regarding Bosch, there is no evidentiary support for Plaintiff's as-applied Equal Protection claim. Defendants are entitled to summary judgment on Count II.

5. Establishment Clause (Count III)

[5] In Count III, Plaintiff alleges that the zoning laws violate the Establishment Clause of the First Amendment of the United States Constitution [17] and Article I, Section 3 of the

Florida Constitution.[18] In order to satisfy the Establishment Clause, a statute or ordinance must pass the three-part test set forth by the United States Supreme Court in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) ("the *Lemon* test"). To survive an Establishment Clause challenge under the *Lemon* test, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' " 403 U.S. at 612–13, 91 S.Ct. 2105 (citations omitted) (quoting *Walz v. Tax Comm'n,* 397 U.S. 664, 674, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970)). Under the Florida Constitution, there is a fourth consideration that is added to the *Lemon* test: " 'The statute must not authorize the use of public moneys, directly or indirectly, in aid of any sectarian institution.' " *Rice v. State,* 754 So.2d 881, 883 (Fla. 5th DCA 2000) (quoting *Silver Rose Entm't, Inc. v. Clay County,* 646 So.2d 246, 251 (Fla. 1st DCA 1994)).

[6] The OCC provisions at issue easily satisfy the *Lemon* test and the additional fourth element applicable under the Florida Constitution. First, zoning schemes ***1352** like the one at issue here are generally recognized as having a secular purpose. *See, e.g., Grosz v. City of Miami,* 721 F.2d 729, 738 (11th Cir.1983) ("That the [zoning] law has both secular purpose and effect is noncontroversial. No one contends that zoning laws are based upon disagreement with religious tenets or are aimed at impeding religion."); *Concerned Citizens of Carderock v. Hubbard,* 84 F.Supp.2d 668, 673 (D.Md.2000) ("Defendants assert a secular purpose motivates the challenged zoning scheme: that it is meant to foster development which is harmonious and compatible with single family residential use. This is, indisputably, a secular purpose, since it is a valid (and common) zoning objective."). Indeed, Plaintiff offers no evidence that the Orange County zoning ordinance has a nonsecular purpose.

Second, there is no evidence in the record that the primary effect of the Orange County ordinance is to advance or inhibit religion, and as the Eleventh Circuit noted in *Grosz,* "given zoning's historical function in protecting public health and welfare and the incidental nature of the asserted burden on religion, the essential effect of zoning laws is clearly secular." 721 F.2d at 738 (citation omitted). Third, Plaintiff has offered no evidence to show that the ordinances at issue foster an entanglement between the government and religion. *See, e.g., Ehlers–Renzi v. Connelly Sch. of the Holy Child, Inc.,* 224 F.3d 283, 291 (4th Cir.2000) (concluding that county zoning ordinance exempting religious school from special exception requirement did not foster excessive entanglement, noting that "the parties appear to agree that it has a disentangling aspect, avoiding governmental intrusion into matters of religious education"); *cf. Tony & Susan Alamo Found., v. Sec'y of Labor,* 471 U.S. 290, 305–06, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985) (finding that Fair Labor Standards Act's recordkeeping requirements did not entangle the government with religious employers and stating that "[t]he Establishment Clause does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations, and the recordkeeping requirements of the Fair Labor Standards Act, while perhaps more burdensome in terms of paperwork, are not significantly more intrusive into religious affairs") (citation omitted). Finally, Plaintiff does not contend that the ordinances authorize public monies in aid of a particular group, and thus the OCC provisions satisfy the fourth prong of the test applicable under the Florida constitution.

In sum, there is no evidence to support a facial or as-applied Establishment Clause violation. Thus, the Defendants are entitled to summary judgment on Count III.

6. Free Speech and Assembly (Count VI)

[7] In Count VI of the Complaint, Plaintiff alleges that the zoning laws violate his rights to freedom of speech and freedom of assembly under the First Amendment to the United States Constitution[19] and Article I, Sections 4 and 5 of the Florida Constitution.[20] The Defendants ***1353** contend that they are entitled to summary judgment on this Count because the zoning ordinances are not content-based restrictions on speech and are reasonable time, place, and manner restrictions on speech.

As explained by the Eleventh Circuit in *One World One Family Now v. City of Miami Beach,* 175 F.3d 1282, 1286 (11th Cir.1999), if a restriction on speech is content-based, strict scrutiny applies, and if the restriction is content-neutral, the court examines whether it is a permissible time, place, and manner restriction. Assuming arguendo that there are First Amendment speech rights at issue in this case, the OCC zoning ordinances are not content-based regulations of speech, but instead are neutral and generally applicable land use regulations; the fact that "religious institution" is listed in the ordinance does not render it content-based.

Although religious organizations are among those that are required to obtain special exceptions to locate in an R–1A district, the ordinance is purely secular, does not challenge or impede religious practices, and treats religious and nonreligious assemblies in the same manner. As the Seventh Circuit recently held with respect to a similar zoning provision, "to the extent that the [ordinance] incidentally regulates speech or assembly within churches, such regulation is motivated not by any disagreement that [the city] might have with the message conveyed by church speech or assembly, but rather by such legitimate, practical considerations as the promotion of harmonious and efficient land use. In this respect it is content neutral." *Civil Liberties for Urban Believers v. City of Chicago,* 342 F.3d 752, 765 (7th Cir.2003), *reh'g en banc denied; accord Petra Presbyterian Church v. Vill. of Northbrook,* No. 03 C 1936, 2003 WL 22048089, at *9 (N.D.Ill. Aug.29, 2003) (finding no free speech violation, noting that there was no evidence suggesting that the purpose of zoning ordinance was to restrict religious speech); *cf. State v. Conforti,* 688 So.2d 350, 354 (Fla. 4th DCA 1997) ("If a statute does not restrict conduct because of the message it expresses, it if is aimed at the 'noncommunicative impact of an act,' then the law is 'content neutral.' ") (quoting Laurence H. Tribe, American Constitutional Law § 12–2, at 792 (2d ed.1988)).

[8] Because the OCC zoning provisions are content-neutral, they are properly analyzed as time, place, and manner restrictions and thus must be narrowly tailored to serve a legitimate government objective and must leave open ample channels of alternative communication. *See Civil Liberties,* 342 F.3d at 765. "In order to satisfy the requirement that it is narrowly tailored, 'a regulation need not be the least restrictive or least intrusive means,' " but "need only further 'a substantial government interest that would be achieved less effectively absent the regulation.' " *Id.* (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 798–99, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)).

The OCC zoning scheme satisfies this test. The zoning ordinances clearly further the County's interest in maintaining the residential character of neighborhoods in R–1A zones and in controlling traffic and congestion. Without the regulation of religious organizations and other group assemblies, these objectives would be achieved less effectively. *See, e.g., Grace United Methodist Church v. City of Cheyenne,* 235 F.Supp.2d 1186, 1204 (D.Wyo.2002) (finding no violation of freedom of speech or association, noting that the fact that the church was required to comply with city zoning scheme did "not violate its rights to free speech or freedom of association ***1354** because the City has an important governmental interest in preserving the character of specific areas of [the city], such as this quiet residential area. The ... zoning ordinance ... is unrelated to the suppression of speech and does not burden more speech, if any, than necessary to further that interest.").

There is no evidence that Plaintiff has been prevented from speaking in his home, and there are ample alternative sites—including some that Plaintiff and his fellow worshipers used even before Plaintiff was cited by the County—available for speech, assembly, and worship in the County. As the Seventh Circuit held in *Civil Liberties:*

> [A]ny population center ... has a substantial interest in regulating the use of its land and ... the [zoning ordinance] promotes that interest. We are also unpersuaded by Appellants' implicit suggestion that the restriction of church use as of right to R zones leaves churches with insufficient channels of communication. Not only may churches freely disseminate religious speech in a majority of [city] land zoned for development, but they may also disseminate ... religious speech in [other] districts with Special Use approval. Similarly, the Planned Development approval process provides larger churches with ample opportunity to locate within [the city] in a manner consistent with the [zoning ordinance's] legitimate, stated purposes. For these reasons, Appellants' First Amendment freedom of speech and freedom of assembly claims are without merit.

342 F.3d at 765–66. The Orange County zoning ordinance is no more restrictive of religious speech and assembly than was the ordinance discussed in *Civil Liberties,* and the Defendants prevail on Count VI.

7. Right to Privacy (Count VII)

[9] In Count VII, Plaintiff alleges that the zoning laws violate his right to privacy under the First Amendment to the United States Constitution[21] and Article I, Section 23 of the Florida Constitution.[22] The right to privacy under the Florida Constitution is broader than the federal constitutional right; it " 'embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution.' " *State v. Conforti,* 688 So.2d 350, 357 (Fla. 4th DCA 1997) (quoting *In re T.W.,* 551 So.2d 1186, 1192 (Fla.1989)).

[10] The Defendants assert that there is no evidence that Plaintiff had a reasonable expectation of privacy, which is a prerequisite for the right to attach. Defendants argue that because Plaintiff advertised the in-home prayer services on the internet, he waived any expectation of ***1355** privacy that he otherwise might have had. Defendants are correct.

"Before the right to privacy attaches ..., there must be a 'legitimate' expectation of privacy. 'Determining whether an individual has a legitimate expectation of privacy in any given case must be made by considering all the circumstances, especially objective manifestations of that expectation.' " *Conforti,* 688 So.2d at 357–58 (quoting *Stall v. State,* 570 So.2d 257, 260 (Fla.1990)) (internal citations omitted). Where activity occurs in a place—even a residence—that is open to the public and which is advertised as open to the public, there is no legitimate expectation of privacy. *Cf. Peters v. Vinatieri,* 102 Wash.App. 641, 9 P.3d 909, 916 (2000) (finding that plaintiff did not have a reasonable expectation of privacy in areas of his home to which he invited the public for commercial purposes and in which an office sign had been posted); *In re Gregory S.,* 112 Cal.App.3d 764, 169 Cal.Rptr. 540, 546 (Ct.App.1981) (noting that no reasonable expectation of privacy exists in areas of private property to which the public has been invited).

Here, members of the public were invited—via the Internet and other means—to Plaintiff's home. Also, a sign had been posted on the Property directing the invited participants to the appropriate door to use for the advertised activities. Furthermore, one of the participants in the activities at Plaintiff's home testified on Plaintiff's behalf at the code enforcement hearing regarding the nature of the activities; it is not as if the code enforcement officers snuck in or engaged in any trickery to gain access to the premises. Although Plaintiff may now be unhappy with the information provided by that participant, Plaintiff's protestations about having an expectation that what went on in his home would be private ring hollow. And, in any event, the Defendants have not limited what Plaintiff or his family may do in the home. *See Murphy v. Zoning Comm'n of the Town of New Milford,* 289 F.Supp.2d 87, 103–05 (D.Conn.2003). Thus, Plaintiff's privacy claim fails.

8. Due Process (Count VIII)

[11] Plaintiff alleges in Count VIII that the Defendants' actions violated his rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution[23] and Article I, Section 9 of the Florida Constitution.[24] Plaintiff contends that the OCC is vague and affords the Defendants unfettered discretion to decide what constitutes a code violation. Specifically, Plaintiff argues that the lack of definitions for the words "primarily" and "related" in the definition of "religious institution" render the pertinent provisions void for vagueness and gives the Defendants the power to enforce the OCC in any way they desire. Defendants, however, assert that the OCC clearly sets forth the types of uses of land that are allowed in the R–1A zone. They argue that the terms "primarily" and "related" in the OCC are easily understandable to persons of ordinary intelligence and that therefore the OCC is not unconstitutionally vague. Again, Defendants' argument is persuasive.

The Supreme Court set forth the controlling vagueness standard in *Grayned v.* ***1356** *City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972):

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be

> prevented, laws must provide explicit standards for those who apply them.

(Footnotes omitted). Here, the words upon which Plaintiff bases his vagueness challenge—"primarily" and "related"—are not complicated words but words easily understood by a person of ordinary intelligence. *See, e.g., In re Stewart,* 175 F.3d 796, 811 (10th Cir.1999) (concluding that word "primarily" in Bankruptcy Code provision was not void for vagueness); *In re Kelly,* 841 F.2d 908, 916 (9th Cir.1988) (same, noting that "the modifier 'primarily' is not a word that is ambiguous or difficult to understand. The Constitution does not require the legislature to incorporate Webster's into each statute in order to insulate it from vagueness challenges."); *High Ol' Times, Inc. v. Busbee,* 673 F.2d 1225 (11th Cir.1982) (reversing district court's determination that statute was unconstitutionally vague and upholding that statute, which defined a "drug-related object" as "any instrument, device, or object which is primarily intended for" certain purposes); *see also Int'l Eateries of Am., Inc. v. Broward County,* 726 F.Supp. 1568, 1578 (S.D.Fla.1989) (finding that inclusion of the word "church" in ordinance without defining it did not render the ordinance vague, noting that it "has a clear enough common meaning to provide adequate notice to those persons who may be subject to the provisions of the distance ordinances"). [25] Thus, these words do not render the OCC provisions at issue void on their face for vagueness. [26] Interestingly, despite the assertions of Plaintiff's attorney that the OCC is abominably written and that he has much experience in writing constitutionally sound codes, he has not submitted an improved-upon version of the OCC despite first volunteering and then being invited to do so.

Additionally, there is no evidence of arbitrary or discriminatory enforcement of the Orange County zoning ordinances by the Defendants. The record reflects, inter ***1357** alia: that meetings or services were scheduled to be held at the Property every day of the week; that those services were advertised on the internet; that the Property's address was listed as the address for the "Chabad of South Orlando"; that groups of people were observed entering the property on 72% of the days on which observation of the Property was made; that one of the attendees testified regarding the religious services being held at the Property; that a sign was maintained on the Property directing visitors to use a specific door for the "shul"; and that Plaintiff, a rabbi, was listed as the "director" of this "chabad." Given this overwhelming evidence that a religious institution was operating at the Property, there is no question that the ordinary meanings of "primarily" and "related" have been satisfied and that the OCC would place a person of ordinary intelligence on notice that it was not permissible to conduct these activities in an R–1A zone without first obtaining a special exception. Thus, both the facial and as-applied due process challenges fail, and the Defendants are entitled to summary judgment on Count VIII.

9. Civil Conspiracy (Count IX)

[12] In Count IX, Plaintiff contends that the individual Defendants—Joel Hammock, Jim Powers, Robert Burns, and Robert High—conspired to violate his rights. During oral argument, the Court asked Plaintiff's counsel what evidence in the record supported this claim. (Tr. of Hr'g on Mot. for Summ. J., Doc. 223 at 148). Counsel responded that the record of the Code Enforcement Board hearing supported this count because it showed "[t]hat the county board members knew that, in fact, other homes met, other people met for religious activity in homes at least three times a week, and at best, they, the board was presented any evidence of at best three times per week. That's it.... The conspiracy is that they violated through a civil conspiracy the equal protection rights of our client. That's the point. That's where that's tied in." (Doc. 223 at 149–50). Counsel did not have any other evidence to support this count other than the record of the Code Enforcement Board hearing. (Doc. 223 at 150).

"An action for civil conspiracy ordinarily requires proof of an agreement between two or more people to achieve an illegal objective, an overt act in furtherance of that illegal objective, and a resulting injury to the plaintiff." *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.,* 140 F.3d 898, 912 (11th Cir.1998); *accord Tucci v. Smoothie King Franchises, Inc.,* 215 F.Supp.2d 1295, 1300 (M.D.Fla.2002). The transcript of the Code Enforcement Board hearing (Ex. 1 to Doc. 205) does not support Plaintiff's civil conspiracy claim. That transcript does not show that there was any agreement among the individual Defendants to violate Plaintiff's constitutional rights or otherwise act illegally, and thus the conspiracy count fails at the first element. *See, e.g., Bivens Gardens,* 140 F.3d at 912 ("None of the evidence plaintiff adduced at trial supports an inference that an agreement existed among the defendants to defraud the hotel of profits."); *Tucci,* 215 F.Supp.2d at 1302 ("There are no facts to support an inference that there was an agreement between [the defendants]."). Instead, the hearing transcript merely reflects a discussion among the individual Defendants and the other Board members regarding whether

Plaintiff had violated the OCC; this is not the equivalent of a civil conspiracy. The individual Defendants are entitled to summary judgment on Count IX.

10. Qualified Immunity of the Individual Defendants

Finally, the Individual Defendants have raised the defense of qualified immunity in this case. The Supreme Court set forth ***1358** the analytical framework for qualified immunity cases in *Saucier v. Katz,* 533 U.S. 194, 201–02, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001):

> A court required to rule upon the qualified immunity issue must consider ... this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? ...
>
> If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition ....
>
> ... "The contours of the right [that the official is alleged to have violated] must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

(Citations omitted). Thus, as to the Individual Defendants' qualified immunity defense, a two-step analysis is required. First, the Court must evaluate whether the alleged conduct of the particular defendant violated a constitutional right. If so, then secondly the Court must assess whether that right was clearly established.

As discussed earlier, the Court has found no constitutional infirmity in the zoning provisions of the OCC either on their face or as applied by the Defendants. Therefore, the Individual Defendants have not violated any of Plaintiff's constitutional rights. Moreover, even if this Court had found the zoning provisions to be constitutionally deficient, the doctrine of qualified immunity would shield the Individual Defendants, members of the Code Enforcement Board who are accused of no more than carrying out their responsibilities and following the provisions of the OCC. It would not be clear to a reasonable Code Enforcement Board member "that his conduct was unlawful in the situation he confronted." *Saucier,* 533 U.S. at 202, 121 S.Ct. 2151.

III. Conclusion

In accordance with the foregoing, it is **ORDERED** and **ADJUDGED** as follows:

1. The Defendants' Alternative Motion for Summary Judgment (Doc. 203) is **GRANTED** as to all nine counts of the Complaint.

2. All other pending motions are **DENIED as moot**.

3. The Clerk is directed to enter a judgment providing that Plaintiff shall take nothing from the Defendants in this action. Thereafter, the Clerk shall close this file.

All Citations

302 F.Supp.2d 1328, 17 Fla. L. Weekly Fed. D 189

Footnotes

1 On the issue of RLUIPA's constitutionality, the United States of America has intervened and has filed a memorandum in support of that statute's constitutionality (Doc. 164). Additionally, an amicus brief on the issue of RLUIPA's constitutionality has been filed by The Becket Fund for Religious Liberty (Doc. 173).

2 In his response memorandum (Doc. 212), Plaintiff contended that some of the witnesses at the code enforcement hearing—Rabbi Sholom Dubov, Jeffrey Lessel, Daniel Brads, and Assistant County Attorney

Gary Glassman—were not sworn under oath and thus their testimony was not properly considered by the Board and should not be considered by the Court. Prior to oral argument, the Defendants moved to file two additional exhibits, a videotape of the Board hearing and an affidavit of witness Daniel Brads, in order to establish that Dubov, Lessel, and Brads (but not attorney Glassman) had been sworn at the hearing. (Doc. 213, filed August 25, 2003). In his response to that motion (Doc. 220), Plaintiff challenges only the "testimony" of Mr. Glassman and apparently now concedes that the other witnesses were duly sworn. Indeed, it appears from the transcript of the Code Enforcement Board hearing that the witnesses were sworn *en masse.* (*See, e.g.,* Ex. 1 to Doc. 205, at 46, 89). Significantly, Plaintiff, who was represented by counsel at the Code Enforcement hearing, did not object that any of these witnesses—two of whom testified on Plaintiff's behalf, not the County's—had not been sworn. Finally, Mr. Glassman is an attorney, not a witness, and he presented overview and argument, not testimony. Thus, Plaintiff's objection to his "testimony" is not well-taken.

3 Plaintiff now attempts to challenge the Internet printout that was submitted to the Board during the hearing. However, he did not raise any objection to the Board's consideration of that information at the hearing, nor did he challenge its accuracy. At this juncture it is important to note that Plaintiff did not appeal the determinations made by the Board, and this Court does not sit in review of those factual findings but only to address Plaintiff's constitutional and statutory challenges. *See, e.g., Westchester Day Sch. v. Vill. of Mamaroneck,* 280 F.Supp.2d 230, 233 (S.D.N.Y.2003) ("Initially, we are mindful of the general proscription that federal courts should not become zoning boards of appeal to review land use determinations. However, 'federal courts may exercise jurisdiction in zoning matters when local zoning decisions, such as here, infringe national Interests protected by statute or by the constitution.' ") (internal citation omitted) (quoting *Innovative Health Sys., Inc. v. City of White Plains,* 931 F.Supp. 222, 234 (S.D.N.Y.1996)); *Tran v. Gwinn,* 262 Va. 572, 554 S.E.2d 63, 65 (2001) (noting trial court's conclusion that "because the [zoning appeals board's] finding that a church was being operated on Tran's property had not been appealed, it was a thing decided"). The Internet printout will be considered as a part of the record that was before the Code Enforcement Board.

4 The word "weekly" appears in the affidavit but was omitted from the hearing transcript. (*See* Ex. 1 to Doc. 205, at 56).

5 Although the Alternative Motion only specifically addresses Counts I–VIII, it refers to the prior motion in support of judgment on the civil conspiracy claim in Count IX (Doc. 203 at 4 n.4).

6 While the parties agree that the second summary judgment motion (Doc. 203) is the operative motion, on some issues the parties rely on their respective memoranda regarding the first motion; thus, on occasion reference is made herein to those memoranda even though they are styled as relating to the first motion rather than the second.

7 The First Amendment provides in pertinent part that "Congress shall make no law ... prohibiting the free exercise" of religion. U.S. Const. amend. 1. Of course, Plaintiff's claim under the First Amendment, like his other federal constitutional claims, is asserted via the Fourteenth Amendment.

8 Article I, Section 3 of the Florida Constitution provides in part, "There shall be no law ... prohibiting or penalizing the free exercise [of religion]. Religious freedom shall not justify practices inconsistent with public morals, peace or safety." Fla. Const. art. 1, § 3.

9 *Cf. Vill. of Belle Terre v. Boraas,* 416 U.S. 1, 9, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974) ("A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one .... The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."); *Vill. of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 386–87, 47 S.Ct. 114, 71 L.Ed. 303 (1926) ("[W]ith the great increase and

concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities.... [W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.").

10 The OCC explains the purpose of the R–1A zone:

> The areas included within ... R–1–A [sic] single-family dwelling districts are intended to be single-family residential areas with large lots and low population densities. Certain structures and uses required to serve educational, religious, utilities and noncommercial recreational needs of such areas are permitted within the districts as special exceptions.

OCC § 38–301. Additionally, the OCC sets forth requirements for special exceptions within R–1A zones, which includes that the application for such exceptions be accompanied by a site plane which indicates "property lines, rights-of-way, and the location of buildings, parking areas, curb cuts and driveways." OCC § 38–303(b).

11 Other jurisdictions have reached the same conclusion in similar cases. *See, e.g., Tran v. Gwinn,* 262 Va. 572, 554 S.E.2d 63, 66–67 (2001) (finding constitutional an ordinance which prohibited operation of place of worship in a residential zone absent a special use permit, noting that courts "have generally concluded that zoning ordinances which regulate the location of churches within the community impose only a minimal burden on the right to the free exercise of religion," that the requirement of a special use permit "imposes a minimal and incidental burden," and that "the Constitution will tolerate zoning ordinances of this type"); *Open Door Baptist Church v. Clark County,* 140 Wash.2d 143, 995 P.2d 33, 47 (2000) (noting that if churches were exempt from zoning application requirements, "one could choose to live in a neighborhood for its entirely residential nature, wake up one morning and find that all other houses on one's block had been replaced by church buildings, and be left without any recourse.... The better approach, we think, is ... that 'we ought to require a very specific showing of hardship to justify exemption from land use restrictions.' ") (quoting *First Covenant Church of Seattle v. City of Seattle,* 114 Wash.2d 392, 787 P.2d 1352, 1364 (1990) (Utter, J., concurring)); *cf. Congregation Kol Ami v. Abington Township,* 309 F.3d 120, 136 (3d Cir.2002) ("A necessary corollary of the extensive zoning authority bestowed upon local municipalities, including the authority to create exclusively residential districts, is the authority to make distinctions between different uses and to exclude some uses within certain zones. Indeed, zoning is by its very design discriminatory, and that, alone, does not render it invalid.").

12 *Cf. Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan,* 87 Hawai'i 217, 953 P.2d 1315, 1345–46 (1998) (concluding that zoning ordinance was "system of individualized exemptions" rather than law of general applicability but that temple seeking height variance failed to present prima facie case of burden on its religious exercise where temple had created its own problems by purchasing property in a restricted zone and where "the burdens placed on the Temple by the height restrictions are of expense and inconvenience").

13 *But see Elsinore Christian Ctr. v. City of Lake Elsinore,* 291 F.Supp.2d 1083, 1090–91 (C.D.Cal.2003) ("Because use of land *is* 'religious exercise' under RLUIPA, there can be no doubt that the City's action denying use of the Subject Property is a 'substantial burden' on that use.") (emphasis in original).

14 The Fourteenth Amendment provides in pertinent part that "[no State shall] deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

15 Article I, Section 2 of the Florida Constitution provides:

> Basic rights.—All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property .... No person shall be deprived of any right because of race, religion, national origin, or physical disability.

Fla. Const. art. I, § 2.

16 Plaintiff agrees that "[t]he facial challenge does not require a disputed factual analysis." (Doc. 168 at 20).

17 The First Amendment provides in pertinent part that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I.

18 Article I, Section 3 of the Florida Constitution provides in pertinent part that "[t]here shall be no law respecting the establishment of religion." Fla. Const. art. I, § 3.

19 In this regard, the First Amendment provides that "Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble." U.S. Const. amend. I.

20 These provisions of the Florida Constitution provide:

> Section 4. Freedom of speech and press.—Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press....
>
> Section 5. Right to assemble.—The people shall have the right peaceably to assemble, to instruct their representatives, and to petition for redress of grievances.

Fla. Const. art. I, §§ 4–5.

21 The right to privacy is implicit in the United States Constitution. *See, e.g., Carey v. Population Servs. Int'l,* 431 U.S. 678, 684, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) ("Although '[t]he Constitution does not explicitly mention any right of privacy,' the Court has recognized that one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment is 'a right of personal privacy, or a guarantee of certain areas or zones of privacy.' ") (quoting *Roe v. Wade,* 410 U.S. 113, 152, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)); *see also State v. Conforti,* 688 So.2d 350, 357 (Fla. 4th DCA 1997) (noting implied privacy right in federal constitution).

22 Article I, Section 23 of the Florida Constitution provides:

> Section 23. Right of privacy.—Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Fla. Const. art. I, § 23.

23 The Fourteenth Amendment provides in pertinent part that "[no State shall] deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

24 Article I, Section 9 of the Florida Constitution provides in part, "No person shall be deprived of life, liberty or property without due process of law." Fla. Const. art. I, § 9.

25 *Cf. L.B. v. State,* 700 So.2d 370, 371–72 (Fla.1997) (concluding "that the term 'common pocketknife,' as contained in the statute, does provide persons of ordinary intelligence with fair notice as to what constitutes forbidden conduct"); *Life Concepts, Inc. v. Harden,* 562 So.2d 726, 728 (Fla. 5th DCA 1990) (holding that the word "compatible" in city ordinance requiring group living facilities to be "compatible with the neighborhood"

did not render ordinance vague; "the word 'compatible' has a plain and ordinary meaning which can be readily understood").

26 As noted earlier, Plaintiff did not appeal the Code Enforcement Board's factual determination that the activities at his house violated the OCC. It has been held that such a failure to appeal precludes a plaintiff from arguing that an ordinance is vague or overbroad. *See Tran v. Gwinn,* 262 Va. 572, 554 S.E.2d 63, 69 (2001) ("Tran's conduct in operating a church falls squarely within the ordinance's application and Tran concedes as much by not appealing the factual determinations of the trial court and board of zoning appeals that he was operating a church. The failure to appeal this factual finding precludes Tran from arguing here that the ordinance is vague or overbroad such that it violates his due process rights. Nor can Tran be heard to complain about the rights of others who may be adversely affected by the ordinance. Tran is not within the class of people who may raise a due process claim against this ordinance.").

EXHIBIT “H”

887 So.2d 1023
Supreme Court of Florida.

Richard WARNER, et al., Appellants,
v.
CITY OF BOCA RATON, Florida, Appellee.

No. SC01–2206.
|
Sept. 2, 2004.
|
Rehearing Denied Nov. 16, 2004.

Synopsis

Background: Owners of plots in public cemetery brought action against city challenging prohibition on vertical grave decorations, alleging that the prohibition violated rights under State and Federal Constitutions and violated the Florida Religious Freedom Restoration Act (FRFRA). Following bench trial, the United States District Court for the Southern District of Florida, Kenneth L. Ryskamp, J., 64 F.Supp.2d 1272, found that city prohibition did not violate any rights under State and Federal Constitutions. Owners appealed. The United States Court of Appeals for the Eleventh Circuit, 267 F.3d 1223, certified questions to the Florida Supreme Court.

Holdings: The Supreme Court, Quince, J., held that:

[1] the protection afforded to the free exercise of religious activity under the FRFRA is broader than that afforded by the decisions of the United States Supreme Court, and

[2] city's regulations regarding grave markers did not violate FRFRA.

Questions answered.

Lewis, J., concurred in result only.

West Headnotes (7)

[1] Constitutional Law Beliefs protected; inquiry into beliefs

Constitutional Law Burden on religion

One who claims a challenged government action violates his or her free exercise of religion must first establish that the belief in question is religious in nature, is sincerely held, and that the government action actually infringes upon the free exercise of the individual's belief. U.S.C.A. Const.Amend. 1; West's F.S.A. Const. Art. 1, § 3.

5 Cases that cite this headnote

[2] Constitutional Law Neutrality; general applicability

Right of free exercise under the First Amendment of the United States Constitution does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes or prescribes conduct that his religion prescribes or proscribes. U.S.C.A. Const.Amend. 1.

[3] Civil Rights Particular cases and contexts

The protection afforded to the free exercise of religiously motivated activity under the Florida Religious Freedom Restoration Act (FRFRA) is broader than that afforded by the decisions of the United States Supreme Court interpreting the Federal Constitution; the FRFRA applies a compelling interest test to neutral laws of general application, and, under the FRFRA, the definition of protected "exercise of religion" subject to the compelling state interest test includes any act or refusal to act whether or not compelled by or central to a system of religious belief. U.S.C.A. Const.Amend. 1; West's F.S.A. Const. Art. 1, § 3; West's F.S.A. §§ 761.02, 761.03.

19 Cases that cite this headnote

[4] Civil Rights Particular cases and contexts

Under the Florida Religious Freedom Restoration Act (FRFRA), a substantial burden on the free exercise of religion is one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him

to engage in conduct that his religion requires. West's F.S.A. §§ 761.02(3), 761.03(1).

24 Cases that cite this headnote

[5] **Civil Rights** Particular cases and contexts

A plaintiff who claims that a governmental regulation constitutes a substantial burden under the Florida Religious Freedom Restoration Act (FRFRA) must prove that a governmental regulatory mechanism burdens the adherent's practice of his or her religion by pressuring him or her to commit an act forbidden by the religion or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates. West's F.S.A. §§ 761.02, 761.03.

22 Cases that cite this headnote

[6] **Civil Rights** Public facilities

City's regulations prohibiting vertical grave markers and decorations in public cemetery did not substantially burden plot owners' free exercise of religion within the meaning of the Florida Religious Freedom Restoration Act (FRFRA); the regulations did not prohibit the plot owners from marking graves and decorating them with religious symbols, but rather, the regulations permitted only horizontal grave markers and allowed vertical grave decorations for 60 days after the date of burial and on certain holidays. West's F.S.A. §§ 761.02, 761.03.

7 Cases that cite this headnote

[7] **Federal Courts** Proceedings following certification

Upon deciding certified questions, the Supreme Court has the authority to consider issues other than those upon which jurisdiction is based, but this authority is discretionary; the discretion should be exercised only when the other issues have been properly briefed and argued and are dispositive of the case.

1 Case that cites this headnote

Attorneys and Law Firms

***1024** James K. Green and Lynn G. Waxman, West Palm Beach, FL; Charlotte H. Danciu, Boca Raton, FL; and Douglas Laycock, Austin, TX on behalf of American Civil Liberties Union Foundation of Florida, Inc. for Appellant.

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Rebecca A. O'Hara, Tallahassee, FL on behalf of Florida League of Cities, Inc., Amicus Curiae; and Douglas L. Stowell, Tallahassee, FL on behalf of the International Cemetery and Funeral Association, Amicus Curiae.

Opinion

QUINCE, J.

We have for review the following two questions concerning Florida law certified by the United States Court of Appeals for the Eleventh Circuit to be determinative of a cause pending in that court and for which there appears to be no controlling precedent:

> Does the Florida Religious Freedom Restoration Act Broaden, and to what extent does it broaden, the definition of what constitutes religiously motivated conduct protected by law beyond the conduct considered protected by the decisions of the United States Supreme Court?
>
> If the act does broaden the parameters of protected religiously motivated conduct, will a city's neutral, generally-applicable ordinance be subjected to strict scrutiny by the courts when the ordinance prevents persons from acting in conformity with their sincerely held religious beliefs, but the acts the persons wish to take are not 1) asserted or implied in relatively unambiguous terms by an authoritative sacred text, or 2) clearly and consistently affirmed in classic formulations of doctrine and practice, or 3) ***1025** observed continuously, or nearly so, throughout the history of the religion, or 4) consistently observed in the tradition in recent times?

Warner v. City of Boca Raton, 267 F.3d 1223, 1227 (11th Cir.2001). We have jurisdiction. *See* art. V, § 3(b)(6), Fla. Const. We rephrase [1] the second question as follows:

> Whether the City of Boca Raton Ordinance at issue in this case violates the Florida Religious Freedom Restoration Act (FRFRA)?
>
> For the reasons stated below, we answer the first certified question in the affirmative and the second question, as rephrased by this Court, in the negative.

MATERIAL FACTS AND PROCEEDINGS

The City of Boca Raton (the City) owns, operates, and maintains a 21.5 acre cemetery for its residents. In November 1982, the City passed a regulation prohibiting vertical grave markers, memorials, monuments, and structures on cemetery plots. The regulation allows individuals to place stone or bronze markers on plots provided that they are level with the ground surface. Richard Warner is a member of a class of city residents (appellants) who purchased burial plots in the City's cemetery. Despite the prohibition, between 1984 and 1996 appellants decorated family graves with vertical grave decorations.

In 1991, the City sent notices to plot owners who had placed vertical grave decorations at their plots, informing them that if they did not remove the noncomplying structures within thirty days, the structures would be removed. A small group of plot owners failed to comply with the City's request to remove the vertical grave decorations. A second notice was sent in 1992, requesting compliance, and again not all plot owners complied with the City's request. However, in response to objections from plot owners, the City agreed to postpone removal of the noncomplying structures pending further study. In 1996, the City amended the regulation to permit some vertical grave decorations up to sixty days from the date of burial and on certain holidays.

During this time, the City commissioned a survey of plot owners to identify their desires concerning vertical grave decorations in the cemetery. The study, conducted by researchers at Florida Atlantic University in 1997, concluded that most plot owners approved of the City's amended regulation. Subsequently, on June 10, 1997, at the regular meeting of the City Council, the City announced that it would begin enforcing the regulations as amended in 1996. All plot owners were notified that if they did not comply with the regulations by January 15, 1998, the City would remove all the noncomplying structures.

Thereafter, appellants filed suit alleging that the prohibition on vertical grave decorations violated their state and federal rights to freedom of expression, freedom of speech, and due process of law. Specifically, appellants argued that the City's prohibition violates the Florida Religious ***1026** Freedom Restoration Act of 1998 (FRFRA). Ch. 98–412, §§ 1–6, 3297–98, Laws of Fla. (codified as §§ 761.01–.05, Fla. Stat. (2003)). After a bench trial, the United States District Court for the Southern District of Florida held that the right to place vertical grave structures was not protected under the FRFRA. *See Warner v. City of Boca Raton,* 64 F.Supp.2d 1272 (S.D.Fla.1999).

The Southern District rejected appellants' argument that the City's regulation violated their right to the free exercise of religion because the FRFRA protected any act substantially motivated by a sincerely held religious belief. Instead, the Southern District concluded that the FRFRA was "intended to protect conduct that, while not necessarily compulsory or central to a larger system of religious beliefs, nevertheless reflects some tenet, practice or custom of a religious tradition." *Id.* at 1282.

After determining the scope of the FRFRA, the Southern District determined whether the placement of vertical decorations on grave sites reflected a tenet, custom or practice of appellants' religious traditions or merely represented a personal preference regarding religious exercise. The Southern District adopted the framework used by Dr. Daniel Pals [2] to determine the place appellants' practices hold within a religious tradition. The court said:

> Under Dr. Pals' framework, a court should consider four criteria in order to determine the place of a particular practice within a religious tradition. In particular, a court should consider whether the practice: 1) is asserted or implied in relatively unambiguous terms by an authoritative sacred text; 2) is clearly and consistently affirmed in classic formulations of doctrine and practice; 3) has been observed continuously, or nearly so, throughout the history of the tradition; and 4) is consistently observed in the tradition as we meet it in recent times. If a practice meets all four of these criteria, it can be considered central to the religious tradition. If the practice meets one or more

> of these criteria, it can be considered a tenet, custom or practice of the religious tradition. If the practice meets none of these criteria, it can be considered a matter of purely personal preference regarding religious exercise.
>
> *Id.* at 1285.

Using this test, the Southern District found that marking graves with religious symbols constituted a practice of appellants' religious traditions. However, it found that the particular manner in which such markers and religious symbols are displayed—vertically or horizontally—amounted to a matter of purely personal preference. The Southern District also found that the City's prohibition on vertical grave structures did not substantially burden appellants' practice of religion. The court reasoned that the City's regulation did not prohibit appellants from decorating the graves with religious symbols. The Southern District pointed out that the regulations permitted horizontal grave markers which "may be engraved with any type of religious symbol. Moreover, out of consideration for mourners vertical grave decorations are permitted for sixty days after the date of burial and for a few days around certain holidays." *Id.* at 1287. Accordingly, the court found that the City's regulation did not violate appellants' rights ***1027** under the FRFRA. Appellants appealed the Southern District's decision to the Eleventh Circuit, which certified the aforementioned questions. *See Warner,* 267 F.3d at 1227.

LAW AND ANALYSIS

I. Certified Question I

The Eleventh Circuit has certified two questions to this Court. The first question reads:

> Does the Florida Religious Freedom Restoration Act broaden, and to what extent does it broaden, the definition of what constitutes religiously motivated conduct protected by law beyond the conduct considered protected by the decisions of the United States Supreme Court?

Warner, 267 F.3d at 1227. Before we define the parameters of our state law, we will first examine the applicable federal law.

Federal Law

Over the past hundred plus years, the United States Supreme Court has vacillated on the standard applicable to laws which in some way infringe on an individual's right to the free exercise of religion. Initially, the Supreme Court held that the Free Exercise Clause did not excuse an individual from the obligation to comply with neutral laws of general applicability. *See, e.g., Minersville Sch. Dist. v. Gobitis,* 310 U.S. 586, 594, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940), *overruled by West Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); *Reynolds v. United States,* 98 U.S. 145, 166–67, 25 L.Ed. 244 (1878). Thus, it appeared that if a neutral law of general applicability was rationally related to a matter of governmental interest, it would not violate the Free Exercise Clause.

However, in 1963 the Supreme Court expanded the protection given to religious freedom. In *Sherbert v. Verner,* 374 U.S. 398, 406, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), the Supreme Court expressly rejected the use of the rational basis standard when evaluating religious freedom claims when it said, "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount [compelling] interests, give occasion for permissible limitation.' " (quoting *Thomas v. Collins,* 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430 (1945)); *see also Wisconsin v. Yoder,* 406 U.S. 205, 215, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.").

Later, the Supreme Court modified the *Sherbert* "compelling interest" test by creating exceptions to its application. The Supreme Court found that the compelling interest test was inapplicable to Free Exercise claims in military and prison situations. *See Goldman v. Weinberger,* 475 U.S. 503, 508, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986) (holding that the First Amendment did not prevent the Air Force from passing regulations which prohibited the wearing of headgear required by a person's religion). *See also Turner v. Safley,* 482 U.S. 78, 87, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) (holding that a court examining prison regulations must only inquire as whether the regulation is "reasonably related" to

legitimate penological objectives, or whether it represents an "exaggerated response" to those concerns). The Supreme Court also began to retreat from the compelling interest test in cases involving ***1028** Free Exercise challenges to a neutral law of general application. *See Bowen v. Roy,* 476 U.S. 693, 707–08, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986) ("Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.") (plurality opinion); *Lyng v. Northwest Indian Cemetery Prot. Ass'n,* 485 U.S. 439, 450, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988) ("[I]ncidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, [do not] require government to bring forward a compelling justification.").

The Supreme Court further receded from *Sherbert* and the compelling interest test in *Employment Division, Department of Human Resources v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), which involved:

> [W]hether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

Id. at 874, 110 S.Ct. 1595. The Supreme Court held that the Free Exercise Clause analysis articulated in *Sherbert* was inapplicable because the law was not aimed at promoting or restricting religious beliefs.[3] Noting that it had never invalidated any governmental action on the basis of the *Sherbert* test except for the denial of unemployment compensation, the Supreme Court stated its reasons for refusing to apply the test in the context of the *Smith* case:

> We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [compelling state interest] test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself"—contradicts both constitutional tradition and common sense.

Id. at 885, 110 S.Ct. 1595 (citations omitted). The Supreme Court rejected the argument advanced by the respondents in *Smith* that the compelling interest test should be used when the conduct prohibited ***1029** by the State is central to the individual's religion. The Supreme Court opined: "What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.' " *Id.* at 887, 110 S.Ct. 1595 (quoting *United States v. Lee,* 455 U.S. 252, 263 n. 2, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) (Stevens, J., concurring in the judgment)). The Court stated that an inquiry into the centrality of particular beliefs to a faith was not within the "judicial ken" and thus, improper. *Id.* at 887, 110 S.Ct. 1595 (quoting *Hernandez v. Commissioner,* 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989)).

Thereafter, in 1993, the United States Congress passed the Religious Freedom Restoration Act (RFRA). RFRA was intended to essentially overrule the Supreme Court's decision in *Smith* and restore the compelling state interest test set forth in *Sherbert* as the standard for free exercise challenges to laws of general applicability. *See* 42 U.S.C. § 2000bb (2000). Accordingly, RFRA prohibited the government from substantially burdening a person's free exercise of religion unless the government showed that the burden: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb–1(b) (2000). Prior to 2000, RFRA defined the "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution." Religious Freedom Restoration Act, P.L. 103–141, § 5(4), 107 Stat. 1488, 1489 (1993). Now, RFRA defines the "exercise of religion" as "any exercise of religion, whether

or not compelled by, or central to, a system of religious belief." *Id.* (adopting definition in 42 U.S.C. § 2000cc–5(7)(A) (2000)).

Initially, RFRA applied to any governmental entity, whether state or federal. *See* P.L. 103–141, §§ 5–6, 107 Stat. 1488, 1489 (1993) (defining government as including "a branch, department, agency, instrumentality, and official ... of the United States, a State, or a subdivision of a State" and providing that "[t]his Act applies to all Federal and State law"). The constitutionality of RFRA as applied to the states was challenged in *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). In arguing that RFRA could be constitutionally applied to the states, the respondent argued that RFRA was a proper exercise of Congress's remedial and enforcement power under the Fourteenth Amendment. *Id.* at 517, 529, 117 S.Ct. 2157. According to the respondent in *Flores,* RFRA was a reasonable means of protecting the free exercise of religion as defined by *Smith. Id.* at 529, 117 S.Ct. 2157.

The Supreme Court rejected this argument, concluding that the scope and reach of RFRA distinguished it from other remedial and enforcement measures passed by Congress. Rather, the Court determined that RFRA was substantive in nature because it imposed a more stringent test for determining the constitutionality of laws burdening religion than that demanded by the United States Constitution as interpreted by the Supreme Court in *Smith.* According to the Court, state "[l]aws valid under *Smith* would fall under RFRA." *Id.* at 534, 117 S.Ct. 2157. Noting that under the Fourteenth Amendment the federal government did not have the power to substantively alter constitutional rights, *id.* at 529, 117 S.Ct. 2157, the Supreme Court invalided RFRA as applied to the states. ***1030** *Id.* at 536, 117 S.Ct. 2157.[4] Therefore, the standard articulated by the Supreme Court in *Smith* remains the threshold of protection for religiously based activities afforded by the Free Exercise Clause contained in the United States Constitution.

Florida Law

Florida's Free Exercise Clause is found in the Florida Constitution's Declaration of Rights and provides:

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

Art. I, § 3, Fla. Const. In interpreting the scope of constitutional rights, this Court has stated that in any state issue, the federal constitution represents the "floor" for basic freedoms, and the state constitution represents the "ceiling." *See Traylor v. State,* 596 So.2d 957, 962 (Fla.1992). This Court has not squarely addressed the parameters of Florida's free exercise clause, but other Florida courts have "treated the protection afforded under the state constitutional provision as coequal to the federal [provision], and have measured government regulations against it accordingly." *Toca v. State,* 834 So.2d 204, 208 (Fla. 2d DCA 2002) (applying *Smith* to conclude that rule of judicial administration requiring the signing of pleadings did not violate petitioner's rights under article I, section 3 of the Florida Constitution); *see also Allen v. Allen,* 622 So.2d 1369 (Fla. 1st DCA 1993) (finding that post-dissolution order prohibiting wife from attending church attended by husband was prohibited under free exercise clause of both the Florida Constitution and the First Amendment). Indeed, a commentary on the 1968 revision of this provision explains that the language of the Florida section "parallels the First Amendment of the U.S. Constitution" and that "cases under the First Amendment of the United States Constitution are of great value in evaluating the status of religious freedoms." Talbot "Sandy" D'Alemberte, Commentary to 1968 Revision, Art. I, § 3, Fla. Const., 25A Fla. Stat. Ann. 106–07 (West 2004).

Prior to the Supreme Court's decision in *Smith,* this Court applied the compelling interest test to free exercise claims.[5] For ***1031** example, in *Town v. State ex rel. Reno,* 377 So.2d 648 (Fla.1979), we applied the Supreme Court's decisions in *Sherbert* and *Yoder* to the question of whether the State had a compelling interest in restricting the use of cannabis as a religious practice. Testimony before the trial court showed that the church permitted children and individuals who had no interest in learning the religion to use the drug. In light of these facts, we found that the State's compelling interest

in protecting society from a dangerous drug outweighed the petitioner's free exercise interest. *Id.* at 651. [6]

In 1998, in response to the United States Supreme Court's decision in *Flores,* the Florida Legislature enacted a state version of the federal Religious Freedom Restoration Act, which was modeled after the federal RFRA. The preamble to the Florida Religious Freedom Restoration Act (FRFRA) provides:

> WHEREAS, it is the finding of the Legislature of the State of Florida that the framers of the Florida Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in s. 3, Art. I of the State Constitution, and
>
> WHEREAS, laws which are "neutral" toward religion may burden the free exercise of religion as surely as laws intended to interfere with the free exercise of religion, and
>
> WHEREAS, governments should not substantially burden the free exercise of religion without compelling justification, and
>
> WHEREAS, the compelling interest test as set forth in certain federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests, and
>
> WHEREAS, it is the intent of the Legislature of the State of Florida to establish the compelling interest test as set forth in *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), to guarantee its application in all cases where free exercise of religion is substantially burdened, and to provide a claim or defense to persons whose religious exercise is substantially burdened by government....

Ch. 98–412, at 3296–97, Laws of Fla. The FRFRA includes several important definitions:

> (1) "Government" or "state" includes any branch, department, agency, instrumentality, or official or other person acting under color of law of the state, a county, special district, municipality, or any other subdivision of the state.
>
> ***1032** (2) "Demonstrates" means to meet the burden of going forward with the evidence and of persuasion.
>
> (3) "Exercise of religion" means an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief.

§ 761.02, Fla. Stat. (2003). The FRFRA also details the protections afforded to religious freedom:

> (1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:
>
> (a) Is in furtherance of a compelling governmental interest; and
>
> (b) Is the least restrictive means of furthering that compelling governmental interest.
>
> (2) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.

§ 761.03, Fla. Stat. (2003). Another provision of the FRFRA provides attorney's fees to the prevailing plaintiff from the government. *See* § 761.04, Fla. Stat. (2003). Lastly, the FRFRA states that nothing in the act will be construed to interpret or address the portion of article I, section 3 of the Florida Constitution or the First Amendment to United States Constitution which deals with the establishment of religion. *See* § 761.05, Fla. Stat. (2003). Thus, the FRFRA has made the compelling state interest test applicable to state cases involving questions of the free exercise of religion.

[1] **[2]** **[3]** Based on the foregoing, we answer the first certified question in the affirmative. The protection afforded to the free exercise of religiously motivated activity under the FRFRA is broader than that afforded by the decisions of the United States Supreme Court for two interrelated reasons. First, the FRFRA expands the free exercise right as construed by the Supreme Court in *Smith* because it reinstates the Court's pre-*Smith* holdings by applying the compelling interest test to neutral laws of general application. Second, under the FRFRA the definition of protected "exercise of religion" subject to the compelling state interest test includes any act or refusal to act *whether or not compelled by or central to a system of religious belief.* The legislative history of the FRFRA suggests that in order to state a claim that

the government has infringed upon the free exercise of religion, a plaintiff must only establish that the government has placed a substantial burden on a practice motivated by a sincere religious belief. [7] Thus, the FRFRA is necessarily broader than United States Supreme Court precedent, which holds that the "right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith,* 494 U.S. at 879, 110 S.Ct. 1595 (internal quotation marks omitted).

Although we conclude that the FRFRA is broader than United States Supreme ***1033** Court precedent, our analysis of this issue does not end here. Appellants and amici curiae [8] argue that under the FRFRA any act by an individual motivated by religion is subject to the compelling state interest test, or strict scrutiny standard. However, we find that appellants' interpretation of the FRFRA is too broad. According to the FRFRA, only government regulations which "substantially burden" a person's exercise of religion are subject to strict scrutiny. *See* § 761.03, Fla. Stat. (2003).

As discussed in *Mack v. O'Leary,* 80 F.3d 1175, 1178 (7th Cir.1996), there are three main definitions of substantial burden adopted at the federal level with regard to RFRA.

> The Fourth, Ninth, and Eleventh Circuits define "substantial burden" as one that either compels the religious adherent to engage in conduct that his religion forbids (such as eating pork, for a Muslim or Jew) or forbids him to engage in conduct that his religion requires (such as prayer). *Goodall by Goodall v. Stafford County School Board,* 60 F.3d 168, 172–73 (4th Cir.1995); *Cheffer v. Reno,* 55 F.3d 1517, 1522 (11th Cir.1995); *Bryant v. Gomez,* 46 F.3d 948 (9th Cir.1995) (per curiam). The Eighth and Tenth Circuits use a broader definition-action that forces religious adherents "to refrain from religiously motivated conduct," *Brown–El v. Harris,* 26 F.3d 68, 70 (8th Cir.1994), or that "significantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of a [person's] individual beliefs," *Werner v. McCotter,* 49 F.3d 1476, 1480 (10th Cir.1995), imposes a substantial burden on the exercise of the individual's religion. The Sixth Circuit seems to straddle this divide, asking whether the burdened practice is "essential" or "fundamental."

Id. at 1178. After considering these differing views, we reject the middle and broad definitions of "substantial burden" as inconsistent with the language and intent of the FRFRA. The middle definition employed by the Sixth Circuit is contrary to the definition of "exercise of religion" contained in the FRFRA in that it is dependent on whether an action is essential or fundamental to a person's religious belief system. If this Court were to make religious motivation the key for analysis of a claim, that would "read out of [FRFRA] the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement." *Henderson v. Kennedy,* 253 F.3d 12, 17 (D.C.Cir.2001). [9]

[4] Accordingly, we conclude that the narrow definition of substantial burden adopted by the Fourth, Ninth, and Eleventh Circuits is most consistent with the language and intent of the FRFRA. Thus, we hold that a substantial burden on the free exercise of religion is one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires. *See Mack,* 80 F.3d at 1178. We acknowledge that our adoption of this definition may occasionally place courts in the position of having to determine whether a particular religious practice is obligatory or forbidden. However, we conclude that this inquiry is preferable to one that requires the Court to question ***1034** the centrality of a particular religious belief or negates the legislative requirement that only conduct that is substantially burdened be protected by strict scrutiny.

II. Certified Question II

We now address the second question certified by the Eleventh Circuit, which asks:

> If the Act does broaden the parameters of protected religiously motivated conduct, will a city's neutral, generally-applicable ordinance be subjected to strict scrutiny by the courts when the ordinance prevents persons from acting in conformity with their sincerely held religious beliefs, but the acts the persons wish to take are not 1) asserted or implied in relatively unambiguous terms by an authoritative sacred test, or 2) clearly and consistently affirmed in classic formulations of doctrine and practice,

> or 3) observed continuously, or nearly so, throughout the history of the religion, or 4) consistently observed in the tradition in recent times?

See Warner, 267 F.3d at 1227. Appellants and amici curiae object to the phrasing of the second certified question because the question is taken from the test used by Dr. Daniel L. Pals. Appellants argue that Dr. Pals' test adds requirements to the FRFRA because the test reads into the statute a requirement that the practice must have a basis in a larger system of beliefs. The focus under the FRFRA, however, is whether the appellants' action is substantially motivated by a religious belief and whether the governmental action enacted substantially burdens the free exercise of that religious belief. *See* §§ 761.02(3), 761.03(1), Fla. Stat. (2003).

Therefore, we have chosen to rephrase the second certified question as follows:

> Whether the City of Boca Raton Ordinance at issue in this case violates the Florida Religious Freedom Restoration Act (FRFRA)?

We answer the second certified question in the negative. As noted above, the Act specifically mandates that the strict-scrutiny standard be applied irrespective of whether or not the burden results from a rule of general applicability. *See* § 761.03, Fla. Stat. (2003). Under the test articulated by the FRFRA, the plaintiff bears the initial burden of showing that a regulation constitutes a substantial burden on his or her free exercise of religion. *See* § 761.03(1), Fla. Stat. (2003). Once that threshold determination has been made, the government bears the burden of establishing that the regulation furthers a compelling governmental interest and is the least restrictive means of furthering that interest. *See* § 761.03(1)(a)-(b), Fla. Stat. (2003). Thus, the plaintiffs must demonstrate that the government has placed a substantial burden on a practice motivated by a sincere religious belief. *See, e.g., Weir v. Nix,* 890 F.Supp. 769, 783 (S.D.Iowa 1995). The Southern District specifically noted: "It is undisputed that the plaintiffs placed vertical decorations on their [c]emetery plots in observance of sincerely held religious beliefs." *Warner,* 64 F.Supp.2d at 1277. [10] Since appellants ***1035** have demonstrated that their religious beliefs are sincere, the next issue is whether the government's regulation constitutes a substantial burden on the free exercise of religion.

[5] **[6]** A plaintiff who claims that a governmental regulation constitutes a substantial burden must "prove that a governmental regulatory mechanism burdens the adherent's practice of his or her religion by pressuring him or her to commit an act forbidden by the religion or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates." *Graham v. Comm'r,* 822 F.2d 844, 850–51 (9th Cir.1987), *aff'd sub nom. Hernandez v. Comm'r,* 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989); *see also Mack.* In the instant case, the Southern District found that the City's regulation did not substantially burden appellants' free exercise of religion. *See Warner,* 64 F.Supp.2d at 1287. We agree with the Southern District's reasoning:

> The City's Regulations do not prohibit the plaintiffs from marking graves and decorating them with religious symbols. Rather, the Regulations permit only horizontal grave markers. These markers may be engraved with any type of religious symbol. Moreover, out of consideration for mourners vertical grave decorations are permitted for sixty days after the date of burial and for a few days around certain holidays. Aside from these times, however, vertical grave decorations are not permitted in the Cemetery. The Court finds that these restrictions on the manner in which religious decorations may be displayed merely inconvenience the plaintiffs' practices of marking graves and decorating them with religious symbols. Accordingly, the Court finds that the prohibition on vertical grave decorations does not substantially burden the plaintiffs' exercise of religion within the meaning of the Florida RFRA.

Id. Since the City's regulation does not substantially burden appellants' religious beliefs, no further analysis is required under the FRFRA.

III. Additional Issues

[7] Appellants contend that this Court should also address whether the City's neutral, generally applicable horizontal marker cemetery regulation violates other provisions of the Florida Constitution. The Eleventh Circuit stated that its phrasing of the certified questions was not designed to restrict this Court's analysis. This Court has the authority to consider issues other than those upon which jurisdiction is based, but this authority is discretionary. *See Savona v. Prudential Ins. Co. of America,* 648 So.2d 705, 707 (Fla.1995). This Court has noted that this discretion should be exercised only when the other issues have been properly briefed and argued and are dispositive of the case. *See id.* Because this issue is not dispositive of this case, we decline appellants' invitation to address this issue.

CONCLUSION

We hold that the FRFRA expands the scope of religious protection beyond the conduct considered protected by cases from the United States Supreme Court. We also hold that under the Act, any law, ***1036** even a neutral law of general applicability, is subject to the strict scrutiny standard where the law substantially burdens the free exercise of religion. [11] For the foregoing reasons, we answer the first certified question in the affirmative and the rephrased certified question in the negative and return this case to the United States Court of Appeals for the Eleventh Circuit.

It is so ordered.

PARIENTE, C.J., and WELLS and ANSTEAD, JJ., concur.

LEWIS, J., concurs in result only.

CANTERO and BELL, JJ., did not participate in the consideration of this case.

All Citations

887 So.2d 1023, 29 Fla. L. Weekly S454

Footnotes

1 We have chosen to rephrase the second certified question because we are keenly aware of the Supreme Court's warning that it "is not within the judicial ken to question the centrality of particular beliefs or practices to a faith." *Employment Div., Dep't of Human Res. v. Smith,* 494 U.S. 872, 887, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (quoting *Hernandez v. Comm'r,* 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989)). The federal court's four-part test not only runs the risk of placing judges in the untenable position of evaluating the merits of different religious claims, it also ignores the fact that the FRFRA protects more conduct than conduct that is central to a litigant's religious practices.

2 Dr. Pals is a professor and former Chair of the Department of Religious Studies at the University of Miami.

3 In *Smith,* The United States Supreme Court defined the Free Exercise of religion as

> the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious *beliefs* as such." The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side on controversies over religious authority or dogma.

> But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts....

Smith, 494 U.S. at 877, 110 S.Ct. 1595 (citations omitted).

4 The Eighth, Ninth, and Tenth Circuits have all found the RFRA to be constitutional as applied to the federal government. *See Guam v. Guerrero,* 290 F.3d 1210, 1221 (9th Cir.2002) ("[W]e now join our sister circuits in holding RFRA constitutional as applied to the federal realm."); *Kikumura v. Hurley,* 242 F.3d 950, 960 (10th Cir.2001) ("Thus, RFRA as applied to the federal government is severable from the portion of the RFRA declared unconstitutional in *Flores,* and independently remains applicable to federal officials."); *In re Young,* 141 F.3d 854, 863 (8th Cir.) ("Because the portion of RFRA applicable to federal law violates neither the separation of powers doctrine nor the Establishment Clause, we conclude that RFRA is constitutional."), *cert. denied,* 525 U.S. 811, 119 S.Ct. 43, 142 L.Ed.2d 34 (1998).

5 As we noted in *Malicki v. Doe,* 814 So.2d 347, 355, 355 n. 5 (Fla.2002), a claim that a law violates the Establishment Clause is assessed under the three-part test announced by the United States Supreme Court in *Lemon v. Kurtzman,* 403 U.S. 602, 612–13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Additionally, Florida's Constitution imposes a prohibition on the use of state revenue "directly or indirectly in the aid of any church, sect, or religious denomination or in aid of any sectarian institution." Art. I, § 3, Fla. Const.; *see also Rice v. State,* 754 So.2d 881, 883 (Fla. 5th DCA 2000) (recognizing that "when considering an establishment clause claim under Florida's constitution, a fourth consideration has been added by article I, section 3, of the Florida Constitution").

6 Appellants cite this Court's decisions in *Public Health Trust v. Wons,* 541 So.2d 96 (Fla.1989), and *In re Dubreuil* 629 So.2d 819 (Fla.1993), for the proposition that the Florida Free Exercise Clause requires the state to show that it has a compelling interest in enacting neutral laws of general application. However, neither *Wons* nor *Dubreuil* dealt exclusively with a free exercise challenge. Rather, both cases also involved the right of privacy. At issue was the right of an expectant mother to refuse a blood transfusion on religiously motivated grounds. This Court applied the compelling interest test in both cases and held that the state's interest in preserving the life of the mother, and thus, in maintaining a home with two parents did not override the mother's right to privacy in making decisions concerning her health based on religious doctrine. *Dubreuil,* 629 So.2d at 828; *Wons,* 541 So.2d at 98.

7 "One who claims a challenged government action violates his or her free exercise of religion must first establish that the belief in question is religious in nature, is sincerely held, and that the government action actually infringes upon the free exercise of the individual's belief." *Weir v. Nix,* 890 F.Supp. 769, 783 (S.D.Iowa 1995).

8 Jeb Bush, Governor of Florida; Liberty Counsel; Florida League of Cities, Inc.; and The International Cemetery and Funeral Association filed amicus briefs in this Court.

9 This Court has stated that a statutory provision should not be construed in such a way that it renders the statute meaningless or leads to absurd results. *See Palm Beach County Canvassing Bd. v. Harris,* 772 So.2d 1273 (Fla.2000).

10 The FRFRA clearly prohibits a reviewing court from conducting a factual inquiry which questions the validity or centrality of a plaintiff's beliefs. The Supreme Court has allowed limited inquiries into religious practices in order to determine whether a governmental regulation substantially burdened conduct motivated by sincere religious beliefs. *See Jimmy Swaggart Ministries v. Bd. of Equalization,* 493 U.S. 378, 391, 110 S.Ct. 688, 107 L.Ed.2d 796 (1990) (noting that no evidence was presented to show that collection and payment of taxes violated church's sincerely held beliefs); *Bob Jones Univ. v. United States,* 461 U.S. 574, 603 n. 8, 103 S.Ct.

2017, 76 L.Ed.2d 157 (1983) (noting evidentiary record which showed that the challenged practices of the university were based on a genuine belief that the Bible forbids interracial dating and marriage); *Wisconsin v. Yoder,* 406 U.S. 205, 215–19, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (examining the record, testimony of expert witnesses, and religious texts to determine whether compulsory education violated the Amish right to free exercise of religion).

11 Both the Third and Fourth District Courts of Appeal have considered the FRFRA. In *First Baptist Church v. Miami–Dade County,* 768 So.2d 1114 (Fla. 3d DCA 2000), the Third District considered whether the county's decision to deny the church's request for a zoning special exception violated the FRFRA. The Third District found that the county did not have the burden of showing it had a compelling interest in denying the church's zoning request. The Third District, relying on United States Supreme Court precedent, reasoned that neutral laws of general application were not required to be justified by a compelling governmental interest. Since the regulation at issue regulated only conduct and was entirely secular in purpose and effect, the Third District held that the zoning board's decision did not violate the FRFRA. *Id.* at 1118.

Similarly, in *Abbott v. City of Fort Lauderdale,* 783 So.2d 1213 (Fla. 4th DCA 2001), the petitioner argued that the city's denial of a permit to conduct a feeding program for the homeless violated his rights under the FRFRA. However, the Fourth District accepted the trial court's findings that the city's rule infringed upon the petitioner's religious rights; thus, it required the city to show that it had a compelling interest in selecting an alternate site. Accordingly, the Fourth District remanded the case for the trial court to determine whether the alternate site selected by the city represented the least intrusive means of furthering the government's compelling interest. *Id.* at 1215.

We note that the Third District's analysis in *First Baptist* is inconsistent with our opinion in the instant case. Accordingly, we disapprove the opinion in *First Baptist.*

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EXHIBIT “I”

366 F.3d 1214
United States Court of Appeals, Eleventh Circuit.

MIDRASH SEPHARDI, INC., Young Israel of Bal Harbor, Inc., Plaintiffs–Counter–Defendants–Appellants,
v.
TOWN OF SURFSIDE, a Florida Municipal Corporation, Defendant–Counter–Claimant–Appellee, Paul Novack, Individually and in his capacity as Mayor of the Town of Surfside, et al., Defendants.

No. 03–13858
|
April 21, 2004.

Synopsis

Background: Two synagogues sued town, alleging that zoning ordinance excluding churches and synagogues from business district, where private clubs and lodges were permitted, violated Religious Land Use and Institutionalized Persons Act (RLUIPA). Town counterclaimed, seeking injunction prohibiting synagogues from continuing at locations in business district. The United States District Court for the Southern District of Florida, No. 99-01566- CV-UUB, Stephen T. Brown, United States Magistrate Judge, granted summary judgment for town. Synagogues appealed.

Holdings: The Court of Appeals, Wilson, Circuit Judge, held that:

[1] synagogues had standing to challenge exclusion from business district;

[2] synagogues lacked standing to challenge exclusion from tourist district;

[3] challenge to procedure for obtaining conditional use permit (CUP) was not ripe;

[4] challenges to ordinance concerned "religious exercise" within meaning of RLUIPA;

[5] ordinance did not violate substantial-burden provision of RLUIPA;

[6] synagogues were similarly situated to private clubs and lodges;

[7] ordinance was subject to strict scrutiny under equal-terms provision of RLUIPA;

[8] ordinance was not narrowly tailored to advance town's stated interest in retail synergy;

[9] equal-terms provision of RLUIPA was appropriate use of Congress's power under § 5 of Fourteenth Amendment;

[10] provision did not contravene establishment clause; and

[11] provision did not violate Tenth Amendment.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (25)

[1] **Federal Courts** Summary judgment

Court of Appeals reviews grant of summary judgment *de novo*, applying same legal standards that bind district court.

88 Cases that cite this headnote

[2] **Federal Courts** Constitutional questions in general

Federal Courts Statutes, regulations, and ordinances, questions concerning in general

Construction and constitutionality of statute are questions of law that Court of Appeals reviews *de novo*.

4 Cases that cite this headnote

[3] **Federal Civil Procedure** In general; injury or interest

Federal Courts Case or Controversy Requirement

Federal Courts Justiciability in general

Constitutional aspect of justiciability focuses on whether Article III requirements of actual "case or controversy" are met, while prudential aspect

asks whether it is appropriate for case to be litigated in federal court by named parties at given time. U.S.C.A. Const. Art. 3, § 2, cl. 1.

10 Cases that cite this headnote

[4] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

Party seeking to invoke federal jurisdiction must demonstrate: (1) injury in fact or invasion of legally protected interest, (2) direct causal relationship between injury and challenged action, and (3) likelihood of redressability.

9 Cases that cite this headnote

[5] **Civil Rights** Property and housing

Civil Rights Property and housing

Two synagogues had standing to challenge town zoning ordinance excluding churches and synagogues from business district, where private clubs and lodges were permitted, as violative of RLUIPA, even though synagogues had not attempted to locate suitable property in two-family residential district, where churches and synagogues were permitted by way of conditional use permit (CUP); even if suitable property existed in other district, synagogues believed they had legal right to remain in business district, and synagogues suffered injury, since town sought injunction prohibiting synagogues from continuing in business district. Religious Land Use and Institutionalized Persons Act of 2000, § 2(a)(1), (b)(1), 42 U.S.C.A. § 2000cc(a)(1), (b)(1).

5 Cases that cite this headnote

[6] **Civil Rights** Property and housing

Two synagogues lacked standing to challenge town zoning ordinance excluding churches and synagogues from tourist district, where private clubs and lodges were permitted, as violative of RLUIPA, since neither synagogue was located in tourist district, nor had concrete and specific plans to locate there. Religious Land Use and Institutionalized Persons Act of 2000, § 2(a)(1), (b)(1), 42 U.S.C.A. § 2000cc(a)(1), (b)(1).

5 Cases that cite this headnote

[7] **Zoning and Planning** Finality; ripeness

Challenge by two synagogues to town zoning ordinance's procedure for obtaining conditional use permit (CUP) to operate church or synagogue in two-family residential district was not ripe, since neither synagogue had applied for CUP; it could not be determined from record how CUP would have been applied and whether town would have used CUP process to deny synagogues permits to operate.

1 Case that cites this headnote

[8] **Federal Courts** Fitness and hardship

In deciding whether claim is ripe for adjudication or review, court looks primarily at: (1) fitness of issues for judicial decision, and (2) hardship to parties of withholding court consideration.

12 Cases that cite this headnote

[9] **Civil Rights** Zoning, building, and planning; land use

Challenges to zoning ordinances are expressly contemplated by RLUIPA, and congregation's challenge to zoning ordinances concern "religious exercise" within meaning of RLUIPA. Religious Land Use and Institutionalized Persons Act of 2000, § 8(7)(A), 42 U.S.C.A. § 2000cc–5(7)(A).

28 Cases that cite this headnote

[10] **Statutes** Language

Any exercise of statutory interpretation begins first with language of statute in question.

1 Case that cites this headnote

[11] **Statutes** Plain, literal, or clear meaning; ambiguity

Although legislative history of statute is relevant to process of statutory interpretation, courts do not resort to legislative history to cloud statutory text that is clear.

3 Cases that cite this headnote

[12] **Civil Rights** Zoning, building, and planning; land use

To result in "substantial burden" on religious exercise, in violation of RLUIPA, zoning ordinance must place more than inconvenience on religious exercise; "substantial burden" is akin to significant pressure which directly coerces religious adherent to conform his or her behavior accordingly. Religious Land Use and Institutionalized Persons Act of 2000, §§ 2(a)(1), 3(a), 42 U.S.C.A. §§ 2000cc(a)(1), 2000cc–1(a).

304 Cases that cite this headnote

[13] **Civil Rights** Zoning, building, and planning; land use

"Substantial burden" on religious exercise, in violation of RLUIPA, can result from zoning ordinance that exerts pressure tending to force religious adherents to forego religious precepts, or mandates religious conduct. Religious Land Use and Institutionalized Persons Act of 2000, §§ 2(a)(1), 3(a), 42 U.S.C.A. §§ 2000cc(a)(1), 2000cc–1(a).

212 Cases that cite this headnote

[14] **Civil Rights** Zoning, building, and planning; land use

Town zoning ordinance excluding synagogues from business district, and permitting them only in two-family residential district, by way of conditional use permit (CUP), did not violate substantial-burden provision of RLUIPA, even though Orthodox-Jewish congregants, who were not allowed to use automobiles on Sabbath, would have had to walk farther to get to synagogues in two-family residential district; burden of walking a few extra blocks was not substantial. Religious Land Use and Institutionalized Persons Act of 2000, § 2(a)(1), 42 U.S.C.A. § 2000cc(a)(1).

31 Cases that cite this headnote

[15] **Civil Rights** Zoning, building, and planning; land use

Churches and synagogues were similarly situated to private clubs and lodges, as required to support claim by two synagogues that town zoning ordinance excluding churches and synagogues from business district, where private clubs and lodges were permitted, violated equal-terms provision of RLUIPA; all fell within natural perimeter of "assembly or institution" under RLUIPA, since all were places in which groups or individuals dedicated to similar purposes could meet together to pursue their interests. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

24 Cases that cite this headnote

[16] **Civil Rights** Zoning, building, and planning; land use

Town zoning ordinance excluding churches and synagogues from business district, where similarly-situated private clubs and lodges were permitted, was subject to strict scrutiny in action by two synagogues alleging that ordinance violated equal-terms provision of RLUIPA; ordinance was neither neutral nor generally applicable, since private clubs and lodges endangered town's stated interest in retail synergy as much or more than churches and synagogues, and failure to treat analogous groups equally indicated that town improperly targeted religious assemblies. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

25 Cases that cite this headnote

[17] **Civil Rights** Zoning, building, and planning; land use

Town zoning ordinance excluding churches and synagogues from business district, where

similarly-situated private clubs and lodges were permitted, was not narrowly tailored to advance town's stated interest in retail synergy, as required to satisfy strict scrutiny, and thus violated equal-terms provision of RLUIPA; town's interest in retail synergy was not pursued against analogous nonreligious conduct, and interest could have been achieved by narrower ordinances that did not improperly distinguish between similar secular and religious assemblies. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

30 Cases that cite this headnote

[18] **Constitutional Law** Enforcement of Fourteenth Amendment

Congress has authority, under enforcement clause of Fourteenth Amendment, to enact legislation to enforce rights guaranteed by First Amendment. U.S.C.A. Const.Amends. 1, 14, § 5.

1 Case that cites this headnote

[19] **Constitutional Law** Congruence and proportionality

One way to determine whether legislation enacted under enforcement clause of Fourteenth Amendment enforces constitutional right without substantively altering it is by evaluating whether legislation is congruent and proportional to injury to be prevented or remedied. U.S.C.A. Const.Amend. 14, § 5.

[20] **Constitutional Law** Enforcement of Fourteenth Amendment

Constitutional Law Deterring, preventing, or remedying violations

In determining whether legislation enacted under enforcement clause of Fourteenth Amendment enforces constitutional right without substantively altering it, court accords great weight to decisions of Congress, and gives Congress wide latitude in enacting preventative or remedial measures. U.S.C.A. Const.Amend. 14, § 5.

[21] **Civil Rights** Power to enact and validity

Constitutional Law Zoning and Land Use

Equal-terms provision of RLUIPA was reasonable means of protecting non-discrimination principles embodied in free exercise and establishment clauses, as well as equal protection clause of Fourteenth Amendment, and thus was appropriate use of Congress's power under enforcement clause of Fourteenth Amendment; Congress's findings regarding widespread discrimination against religious institutions were plausible, and provided basis for concluding that RLUIPA remedied and prevented discriminatory land use regulations. U.S.C.A. Const.Amends. 1, 14, § 5; Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

32 Cases that cite this headnote

[22] **Civil Rights** Power to enact and validity

Constitutional Law Zoning and Land Use

Equal-terms provision of RLUIPA did not impermissibly elevate religion in manner contravening establishment clause; law's purpose was to alleviate significant government interference with exercise of religion, it did not allow religious assemblies to avoid application of zoning regulations, nor impose affirmative duties on states that would require them to facilitate or subsidize exercise of religion, and it did not require pervasive monitoring to prevent government from indoctrinating religion. U.S.C.A. Const.Amend. 1; Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

16 Cases that cite this headnote

[23] **Constitutional Law** Establishment of Religion

Statute will survive establishment clause attack if (1) it has secular legislative purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not

foster excessive government entanglement with religion. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[24] **Constitutional Law** Religious Organizations in General

Statute does not violate establishment clause simply because it lifts burdens imposed on religious institutions without affording similar benefits to secular entities. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[25] **Civil Rights** Power to enact and validity **States** Civil rights

Equal-terms provision of RLUIPA did not violate Tenth Amendment, since it was proper exercise of Congress's power under § 5 of Fourteenth Amendment, and it left individual states free to eliminate discrimination in any way they chose, so long as discrimination was actually eliminated. U.S.C.A. Const.Amends. 10, 14; Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

6 Cases that cite this headnote

Attorneys and Law Firms

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Appeals from the United States District Court for the Southern District of Florida.

Before WILSON and KRAVITCH, Circuit Judges, and GOLDBERG [*], Judge.

Opinion

WILSON, Circuit Judge:

Young Israel of Bal Harbour ("Young Israel") and Midrash Sephardi ("Midrash"), two synagogues serving the Surfside–Bal ***1219** Harbour–Bay Harbor Islands area of Miami–Dade County, Florida, appeal the district court's entry of summary judgment in favor of the Town of Surfside ("Surfside") on the synagogues' claims challenging the Surfside Zoning Ordinance ("SZO") under the Religious Land Use and Institutionalized Persons Act ("RLUIPA" or the "Act"), 42 U.S.C. § 2000cc *et seq.* [1] We first hold that the SZO's provision excluding churches and synagogues from locations where private clubs and lodges are permitted violates the equal terms provision of RLUIPA. Consequently, we must decide whether RLUIPA is a constitutional exercise of Congress's authority under the First, Tenth, and Fourteenth Amendments. Finding that it is, we reverse the decision of the district court.

Background

Surfside, a small coastal town north of the City of Miami Beach and south of Bal Harbour, Florida, comprises roughly one square mile and has approximately 4,300 residents and an additional estimated tourist population of 2,030. Midrash and Young Israel (collectively the "congregations") are small Orthodox Jewish synagogues that serve the Surfside area. Together they have over one hundred members who reside in or around Surfside; their attendance triples during the winter tourist months. In addition to Midrash and Young Israel, two churches and two other synagogues presently operate in Surfside.

I. The Challenged Ordinance

Chapter 90 of the Code of the Town of Surfside, Florida, (hereinafter "SZO § X") divides Surfside into eight zoning districts, identified in Article III of the SZO. Article IV of the SZO sets forth the specific regulations governing the applicable districts, and delineates permitted uses as of right, and uses permitted subject only to special use permit or

prior conditional use approval. Surfside's zoning scheme is permissive: any use not specifically permitted is prohibited. *See* SZO § 90–6(1).

Under Article IV, churches and synagogues are prohibited in seven of the eight zoning districts. SZO permits churches and synagogues in the "RD–1 two-family residential district" ("RD–1 district") by way of conditional use permit ("CUP") obtained after approval by the Surfside Town Commission. SZO § 90–147(d). The SZO requires a CUP because conditional uses are "generally of a public or semipublic character ... but because of the nature of the use and possible impact on neighboring properties, require the exercise of planning judgment...." SZO § 90–41(a). CUPs are also required for educational institutions and museums, off-street parking lots and garages, public and governmental buildings, and public utilities. *See* SZO § 90–41(b)(1)–(5). [2]

Surfside's business district, which encompasses two blocks within the town, is ***1220** defined by SZO § 90–152 "to provide for retail shopping and personal service needs of the town's residents and tourists." SZO § 90–152(a). Section 90–152 further states that regulations governing the business district are "intended to prevent uses and activities which might be noisy, offensive, obnoxious, or incongruous in behavior, tone or appearance and which might be difficult to police." *Id.* Theaters and restaurants are permitted on the first floor level of the business district, while private clubs and lodge halls, health clubs, dance studios, music instruction studios, modeling schools, language schools, and schools of athletic instruction are only permitted above the first floor. *See* SZO § 90–152(b)(8), (18). Although permitted, Surfside does not have private clubs, social clubs, lodges or theaters. Churches and synagogues are prohibited in the business district. [3]

II. The Litigants

Midrash was formed in 1995 and leases the second floor of 9592 Harding Avenue from Ohio Savings Bank ("OSB"). The Harding Avenue location is within Surfside's business district, on the south side of the 96th Street boundary between the towns of Bal Harbour and Surfside, three blocks away from Bay Harbor Islands. Midrash draws its membership from all three towns in the Surfside–Bal Harbour–Bay Harbor area.

Surfside denied a Midrash application for a special use permit, and denied Midrash's application for a zoning variance to operate in its current location because Midrash failed to provide written permission from OSB. [4] Midrash did not appeal either denial, nor did it seek OSB's permission to re-apply for either a special use permit or a variance. [5]

In March 1999, Young Israel began leasing space in the Coronado Hotel, located in Surfside's tourist district, one block south of the 96th Street boundary between the towns of Bal Harbour and Surfside and several blocks away from Bay Harbor Islands. In November 2000, the Coronado Hotel was sold, and as a result, Young Israel congregants joined temporarily with Midrash congregants in Midrash's Harding Avenue location. Like Midrash, Young Israel draws its membership from all three towns in the Surfside–Bal Harbour–Bay Harbor area. Young Israel has never attempted to obtain a CUP or a ***1221** variance. Both congregations maintain that any attempt to relocate in the permitted RD–1 district would be futile because suitable land is unavailable.

The members of Midrash and Young Israel adhere to the strict observance of Orthodox Judaism. Synagogue services include religious prayer, worship, song, Torah readings, sermons, group discussions, required Sabbath and holiday festivities, celebrations of religious events and religious study. A central tenet of Orthodox Jewish faith requires daily prayers and the presence of a "minyan"—a quorum of ten males over the age of thirteen—for the reading from the Torah on the weekly Sabbath and religious holidays. According to the synagogues, they have hosted weddings, Bar–Mitzvahs, Brit–Milahs, community holiday meals and festivities, lectures and group discussions on social and political issues, meetings on community welfare and public service activities, and singles events, all within the context of their religious and spiritual missions.

Orthodox Judaism forbids adherents to use cars or other means of transportation during the weekly Sabbath and religious holidays; thus, adherents prefer to gather for worship and religious study in synagogues close enough to their homes to allow them to walk to services. [6] To this end, the congregations claim that the RD–1 district is out of the required walking range for a significant number of their members, particularly elderly ones, who reside on the northern side of Surfside and in the neighboring Bal Harbour and Bay Harbor communities.

Surfside claims that the SZO was designed in part to invigorate the business district and to create a strong tax

base through its retail district.[7] The economic viability of the business district—the only ***1222** retail service area in Surfside—is critical to Surfside's tax base, job base, and servicing the needs of Surfside's residents. Accordingly, Surfside avers that allowing churches and synagogues in the business district would erode Surfside's tax base, on which Surfside is dependent for revenue, and would result in economic hardship on the residents. Because Surfside has a difficult time competing for business with the nearby Shops at Bal Harbour—and recently lost a major retail supermarket chain—Surfside claims that it cannot afford to place non-economic establishments in the business district without risking the economic stability of Surfside.

Surfside allows private clubs and similar places of assemblage in the business district because it believes such organizations are compatible with the retail character of the business district. Surfside contends that private clubs are entertainment centers and typically occupy retail space in commercial districts where revitalization is required. Surfside argues that churches and synagogues, on the other hand, contribute little synergy to retail shopping areas and disrupt the continuity of retail environments.

III. Procedural History

In May 1999, Surfside initiated two actions against the congregations and their respective lessors in state court to enjoin the use of the Harding Avenue site and the Coronado Hotel as synagogues and to impose civil penalties for alleged violations of the SZO. The actions were removed to federal court and dismissed without prejudice. In July 1999, the congregations filed the instant action seeking declaratory and injunctive relief under 42 U.S.C. § 1983.[8] Surfside answered and filed a two-count counterclaim seeking declaratory and injunctive relief, as well as civil penalties and attorneys' fees.

Both parties moved for summary judgment. Surfside submitted evidence from land use experts on the economic viability of a small business district, who asserted that allowing churches and synagogues in the business district would erode Surfside's tax base. The congregations attempted to rebut this evidence by submitting affidavits from rabbis and congregants relating to the use and impact of the synagogues and the likely burden should the synagogues be required to relocate. The district court granted summary judgment for Surfside on five of six counts of the congregations' complaint and denied summary judgment in full for the congregations.

In November 2000, the congregations filed a third amended complaint alleging an additional claim based on RLUIPA. The district court granted summary judgment in favor of Surfside on all aspects of the congregants' RLUIPA claim and subsequently granted Surfside's counterclaim for an injunction.

We issued a stay of injunction pending appeal. Pursuant to 28 U.S.C. § 2403(a), the United States has intervened to defend the constitutionality of RLUIPA.

Standard of Review

[1] **[2]** We review a grant of summary judgment *de novo,* applying the same legal ***1223** standards that bind the district court. *See Cast Steel Prods., Inc. v. Admiral Ins. Co.,* 348 F.3d 1298, 1301 (11th Cir.2003). The construction and constitutionality of a statute are questions of law that we review *de novo. See Ranch House, Inc. v. Amerson,* 238 F.3d 1273, 1277 (11th Cir.2001).

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED.R.CIV.P. 56(c). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *see also Morisky v. Broward County,* 80 F.3d 445, 447 (11th Cir.1996). On a summary judgment motion, the record and all reasonable inferences that can be drawn from it must be viewed in the light most favorable to the non-moving party. *See Cast Steel,* 348 F.3d at 1301.

Discussion

I. Justiciability

As an initial matter, we must address whether the congregations have standing to bring their claims and, with

respect to their claim challenging the CUP procedure, whether that claim is ripe.

[3] Both ripeness and standing are doctrines relating to the justiciability of the congregations' claims, which encompasses both constitutional and prudential concerns. *See Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale,* 922 F.2d 756, 759 (11th Cir.1991). The constitutional aspect of justiciability focuses on whether the Article III requirements of actual "case or controversy" are met, while the prudential aspect asks whether it is appropriate for this case to be litigated in a federal court by these parties at this time. *See id.* at 759–60.

Article III of the United States Constitution limits the power of federal courts to adjudicating actual "cases" and "controversies." U.S. CONST. art. III, § 2, cl. 1. "This case-or-controversy doctrine fundamentally limits the power of federal courts in our system of government, and helps to 'identify those disputes which are appropriately resolved through judicial process.' " *Ga. State Conference of NAACP Branches v. Cox,* 183 F.3d 1259, 1262 (11th Cir.1999) (quoting *Whitmore v. Arkansas,* 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)).

[4] The most significant doctrine of case-or-controversy is the requirement of standing. *Id.* "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). A party seeking to invoke federal jurisdiction must demonstrate: 1) an injury in fact or an invasion of a legally protected interest; 2) a direct causal relationship between the injury and the challenged action; and 3) a likelihood of redressability. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *see also Pittman v. Cole,* 267 F.3d 1269, 1282–85 (11th Cir.2001). In evaluating whether a party has standing, we must "accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth,* 422 U.S. at 501, 95 S.Ct. 2197.

[5] Surfside argues that the congregations lack standing to assert that the SZO violates their constitutional rights because neither Midrash nor Young Israel has attempted ***1224** to locate property in the RD–1 district, nor has either synagogue applied for a CUP or received OSB's permission to do so. Surfside's argument misses the point of the congregations' contention: even if a "suitable property" existed in RD–1 district, the congregations believe they have a legal right to remain in the business district.

[6] Surfside has already sought to enforce § 90–152 against the congregations in an earlier state court action. In the instant action, Surfside seeks an injunction prohibiting the congregations from continuing at their current location, as well as an imposition of civil penalties. As a result of Surfside's attempts to enforce the provisions of § 90–152 against them, the congregations have suffered the requisite injury for standing purposes. We find that the congregations have standing to challenge the application of business district regulations outlined in SZO § 90–152. [9]

[7] The congregations also seek to challenge the CUP requirement and procedure found in SZO § 90–41. The district court determined that the synagogues lacked standing to contest the constitutionality of § 90–41 because by failing to follow procedures for obtaining a CUP, the congregations had not suffered an injury because of the application of § 90–41. Midrash nevertheless contends that it has standing to challenge the CUP because of the likelihood that Surfside will enforce the provision against it in the future. Section 90–41 requires a CUP for churches and synagogues "in any district in which they are specifically allowed." Reading § 90–41 *in pari matera* with § 90–152, the congregations, if victorious, must apply for a CUP to continue operating at their current location. Assuming the correctness of the congregations' challenge to the validity of § 90–152 under RLUIPA, the congregations argue that any declaratory or injunctive relief invalidating § 90–152 would be incomplete if their challenge to § 90–41 were not considered as well.

[8] The congregations' CUP challenge implicates the doctrine of ripeness, which, like the standing doctrine, involves consideration of both constitutional and prudential concerns. *See Pittman,* 267 F.3d at 1278. The purpose of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements...." *Abbott Labs. v. Gardner,* 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *abrogated on other grounds, Califano v. Sanders,* 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). In deciding whether a claim is ripe for adjudication or review, we look primarily at two considerations: 1) the fitness of the issues for judicial decision, and 2) the hardship to the parties of withholding court consideration. *Id.* at 149, 87 S.Ct. 1507.

The congregations' CUP challenge fails the prudential, or "fitness," prong of the ripeness inquiry. Because the congregations have not received a final decision on a CUP application—indeed, neither party has seriously applied for a CUP—the congregations do not raise a purely legal issue which we can decide in the abstract without further factual development. *Cf. id.* Instead, the congregations' allegations amount to mere speculation about contingent future events. We cannot determine from the record how the CUP will be applied and whether Surfside will use the ***1225** CUP process to deny the plaintiffs permits to operate their synagogues. The record contains no significant evidence of Surfside's having denied CUPs in the past, and thus, the impact of the CUP requirement is not sufficiently direct and immediate as to render the issue appropriate for judicial review. Such inquiry is better postponed until the issues are presented in the more concrete circumstance of a challenge to § 90–41 as applied.

We turn to the plaintiff's challenge to SZO § 90–152 under RLUIPA.

II. RLUIPA

Two operative subsections of RLUIPA are at issue in this case: § (a) (the "substantial burden provision"), and § (b)(1) (the "equal terms provision"). We address each of these sections in turn.

A. Substantial Burden on Religious Exercise

Section (a)(1) of RLUIPA provides:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a compelling interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1).

Section (a)(1) applies only if one of three jurisdictional tests is first met: either (A) the burden is imposed in a federally-funded program or activity; (B) the burden affects, or removal of the burden would affect, interstate commerce; or (C) the "burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes ... individualized assessments of the proposed uses for the property involved." 42 U.S.C. § 2000cc(a)(2). "Land use regulation" is defined as a "zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has ... [a] leasehold ... in the regulated land or a contract or option to acquire such an interest." 42 U.S.C. § 2000cc–5(5).

Jurisdiction in this case is appropriate under RLUIPA's "individualized assessment" test. *See id.* at § 2000cc(a)(2)(C). The SZO requires each church and synagogue to apply for a CUP prior to operating in Surfside. This assessment procedure, which results in a case-by-case evaluation of the proposed activity of religious organizations, carries the concomitant risk of idiosyncratic application of SZO standards. Surfside officials may use their authority to individually evaluate and either approve or disapprove of churches and synagogues in potentially discriminatory ways. Thus, SZO is quintessentially an "individual assessment" regime vis-a-vis churches and synagogues.

The general rule of RLUIPA is that state action substantially burdening "religious exercise" must be justified as the least restrictive means of furthering a compelling governmental interest. *Id.* at §§ 2000cc(a)(1), 2000cc–1(a). To invoke the protection of § (a) of RLUIPA, plaintiffs bear the burden of first demonstrating that the regulation substantially burdens religious exercise. *See id.* at § 2000cc–2(b). Because the alleged burden is imposed as a result of SZO, we first consider whether "religious exercise" is implicated by either the SZO or its implementation.

1. Religious Exercise

Past cases have held that zoning decisions do not generally impose a substantial ***1226** burden on religious exercise. *See Grosz v. City of Miami Beach,* 721 F.2d 729, 739 (11th Cir.1983); *see also Christian Gospel Church, Inc. v. City and County of San Francisco,* 896 F.2d 1221, 1224 (9th Cir.1990); *Messiah Baptist Church v. County of Jefferson,* 859 F.2d 820, 824–25 (10th Cir.1988); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood,* 699 F.2d 303, 306–07 (6th Cir.1983). These cases all considered whether

the "religious exercise" implicated by zoning decisions was integral to a believer's faith. RLUIPA obviates the need for such analysis by providing a statutory definition of "religious exercise."

[9] Under RLUIPA, "religious exercise" includes the "use, building, or conversion of real property for the purpose of religious exercise...." 42 U.S.C. § 2000cc5(7)(B). Unlike the suggestions made in the cases cited above, "religious exercise" does not have to be "compelled by, or central to, a system of religious belief." *Id.* at § 2000cc–5(7)(A). In passing RLUIPA, Congress recognized that places of assembly are needed to facilitate religious practice, as well as the possibility that local governments may use zoning regulations to prevent religious groups from using land for such purposes. Thus, challenges to zoning ordinances are expressly contemplated by the statute, and there is no doubt that the congregations' challenge concerns "religious exercise" within the meaning of RLUIPA. Therefore, the question then becomes whether the challenged zoning regulations, or the application thereof, effect a "substantial burden" on the congregations' use of real property for the purpose of religious exercise. We turn to this question.

2. Substantial Burden

[10] **[11]** Any exercise of statutory interpretation begins first with the language of the statute in question. *See Nat'l Coal Ass'n v. Chater,* 81 F.3d 1077, 1081 (11th Cir.1996). Because RLUIPA does not define "substantial burden," we give the term its ordinary or natural meaning. *See id.* Although the legislative history of a statute is relevant to the process of statutory interpretation, "we do not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States,* 510 U.S. 135, 147–48, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994). We turn, therefore, to other instances in which courts have defined or discussed the term "substantial burden."

The Supreme Court's definition of "substantial burden" within its free exercise cases is instructive in determining what Congress understood "substantial burden" to mean in RLUIPA. The Court's articulation of what constitutes a "substantial burden" has varied over time. *See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 450, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988) (indicating that no substantial burden exists where regulation does not have "a tendency to coerce individuals into acting contrary to their religious beliefs"); *Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 141, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987) (finding substantial burden when government put "substantial pressure on an adherent to modify his behavior and to violate his beliefs"); *Thomas v. Review Bd. of Ind. Employment Sec. Div.,* 450 U.S. 707, 718, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) (same); *Sherbert v. Verner,* 374 U.S. 398, 404, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (finding a substantial burden when an individual is required to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion ... on the other"); *but see Bowen v. Roy,* 476 U.S. 693, 707–08, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986) ***1227** (finding no substantial burden where government action interfered with, but did not coerce, an individual's religious beliefs); *Lyng,* 485 U.S. at 452, 108 S.Ct. 1319 (same).

We have held that an individual's exercise of religion is "substantially burdened" if a regulation completely prevents the individual from engaging in religiously mandated activity, or if the regulation requires participation in an activity prohibited by religion. *See Cheffer v. Reno,* 55 F.3d 1517, 1522 (11th Cir.1995) (applying the Religious Freedom Restoration Act, we found no substantial burden when religion did not require particular means of expressing religious view and alternative means of religious expression were available); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater,* 2 F.3d 1514, 1550 (11th Cir.1993) (finding a substantial burden when regulation had the effect of mandating religious conduct).

In interpreting the same provision of RLUIPA as we have before us today, the Seventh Circuit recently declared:

> in the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable.

Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir.2003) (hereinafter "*CLUB* "). While we decline to adopt the Seventh Circuit's definition —which would render § b(3)'s total exclusion prohibition meaningless [10] —we agree that "substantial burden" requires something more than an incidental effect on religious exercise.

[12] **[13]** The combined import of these articulations leads us to the conclusion that a "substantial burden" must place more than an inconvenience on religious exercise; a "substantial burden" is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.

[14] The congregations argue that requiring them to locate their synagogues in the RD–1 district constitutes a substantial burden for two related reasons. First, they contend that relocation would require their congregants to walk farther. Specifically, they suggest that the additional blocks would greatly burden congregants who are ill, young or very old. The inconvenience occasioned on these congregants would cause them to stop attending services altogether, significantly impairing the synagogues' operation. As a result, the congregations suggest that the significant decrease in attendance would require them to cease operations altogether, thereby creating an obvious substantial burden on their religious exercise. [11]

***1228** Viewing the evidence in a light favorable to the congregations, we first note that they do not claim that their current location has some religious significance such that their faith requires a synagogue at this particular site. Although they are not permitted to locate in the business district, the congregations have the alternative of applying for a permit to operate only a few blocks from their current location. For purposes of evaluating whether the SZO exacts a substantial burden within the meaning of RLUIPA, the relevant inquiry is whether and to what extent this particular requirement burdens the congregations' religious exercise.

While walking may be burdensome and "walking farther" may be even more so, we cannot say that walking a few extra blocks is "substantial," as the term is used in RLUIPA, and as suggested by the Supreme Court. The permitted RD–1 district is in the geographic center of a relatively small municipality, proximate to the business, tourist and residential districts. Deposition testimony indicated that congregants wishing to practice Orthodox Judaism customarily move where synagogues are located and do not typically expect the synagogues to move closer to them. *See* Casper Dep. at 23–24. In any given congregation, some members will necessarily walk farther than others, and, inevitably, some congregants will have greater difficulty walking than others. While we certainly sympathize with those congregants who endure Floridian heat and humidity to walk to services, the burden of walking a few extra blocks, made greater by Mother Nature's occasional incorrigibility, is not "substantial" within the meaning of RLUIPA.

Were we to adopt the synagogues' reasoning, it would be virtually impossible for a municipality to ensure that no individual will be burdened by the walk to a temple of choice. Municipalities that allow religious exemptions to alleviate even the small burden of walking a few extra blocks would run the risk of impermissibly favoring religion over other secular institutions, or of favoring some religious faiths over others.

Given the facts in this case, the SZO does not exact a "substantial" burden on the congregations' religious exercise. Because we cannot say that the SZO imposes a substantial burden on religious exercise, the congregations have failed to establish a *prima facie* case under § (a). We need not reach the question of whether Surfside can justify the burden created by articulating a compelling government interest, nor need we reach the constitutionality of § (a). We turn next to the second argument advanced by the congregations under RLUIPA: whether Surfside's favorable treatment of private clubs and lodges relative to churches and synagogues violates RLUIPA's equal terms provision.

B. Equal Terms

The congregations argue that the SZO violates § (b)(1) of RLUIPA, which provides that "[n]o government shall impose ***1229** or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1).

The Seventh Circuit has stated that "the substantial burden [§ (a)] and nondiscrimination provisions [§ (b)] are operatively independent of one another." *CLUB,* 342 F.3d at 762. Indeed, the application of § (b)(1) occasions difficulties of statutory construction not encountered when addressing

§ (a)'s prohibition against substantial burdens on religious exercise. First, § (b)(1) does not require the plaintiff to meet a threshold jurisdictional test similar to that articulated in § (a)(2). Second, while § (b)(1) has the "feel" of an equal protection law, it lacks the "similarly situated" requirement usually found in equal protection analysis. *See City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 447–50, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Third, unlike § (a), § (b)(1) renders a municipality strictly liable for its violation, rendering a discriminatory land use regulation *per se* unlawful without regard to any justifications supplied by the zoning authority. We address each problem in turn.

1. Jurisdictional Nexus

The plain terms and structure of RLUIPA indicate that the jurisdictional prerequisites included in § (a) and discussed above do not apply to § (b)'s prohibition on discrimination against and exclusion of religious institutions. First, § (a)(2) specifically enumerates three jurisdictional tests, at least one of which must be satisfied prior to § (a)(1)'s application, while § (b) is silent as to jurisdictional tests. Second, § (a)(2), by its terms, applies to "subsection" (a). *See* 42 U.S.C. § 2000cc(a)(2) ("This *subsection* applies in any case in which [listing jurisdictional tests].") (emphasis added). Finally, the jurisdictionlimits relate to burdens imposed by a government —language which is consistent with § (a)(1)'s prohibition on imposing a substantial burden without justification. *See id.* at § 2000cc(a)(1) ("No government shall impose or implement a land use regulation in a manner that imposes a substantial *burden* on the religious exercise of a person ....") (emphasis added).

Congress included the three jurisdictional limitations in 42 U.S.C. § 2000cc(a)(2) to satisfy the Supreme Court's concerns regarding congressional authority to enact legislation protecting the free exercise of religion. *See, e.g., City of Boerne v. Flores,* 521 U.S. 507, 534, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (striking down the Religious Freedom Restoration Act because it was a "considerable congressional intrusion into the State's traditional prerogative and general authority to regulate"). It was Congress's belief that applying RLUIPA in these more limited situations will alleviate federalism concerns raised by earlier religious liberty legislation. *See* 146 CONG. REC. S7774–01, *S7775 (2000) (joint statement of Sens. Hatch and Kennedy on the Religious Land Use and Institutionalized Person Act of 2000) (hereinafter "Joint Statement").

As discussed above, the SZO imposes a system of individualized assessments within the meaning of 42 U.S.C. § 2000cc(a)(2)(C), which requires that the burden be "imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes ... individualized assessments of the proposed uses for the property involved." 42 U.S.C. § 2000cc(a)(2). RLUIPA's text and structure suggest that § (a)(2)'s threshold jurisdictional test does not apply to § (b)'s equal terms provision. While the application of a jurisdictional test to § (b) claims will provide fodder for future exercises in statutory interpretation, ***1230** we do not reach this question. Because we find that the congregations allege conduct satisfying the third jurisdictional prong of § (a)(2), we do not reach the question of whether they are *required* to satisfy this jurisdictional test.

2. "Similarly Situated"

[15] The parties assume that § (b) applies to assemblies and institutions that are similarly situated in all relevant respects. *See, e.g., Cleburne,* 473 U.S. at 439, 105 S.Ct. 3249. Indeed, the district court adopted this familiar "similarly situated" test when evaluating the congregations' claims. The district court concluded that private clubs and other secular institutions are not similarly situated to churches and synagogues because "private clubs provid[e] more of a social setting [and] provide more synergy for the shopping district in keeping with the purpose of § 90–152," than churches and synagogues. *Midrash Sephardi v. Surfside,* No. 99–1566–CIV–Ungaro–Benages/Brown, at 17 (S.D.Fla. July 13, 2000) (order granting partial summary judgment). The district court also found that "churches, synagogues, educational or philanthropic museums (including museums), parking lots and garages, public and governmental buildings and public utility/public services uses are all Conditional uses ... [which] ... fall within Justice Harlan's natural perimeter test, [12] as this would apply to a group of secular and non-secular uses that 'are of a public or semi-public character.' " *Id.* (citing SZO § 90–41(a)).

Section (b)(1) makes it clear that the relevant "natural perimeter" for consideration with respect to RLUIPA's prohibition is the category of "assemblies or institutions." The district court erred by not considering RLUIPA's statutory categorization as the relevant "perimeter." By adopting Surfside's conditional use definition [13] as the relevant "natural perimeter," the district court overlooked

the express provisions of RLUIPA which require a direct and narrow focus. Under RLUIPA, we must first evaluate whether an entity qualifies as an "assembly or institution," as that term is used in RLUIPA, before considering whether the governmental authority treats a religious assembly or institution differently than a nonreligious assembly or institution. *See* 42 U.S.C.2000cc(b)(1).

Because RLUIPA does not define "assembly" or "institution," we construe these terms in accordance with their ordinary or natural meanings. *See Nat'l Coal Ass'n,* 81 F.3d at 1081.

An "assembly" is "a company of persons collected together in one place [usually] and usually for some common purpose (as deliberation and legislation, worship, or social entertainment)," WEBSTER'S 3D NEW INT'L UNABRIDGED DICTIONARY 131 (1993); or "[a] group of persons organized and united for some common purpose." BLACK'S LAW DICTIONARY 111 (7th ed.1999). An institution is "an established society or corporation: an establishment or foundation esp. of a public character," WEBSTER'S 3D NEW INT'L UNABRIDGED DICTIONARY 1171 (1993); ***1231** or "[a]n established organization, esp. one of a public character...." BLACK'S LAW DICTIONARY 801 (7th ed.1999).

The SZO does not define the terms "church" or "synagogue," but does group them with "place[s] of assembly." *See* SZO § 90–226(b) (adopting regulations related to parking spaces). According to the SZO, a private club is "a building and facilities or premises, owned and operated by a corporation, association, person or persons *for social, educational or recreational purposes,* but not primarily for profit and not primarily to render a service which is customarily carried on as a business." SZO § 90–2(20) (emphasis added).

The SZO's definition of private club comports with a natural and ordinary understanding of "assembly" as a group gathered for a common purpose. Like churches and synagogues, private clubs are places in which groups or individuals dedicated to similar purposes—whether social, educational, recreational, or otherwise—can meet together to pursue their interests. We conclude therefore that churches and synagogues, as well as private clubs and lodges, fall within the natural perimeter of "assembly or institution." [14] Finding that private clubs and lodges are similarly situated to churches and synagogues, we turn to whether under RLUIPA, Surfside may treat them differently.

3. Violation of § (b)

As noted above, the text of SZO § 90–152, which permits private clubs and other secular assemblies, excludes religious assemblies from Surfside's business district. Because we have concluded that private clubs, churches and synagogues fall under the umbrella of "assembly or institution" as those terms are used in RLUIPA, this differential treatment constitutes a violation of § (b)(1) of RLUIPA.

4. Level of Scrutiny

The interested parties in this case disagree as to the applicable level of scrutiny a law violating § (b) must undergo. Surfside assumes that it may justify a violation of § (b) by demonstrating that the varying treatment of different assemblies is rationally related to a legitimate purpose advanced by Surfside—the so-called "rational basis" review. The congregations argue that the ordinance must undergo strict scrutiny: Surfside must demonstrate that its ordinance is narrowly tailored to advance a compelling interest. Finally, the United States submits that § (b)'s prohibition does not allow a defendant to escape liability by providing a "rational basis" or "compelling interest"—in effect, holding government strictly liable a violation of § (b).

To clarify our analysis of a § (b) violation, we examine the jurisprudential foundations for Congress's enactment of § (b).

Mindful of the Supreme Court's admonition that a government would inhibit free exercise rights "if it sought to ban such acts of abstentions only when they are engaged in for religious reasons," *Employment Div., Dept. of Human Res. v. Smith,* 494 U.S. 872, 877, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), Congress enshrined similar non-discrimination principles in § (b)'s requirement that religious and nonreligious assemblies or institutions be treated equally. *See* Joint Statement, at *S7776 ("Sections [(b)(1) and (2)] ... enforce the Free Exercise Clause rule against laws that burden religion and are ***1232** not neutral and generally applicable."); H.R. REP. NO. 106–219, at 7 n.9 (1999).

Prior to *Smith,* the Supreme Court applied strict scrutiny to cases in which a government discriminated against religion or religious exercise. *See, e.g., Thomas,* 450 U.S. at 718, 101 S.Ct. 1425 ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of

achieving some compelling state interest."); *Wisconsin v. Yoder,* 406 U.S. 205, 215, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."). While *Smith* abrogated the application of strict scrutiny by emphasizing that such review would not apply to neutral laws of general applicability that incidentally burden religious exercise, *see id.* at 879, 110 S.Ct. 1595, the Court indicated that the heightened standard of review would continue to apply where a law fails to similarly regulate secular and religious conduct implicating the same government interests. *See id.* at 886, 110 S.Ct. 1595 n. 3 ("[W]e strictly scrutinize governmental classifications based on religion.") (citations omitted). After *Smith,* it remains true that a law that is not neutral or generally applicable must undergo strict scrutiny. *See id.* at 879, 110 S.Ct. 1595.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah presented an opportunity for the Supreme Court to elaborate upon what was meant by neutrality and general applicability. In examining a series of ordinances which had the effect of proscribing ritualistic animal sacrifice by adherents of the Santeria religion, the Court confirmed that the government violates Free Exercise rights when it selectively imposes burdens on religious conduct. 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). Although the *Lukumi* Court found the city's proscription facially neutral, the Court nevertheless concluded that the ordinances violated principles of neutrality by improperly targeting the Santeria religion. *See id.* at 534, 113 S.Ct. 2217. Recognizing that the ordinances were both underinclusive and overbroad, the Court concluded that they were not neutral, but rather "had as their object the suppression of religion." *Id.* at 542, 113 S.Ct. 2217. The Court also found that the ordinances were not generally applicable because they pursued the city's interests only against conduct motivated by religious belief. *Id.* at 545, 113 S.Ct. 2217. The Court then subjected the ordinances to strict scrutiny, striking them down after determining that they were not narrowly tailored to accomplish government's interests, nor were the governmental interests compelling. *See id.* at 546, 113 S.Ct. 2217.

RLUIPA's equal terms provision codifies the *Smith-Lukumi* line of precedent. By requiring equal treatment of secular and religious assemblies, RLUIPA allows courts to determine whether a particular system of classifications adopted by a city subtly or covertly departs from requirements of neutrality and general applicability. A zoning law is not neutral or generally applicable if it treats similarly situated secular and religious assemblies differently because such unequal treatment indicates the ordinance improperly targets the religious character of an assembly. Thus, a violation of § (b)'s equal treatment provision, consistent with the analysis employed in *Lukumi,* must undergo strict scrutiny. *Id.*

[16] Indeed, a closer look at § 90–152 reveals that Surfside improperly targeted religious assemblies and violated Free Exercise requirements of neutrality and general applicability. While merely the mention of church or synagogue in a zoning code does not destroy a zoning code's neutrality, we must nevertheless be mindful of ***1233** the potential for impermissible "religious gerrymanders," which may render a zoning code operatively non-neutral. *Walz v. Tax Comm'n of New York City,* 397 U.S. 664, 696, 90 S.Ct. 1409, 25 L.Ed.2d 697 (Harlan, J., concurring). As we have noted, the text of § 90–152 treats religious assemblies differently than secular assemblies by excluding religious assemblies from the business district, a factor that is enough to constitute a violation of § (b) of RLUIPA, and, as we discuss below, also indicates an infringement of the *Smith* principles of neutrality and general applicability. With respect to neutrality, the purpose and operation of the ordinance reveal an impermissible attempt to target religious assemblies.

The purpose and operation of Surfside's business district is "to provide for retail shopping and personal service needs of the town's residents and tourists." SZO § 90–152(a). The regulations governing the business district are "intended to prevent uses and activities which might be noisy, offensive, obnoxious, or incongruous in behavior, tone or appearance and which might be difficult to police." *Id.*

Religious institutions, Surfside argues, are open only once a week, usually on a day or at a time that other area businesses are closed. Surfside maintains that the "central use" of a religious institution is as a "single destination" where congregants fill a "spiritual need" and then, presumably, vacate the area. For these reasons, Surfside contends that churches and synagogues do not cater to or stimulate the shopping and retail needs of Surfside residents in a way that comports with the objectives of the business district. Private clubs, on the other hand, allegedly provide a more "social" setting and promote "synergy" with the shopping district because the nature of activity in a club or lodge is entertainment. [15]

The congregations provide evidence that they meet throughout the week for purposes other than religious

services, including Torah classes and group discussion. They aver that they hold social and entertainment gatherings, albeit within the context of their religious and spiritual mission. The congregations submit evidence suggesting that members regularly patronize area shops before and after services and meetings. The evidence also demonstrates that the congregations themselves purchase food, paper, and other supplies from the businesses in the area. The presence of synagogues has also led to the opening of kosher food businesses in the area. This evidence indicates that § 90–152 is overinclusive with respect to Surfside's objectives of promoting retail activity and synergy because the synagogues contribute to the retail and commercial activity of the business district.

Our review of the record indicates that § 90–152 is also underinclusive for the interests Surfside seeks to advance. The SZO's definition of private clubs belies Surfside's argument that private clubs are "typical retail and service activities" by indicating that private clubs are organizations existing "for social, educational or recreational purposes, but not primarily for profit and not primarily to render a service which is customarily carried on as a business." SZO § 90–2(20). Moreover, permitted private clubs include organizations ***1234** that often meet weekly, monthly, or bi-monthly, and sometimes during non-business hours—hours of operation which fail to stimulate an increase in consumer traffic to the business district. Other than conclusory assertions that private clubs are more social than churches—assertions disputed by evidence submitted by the congregations—and that the increased sociability lends itself to increased patronage of local establishments, Surfside provides no evidence that private clubs and lodges *actually* contribute to the business district in a way appreciably different than religious institutions. Surfside's stated goal of retail synergy is pursued only against religious assemblies, but not other non-commercial assemblies, thus devaluing the religious reasons for assembling. Under *Lukumi,* this discriminatory treatment extinguishes an ordinance's neutrality. *See Lukumi,* 508 U.S. at 538, 113 S.Ct. 2217.

As the evidence suggests, the synagogues are not incongruous with the stated objectives and purposes of the business district advanced by Surfside through the SZO. By prohibiting religious assemblies in Surfside's business district, § 90–152 improperly targeted religious assemblies for dissimilar treatment and is therefore, not neutral. [16]

We turn to the second Free Exercise requirement that a law burdening religious practice must be generally applicable. *Lukumi,* 508 U.S. at 542, 113 S.Ct. 2217. Surfside argues that the SZO places restrictions not only on religious entities, but also on other organizations, including educational institutions and museums, off-street parking lots and garages, public and governmental buildings, and public utilities.

Zoning laws inherently distinguish between uses and necessarily involve selection and categorization, often restricting religious assemblies to designated districts and frequently requiring that religious assemblies complete a conditional use application procedure. *See id.* at 542–43, 113 S.Ct. 2217 ("All laws are selective to some extent ... [but] inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.").

Surfside's treatment of synagogues as categorically different because they have "[n]ever held a social, communal, public service or other community affair event which is *unrelated to [their] religious and spiritual mission or purpose* " clearly implicates the Supreme Court's requirement that governments should not treat secular motivations more favorably than religious motivations. *See generally id.; see also Smith,* 494 U.S. at 877, 110 S.Ct. 1595. The operation of § 90–152 to exclude religious assemblies because of their spiritual mission is just one indication that Surfside improperly excluded religious assemblies because of their religiosity. Another indication is the underinclusiveness of § 90–152. *See Lukumi,* 508 U.S. at 542–45, 113 S.Ct. 2217 (concluding that because the city's ordinances pursued the city's interests only against religious conduct, the ordinances were not generally applicable). The inclusion of private clubs in the business district, which operate for "social, educational ***1235** or recreational purposes, but not primarily for profit and not primarily to render a service which is customarily carried on as a business," *see* SZO § 90–2(20), is incompatible with Surfside's asserted goals of achieving maximum economic benefit and the concentration and development of commercial uses along Harding Avenue. *See* 1995–2000 Comprehensive Plan. Because private clubs do not serve Surfside's economic and commercial goals but are nevertheless permitted in the business district indicates that § 90–152 pursues Surfside's interests only against conduct motivated by religious belief.

Including private clubs and lodges as permitted uses in Surfside's business district, while simultaneously excluding religious assemblies, violates the principles of neutrality

and general applicability because private clubs and lodges endanger Surfside's interest in retail synergy as much or more than churches and synagogues. Surfside's failure to treat the analogous groups equally indicates that Surfside improperly targeted religious assemblies.

As demonstrated above, a violation of § (b)'s equal treatment provision indicates that the offending law also violates the *Smith* rule requiring neutrality and general applicability. Consistent with the analysis employed in *Lukumi,* a law violating § (b) must therefore undergo the most rigorous of scrutiny. *Cf. Fraternal Order of Police Newark Lodge No. 12 v. City of Newark,* 170 F.3d 359, 366 (3d Cir.1999) (applying strict scrutiny to overturn regulation that "indicat[ed] that the [government] made a value judgment that secular (i.e., medical) motivations for wearing a beard [were] important enough to overcome its general interest in uniformity but that religious motivations [were] not").

[17] We turn to whether Surfside, through the implementation of the SZO, "advance[s] interests of the highest order" and is narrowly tailored in pursuit of those interests. *Lukumi,* 508 U.S. at 546, 113 S.Ct. 2217. As we have discussed, SZO § 90–152 is overinclusive and underinclusive in substantial respects. The proffered interests of retail synergy are not pursued against analogous nonreligious conduct, and those interests could be achieved by narrower ordinances that do not improperly distinguish between similar secular and religious assemblies. Because § 90–152 treats religious institutions on less than equal terms with nonreligious institutions, § 90–152 is invalid under § (b)(1) of RLUIPA. [17] Finding that SZO § 90–152 is not narrowly tailored to Surfside's interest, we need not address whether this interest is of "the highest order." *See Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 232, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987).

III. Constitutionality of RLUIPA

Surfside argues that if we find that the SZO violates RLUIPA, such a finding is ***1236** not dispositive because RLUIPA is unconstitutional for three reasons: 1) RLUIPA exceeds Congress's power under § 5 of the Fourteenth Amendment; 2) RLUIPA establishes religion in violation of the First Amendment; and 3) Congress lacked authority to pass RLUIPA because RLUIPA infringes on state sovereignty under the Tenth Amendment. The district court did not address the constitutionality of RLUIPA, instead finding that the congregations did not allege conduct that would invoke its protections. After a brief review of RLUIPA's statutory and case law predecessors, we turn to Surfside's contentions, confining our analysis of RLUIPA's constitutionality to the provisions implicated by Surfside's conduct. We conclude that RLUIPA withstands our scrutiny and is a proper exercise of Congress's § 5 powers.

A. RLUIPA Background

In 1990, the Supreme Court decided *Smith,* which held that the Free Exercise Clause of the First Amendment does not exempt an individual from compliance with a valid and neutral law of general applicability merely because the law incidentally burdens religious conduct. *See Smith,* 494 U.S. at 879, 110 S.Ct. 1595. In response to *Smith,* Congress enacted the Religious Freedom Restoration Act ("RFRA"), 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb *et seq.*). RFRA sought to rescind *Smith* and restore what some refer to as the pre-*Smith* standard: the "compelling interest/least restrictive means" test found in *Sherbert,* 374 U.S. at 407–09, 83 S.Ct. 1790, and *Yoder,* 406 U.S. at 214–15, 92 S.Ct. 1526.

Four years later, the Supreme Court struck down RFRA as it relates to state and local governments in *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). Congress may enforce constitutional rights pursuant to § 5 of the Fourteenth Amendment. However, in *Boerne,* the Supreme Court held that by enacting RFRA, Congress had exceeded that authority by *defining* rights instead of simply *enforcing* them. *Boerne,* 521 U.S. at 532, 117 S.Ct. 2157. RLUIPA is a response to *Boerne,* becoming the latest congressional effort to offer statutory protection to religious liberty. *See* H.R.REP. NO. 106–219, at 4 (commenting that "H.R. 1691 [RLUIPA's legislative predecessor] was introduced, in part, in response to the Supreme Court's partial invalidation of the Religious Freedom Restoration Act....").

Congress sought, through RLUIPA, to protect religious land uses from discriminatory processes used to exclude or otherwise limit the location of churches and synagogues in municipalities across the country. *See* Joint Statement, at *S7774–S7775. As indicated during nine hearings held before both houses of Congress, RLUIPA targets zoning codes which use individualized and discretionary processes to exclude churches, especially "new, small or unfamiliar churches ... [like] black churches and Jewish shuls and synagogues." *Id.* at *S7774. The legislative record contained statistical, anecdotal and testimonial evidence suggesting that discrimination is widespread and typically results in

the exclusion of churches and synagogues even in places where theaters, meeting halls and other secular assemblies are permitted. *Id.* at *S7774. According to RLUIPA co-sponsors Senators Hatch and Kennedy:

> The hearing record compiled massive evidence that [the right to build, buy, or rent space for churches and synagogues] is frequently violated. Churches in general, and new, small or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation.

***1237** *Id.* at *S7774.

RLUIPA features two primary means of addressing these perceived infringements on religious liberty. RLUIPA revives RFRA's substantial burden test, confining the reach of this test to land use regulations that first pass jurisdictional muster. RLUIPA also contains § (b), a wholly new provision directed at zoning codes that discriminate against, or among religious institutions or unreasonably limit religious institutions in a jurisdiction. *See* 42 U.S.C. § 2000cc(b). As discussed above, SZO § 90–152 violates § (b)(1) of RLUIPA.

B. Fourteenth Amendment

Surfside first argues that by enacting RLUIPA, Congress exceeded its power under § 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

The Supreme Court has characterized Congress's power under § 5 of the Fourteenth Amendment as "remedial." *South Carolina v. Katzenbach,* 383 U.S. 301, 326, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). As the Court noted in *Boerne:*

> The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States.... Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

Boerne, 521 U.S. at 519, 117 S.Ct. 2157.

[18] Neither party disputes, nor is there reason to doubt, that RLUIPA purports to protect certain religious liberties guaranteed by the First Amendment. In determining whether RLUIPA is an appropriate exercise of Congress's § 5 power, we must first determine whether Congress has the authority to enact legislation to enforce the rights guaranteed by the First Amendment. *See Boerne,* 521 U.S. at 519, 117 S.Ct. 2157. *Boerne* answered this question in the affirmative. *See id.; see also Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (holding that the "fundamental concept of liberty embodied in [the Fourteenth Amendment's Due Process Clause] embraces the liberties guaranteed by the First Amendment").

[19] The second inquiry under *Boerne* is whether RLUIPA "enforces" a constitutional right without substantively altering that right. *See id.* One way in which we determine whether § 5 legislation enforces a right is by evaluating whether the legislation is congruent and proportional to the injury to be prevented or remedied. *Id.* at 520, 117 S.Ct. 2157. Under *Boerne*, preventative measures are more likely to withstand scrutiny if they prohibit actions that themselves have "a significant likelihood of being unconstitutional." *Id.* at 532, 117 S.Ct. 2157. Thus, according to *Boerne*, if RLUIPA merely codifies existing constitutional principles, it is an acceptable use of Congress's § 5 remedial tool. [18]

[20] When conducting this analysis, we accord "great weight to the decisions of Congress," *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.,* 412 U.S. 94, 102, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973), and ***1238** give Congress "wide latitude" in enacting preventative or remedial measures. *Boerne,* 521 U.S. at 520, 117 S.Ct. 2157. As Justice Frankfurter has noted, courts must give "due regard to the fact that [they are] not exercising a primary judgment but [are] sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government." *Joint Anti–Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 164, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress has specifically considered the question of the law's constitutionality. *See Rostker v. Goldberg,* 453 U.S. 57, 64, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981).

[21] The United States argues that RLUIPA is a reasonable means of protecting the non-discrimination principles embodied in the Free Exercise and the Establishment Clauses

of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment.

A survey of Free Exercise cases indicates that government action that specifically targets religion or religious conduct for distinctive treatment can be an impermissible intrusion on an individual's free exercise rights. *See Lukumi,* 508 U.S. at 534, 113 S.Ct. 2217 ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.... '[We] must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.' ") (quoting *Walz,* 397 U.S. at 696, 90 S.Ct. 1409 (Harlan, J., concurring)); *McDaniel v. Paty,* 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978) (invalidating law that disqualified members of the clergy from holding certain public offices); *Fowler v. Rhode Island,* 345 U.S. 67, 69–70, 73 S.Ct. 526, 97 L.Ed. 828 (1953) (invalidating law which discriminated among religious sects). In *Lukumi,* the Supreme Court reaffirmed the principle that free exercise rights must be protected against laws that selectively impose burdens on conduct motivated by religious belief. *See Lukumi,* 508 U.S. at 543, 113 S.Ct. 2217; *see also Hobbie,* 480 U.S. at 146, 107 S.Ct. 1046 (overturning state decision to withhold unemployment compensation to an employee who refused to work on her Sabbath as violative of Free Exercise rights); *FOP,* 170 F.3d at 366–67 (holding that a police department policy prohibiting beards but allowing a medical exemption violated the nondiscrimination principles of the Free Exercise Clause).

The Establishment Clause mandates equal treatment of religious and secular assemblies based on the converse theory: the government may not favor the religious over non-believers because such favoritism would amount to an impermissible establishment of religion. *See, e.g., Gillette v. United States,* 401 U.S. 437, 450, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971) ("[T]he Establishment Clause prohibits government from abandoning secular purposes ... to favor adherents of any sect or religious organization."). The Supreme Court has consistently disapproved of unequal treatment that elevates religion over secular interests. *See generally Texas Monthly, Inc. v. Bullock,* 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989) (striking down law exempting only religious publications from taxation); *Engel v. Vitale,* 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962) (striking down state-sponsored prayers); *see also Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet,* 512 U.S. 687, 704, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994) (stating that "civil power must be exercised in a manner neutral to religion"); ***1239** *Zorach v. Clauson,* 343 U.S. 306, 314, 72 S.Ct. 679, 96 L.Ed. 954 (1952) (stating that Government may not "prefer[ ] those who believe in no religion over those who do believe"). This bar to unequal treatment is also the fundamental point of *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), which held that the Establishment Clause requires that the "principal or primary effect [of governmental action] must be one that neither advances nor inhibits religion." *Id.* at 612, 91 S.Ct. 2105.

In short, the equal treatment required by the two Religion Clauses serves to protect individuals from encroachments on the right to freely engage in religious exercise, and offers protection from government action that impermissibly favors religion.

Finally, the Equal Protection Clause mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws," U.S. CONST. amend. XIV, § 1, cl. 4, which provides support for § (b) by "direct[ing] that all persons similarly situated should be treated alike." *Cleburne,* 473 U.S. at 439, 105 S.Ct. 3249.

In *Cleburne,* the Supreme Court reviewed a city's land use regulation that distinguished between homes for persons with mental disabilities from multiple dwellings, boarding and lodging houses, fraternity or sorority houses, and dormitories. *Cleburne* held that the difference between a group home and these other uses was irrelevant unless the group home and its occupants "would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not." *Id.* at 448, 105 S.Ct. 3249. By employing an equal protection analysis to examine whether a law applies equally to similarly situated assemblies or institutions, courts can ferret out laws that are facially neutral but discriminate in fact. *See Lukumi,* 508 U.S. at 540, 113 S.Ct. 2217.

We agree with Justice O'Connor's observation that "the Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, ... and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Kiryas Joel,* 512 U.S. at 715, 114 S.Ct. 2481 (O'Connor, J., concurring). On the face of RLUIPA's equal terms provision, the echoes of these constitutional principles are unmistakable. Simply put, to

deny equal treatment to a church or a synagogue on the grounds that it conveys religious ideas is to penalize it for being religious. Such unequal treatment is impermissible based on the precepts of the Free Exercise, Establishment and Equal Protection Clauses.

Congress's power is certainly not without limits, but we find that Congress's findings regarding the widespread discrimination against religious institutions are plausible and provide a basis for concluding that RLUIPA remedies and prevents discriminatory land use regulations. *See United States v. Holmes,* 838 F.2d 1175, 1177 (11th Cir.1988) ("[W]here a statute does not discriminate on racial grounds or against a suspect class, Congress'[s] judgment will be sustained in the absence of persuasive evidence that Congress had no reasonable basis for drawing the lines that it did."). RLUIPA tailors the nondiscrimination prohibitions annunciated above to land use regulations because Congress identified a significant encroachment on the core First and Fourteenth Amendment rights of religious observers. Because § (b)(1) of RLUIPA codifies existing Free Exercise, Establishment Clause and Equal Protection rights against states and municipalities that treat religious assemblies or institutions "on less than equal terms" than secular institutions, § (b) is an appropriate ***1240** and constitutional use of Congress's authority under § 5 of the Fourteenth Amendment.

C. Establishment Clause

[22] We turn to Surfside's contention that RLUIPA impermissibly elevates religion in a manner contravening the Establishment Clause.

At its core, Surfside's argument implicates the intersection of both religious liberties principles found in the First Amendment—the right to free exercise of religion and the prohibition against establishment of religion. As courts strive for a "benevolent neutrality" toward religion that allows religious exercise to exist without either endorsement or interference, they do so with the recognition that the two Religion Clauses, "both of which are cast in absolute terms," would, if taken to their logical extremes, "tend to clash with [each] other." *Walz,* 397 U.S. at 668–69, 90 S.Ct. 1409. When deciding these cases, courts are sometimes forced to enter the debate about whether the Free Exercise Clause allows exemptions from burdensome laws, *see, e.g., Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter–Day Saints v. Amos,* 483 U.S. 327, 336, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987) (upholding a law which granted religious employers an exemption from compliance with Title VII's protection against religious discrimination), or whether the Establishment Clause *prohibits* such exemptions, either on the grounds that an exemption impermissibly discriminates against the nonreligious, *see e.g., Texas Monthly,* 489 U.S. at 9, 109 S.Ct. 890 (plurality opinion) (government "may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general ... conveying the message that those who do not contribute gladly are less than full members of the community"), or on the grounds that the exemption impermissibly advances religion. *See, e.g., Edwards v. Aguillard,* 482 U.S. 578, 593, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (striking down Louisiana's Creationism Act because it impermissibly endorses religion).

[23] The three-part test provided by *Lemon* helps determine whether a statute achieves neutrality towards religion by avoiding "sponsorship, financial support, and active involvement of the sovereign in religious activity." 403 U.S. at 612, 91 S.Ct. 2105 (quoting *Walz,* 397 U.S. at 668, 90 S.Ct. 1409). A statute will survive an Establishment Clause attack if 1) it has a secular legislative purpose, 2) its primary effect neither advances nor inhibits religion, and 3) it does not foster excessive government entanglement with religion. *Id.* at 612–13, 90 S.Ct. 1409. [19] "State action violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards,* 482 U.S. at 583, 107 S.Ct. 2573.

1. Purpose

Lemon first requires that the law at issue serve a "secular legislative purpose." 403 U.S. at 612, 91 S.Ct. 2105. The Supreme Court has upheld statutes that "alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos,* 483 U.S. at 335, 107 S.Ct. 2862; *see also Hobbie,* 480 U.S. at 144–45, 107 S.Ct. 1046 (noting ***1241** that "the government may (and sometimes must) accommodate religious practices ... without violating the Establishment Clause"). In requiring neutrality toward religion, the government need not be "oblivious to impositions that legitimate exercises of state power may place on religious belief and practice," *Kiryas Joel,* 512 U.S. at 705, 114 S.Ct. 2481, nor must the "government show a callous indifference to religious groups." *Zorach,* 343 U.S. at 314, 72 S.Ct. 679. Where, as here, a law's purpose is to alleviate significant

government interference with the exercise of religion, that purpose does not violate the Establishment Clause.

2. Effect

The second requirement under *Lemon* is that the law in question have a "principal or primary effect ... that neither advances nor inhibits religion." 403 U.S. at 612, 91 S.Ct. 2105. The Supreme Court has said that "[a] law is not unconstitutional simply because it *allows* churches to advance religion.... For a law to have forbidden 'effects' under *Lemon,* it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Amos,* 483 U.S. at 337, 107 S.Ct. 2862.

[24] We find unpersuasive Surfside's argument that the application of RLUIPA's equal terms provision gives an impermissible special preference to religious interests. *Amos* makes it clear that a law does not violate the Establishment Clause simply because it lifts burdens imposed on religious institutions without affording similar benefits to secular entities. 483 U.S. at 338, 107 S.Ct. 2862 ("[W]e see no reason to require that the [burden-alleviating] exemption comes packaged with benefits to secular entities."). Moreover, contrary to Surfside's assertions, RLUIPA does not allow religious assemblies to avoid the application of zoning regulations. RLUIPA does not impose affirmative duties on states that would require them to facilitate or subsidize the exercise of religion. RLUIPA instead calls for exactly the opposite—forbidding states from imposing impermissible burdens on religious worship.

For purposes of analyzing the second prong of *Lemon,* a relevant and meaningful distinction exists between statutes whose effect is to advance religion and statutes whose effect is to allow religious organizations to advance religion. *See Amos,* 483 U.S. at 336–337, 107 S.Ct. 2862; *Kiryas Joel,* 512 U.S. at 719, 114 S.Ct. 2481 (O'Connor, J., concurring). RLUIPA, by mandating *equal* as opposed to *special* treatment for religious institutions, does not advance religion by making it easier for religious organizations themselves to advance religion.

3. Entanglement

Under *Lemon* 's third prong, a statute must not result in excessive entanglement between church and state. 403 U.S. at 613, 91 S.Ct. 2105. RLUIPA does not require "pervasive monitoring" to prevent the government from indoctrinating religion. *See Agostini,* 521 U.S. at 233, 117 S.Ct. 1997. RLUIPA does not call on the government to supervise land use regulations to make sure governmental funds do not sponsor religious practice, nor does it require state or local officials to develop expertise on religious worship or to evaluate the merits of different religious practices or beliefs. RLUIPA requires only that states avoid discriminating against or among religious institutions. As such, RLUIPA passes muster under *Lemon* 's third prong.

That the Constitution's prohibition of the "establishment of religion" also allows—and sometimes mandates—equal treatment of religion seems obvious. ***1242** Equal treatment maintains the separation of church and state by keeping the government separate from people's decisions about religion, while ensuring that the government does not "make [ ] adherence to religion relevant to a person's standing in the political community." *Wallace,* 472 U.S. at 69, 105 S.Ct. 2479 (O'Connor, J., concurring in judgment); *see also Kiryas Joel,* 512 U.S. at 715, 114 S.Ct. 2481 (O'Connor, J., concurring in part and concurring in judgment); *County of Allegheny v. ACLU,* 492 U.S. 573, 626, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (O'Connor, J., concurring in part and concurring in judgment). Because RLUIPA accommodates religion by remedying and preventing discriminatory zoning in accordance with principles established by the First and Fourteenth Amendments, RLUIPA does not violate the Establishment Clause. [20]

D. Tenth Amendment

[25] Finally, we reject the argument that in enacting RLUIPA, Congress violated the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Although RLUIPA intrudes to some degree on local land use decisions, RLUIPA does not violate principles of federalism if it is otherwise grounded in the Constitution. *See New York v. United States,* 505 U.S. 144, 156, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). Because RLUIPA is a proper exercise of Congress's power under § 5 of the Fourteenth Amendment, there is no violation of the Tenth Amendment.

Moreover, RLUIPA must not "compel the States to enact or enforce a federal regulatory program." *Printz v. United*

States, 521 U.S. 898, 935, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997); *New York,* 505 U.S. at 175–77, 188, 112 S.Ct. 2408. While RLUIPA may preempt laws that discriminate against or exclude religious institutions entirely, it leaves individual states free to eliminate the discrimination in any way they choose, so long as the discrimination is actually eliminated. *See Fed. Energy Regulatory Comm'n v. Mississippi,* 456 U.S. 742, 759, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982) ("[T]he Federal government may displace state regulation even though this serves to 'curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important.") (citation omitted); ***1243** *City of Rome v. United States,* 446 U.S. 156, 179, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980) (contemplating Fourteenth Amendment's interference with state rights); *Gregory v. Ashcroft,* 501 U.S. 452, 468, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (same).

RLUIPA's core policy is not to regulate the states or compel their enforcement of a federal regulatory program, but to protect the exercise of religion, a valid exercise of Congress's § 5 power under the Fourteenth Amendment, which does not run afoul of the Tenth Amendment's protection of the principles of federalism.

Conclusion

For the foregoing reasons, we find that § 90–152 of the SZO violates § (b)(1) of RLUIPA. We REVERSE the decision of the district court, and REMAND for further proceedings consistent with this opinion.

All Citations

366 F.3d 1214, 17 Fla. L. Weekly Fed. C 453

Footnotes

* Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.

1 The plaintiffs also contend that the SZO violates their rights under the First and Fourteenth Amendments, as well as their rights under the Florida Religious Freedom and Restoration Act. Because we sustain the congregations' RLUIPA challenge to the ordinance, we need not reach these additional claims.

2 The standards and procedures for conditional use approval are set forth in SZO § 90–41, which provides that conditional use approval shall only be granted "where it has been clearly shown that the public health, safety, morals, and general welfare will not be adversely affected ... and that necessary safeguards will be provided for the protection of surrounding property." SZO § 90–41(b). Section 90–41 further provides that "[t]he planning and zoning board's report to the town commission may contain recommendations regarding conditions which should be imposed by the town commission in approving the conditional use," and that "[t]he town commission may establish these and/or additional conditions for an approval." SZO § 90–41(d). The SZO does not articulate any other standards governing the CUP procedure.

3 Although other uses "having the same general characteristics and of such nature that the same would not lower the standards of the area" may be permitted in the business district by way of special use exception, churches and synagogues may not apply for special use exceptions because churches and synagogues are only permitted "in any district which they are *specifically* allowed." *Compare* SZO § 90–152(e) *with* SZO § 90–41(b) (emphasis added).

4 Written permission from the owner is required for all applications for rezoning, including applications for variances, conditional uses, and special uses. *See* SZO § 90–58(6), (7).

5 Section 90–91 provides that the town commission may grant approval for special exceptions, special use permits or variances "after having received a report and recommendation of the planning and zoning board." SZO § 90–91(a). "Special exceptions or variances shall only be granted in cases of demonstrable and

exceptional hardship as distinguished from purposes or reasons of convenience, profit or caprice." SZO § 90–91(b). Neither party argues that the synagogues have shown, or indeed could show, the requisite hardship in order to obtain special exceptions or variances.

6 Surfside argues that Jewish law permits the elderly and persons with medical conditions to use transportation to attend services, and thus that walking is not a *per se* requirement of Orthodox Judaism. It is worth noting at this point that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Commissioner,* 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989).

7 Surfside cites the 1995–2000 Comprehensive Plan, adopted pursuant to Local Government Comprehensive Planning and Land Development Regulation Act, FLA. STAT. ANN. § 163.3161 *et seq.* The 1995–2000 Plan states that Surfside's primary goal in drafting the SZO is to "[e]nsure that the character and location of future land uses directs growth in such a way so as to provide maximum economic benefit" to Surfside. Thus, under the 1995–2000 Plan, Surfside encourages, *inter alia,* 1) revitalization of the existing Harding Avenue business area; 2) concentration of commercial uses in and around Harding Avenue; 3) development of commercial office space along Collins Avenue between 93rd and 96th Streets to provide a greater population for retail and service shops along Harding Avenue; and 4) development of commercial uses along 94th, 95th, and 96th Streets between Collins and Harding Avenues.

The 2010 Comprehensive Plan states, *inter alia,* that Surfside's objectives are to 1) encourage private investment in the revitalization of the Harding Avenue business district; 2) maintain and improve zoning regulations which permit the concentration of commercial uses in and around the established Harding Avenue business area; and 3) maintain and improve zoning regulations which permit commercial office space along Collins Avenue as part of mixed use developments which provide concentrations of workers and/or residents to support retail and service uses along Harding Avenue.

We have said that "Florida's land use planning statutes provide for the adoption of comprehensive plans to control and direct the use and development of property within a county or municipality. Once a comprehensive plan for an area is adopted, all development approved by a governmental agency must be consistent with the plan." *Eide v. Sarasota County,* 908 F.2d 716, 718–19 (11th Cir.1990) (citations omitted).

8 The synagogues' original complaint alleged a facial equal protection violation, which was replaced in the second amended complaint with an as-applied equal protection claim. Upon reviewing the record, we find that the synagogues abandoned their facial equal protection claim. The district court was not presented with and did not resolve an equal protection argument based on Surfside's treatment of private clubs and lodges. Therefore, we will not consider this argument on appeal. *See Walker v. Jones,* 10 F.3d 1569, 1572 (11th Cir.1994). To the extent that the argument overlaps with the synagogues' RLUIPA claim, we discuss that issue *infra.*

9 However, we find that neither Midrash nor Young Israel has standing to challenge the application of § 90–151, which defines Surfside's tourist district and, like § 90–152, permits private clubs but excludes churches and synagogues. *See* 90–151(b)(2). Neither party is located in the tourist district, and neither party has concrete and specific plans to locate in there.

10 The "exclusions and limits" provision provides that "[n]o government shall impose or implement a land use regulation that—(A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. § 2000cc(b)(3).

11 In addition to these burdens, the congregations suggest that they will not be able to find land or a facility sizable enough to accommodate their congregations in the permitted RD–1 district. That the congregations

may be unable to find suitable alternative space does not create a substantial burden within the meaning of RLUIPA. As the Seventh Circuit noted, "whatever specific difficulties [the plaintiff church] claims to have encountered, they are the same ones that face all [land users], not merely churches. The harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them." *Love Church v. City of Evanston,* 896 F.2d 1082, 1086 (7th Cir.1990).

The congregations also contend that the burden of requiring them to apply for a CUP constitutes a substantial burden on religious exercise. Requiring churches and synagogues to apply for CUPs allows the zoning commission to consider factors such as size, congruity with existing uses, and availability of parking. We have found that such reasonable "run of the mill" zoning considerations do not constitute substantial burdens on religious exercise. *See Lady J. Lingerie, Inc. v. Jacksonville,* 176 F.3d 1358, 1362 (11th Cir.1999).

12 *See Walz v. Tax Comm'n of New York City,* 397 U.S. 664, 696, 90 S.Ct. 1409, 25 L.Ed.2d 697 (Harlan, J., concurring) ("In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.").

13 Conditional uses, which include churches, synagogues, educational institutions, museums, off-street parking lots and garages, public and governmental buildings, and public utilities are "generally of a public or semipublic character ... but because of the nature of the use and possible impact on neighboring properties, require the exercise of planning judgment...." SZO § 90–41(a).

14 Indeed, the legislative history indicates that § (b)(1) was intended to apply in *precisely* the situation presented here. *See* Joint Statement, at *S7774 ("Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes.").

15 Surfside does not define "synergy" but the evidence suggests that Surfside's primary concern was encouraging an increase in consumer traffic in its business and tourist districts. While Surfside suggests that allowing churches and synagogues will erode its tax base and ultimately require a decrease in services offered by Surfside to its residents, it does not devote much time to this argument. As described below, § 90–152 is both over- and underinclusive with respect to Surfside's goal of synergy, no matter how that term is defined.

16 We reject Surfside's contention that the SZO is neutral because there is no evidence of selective and discriminatory intent against Orthodox Jews, a pattern of hostility or discriminatory animus toward the synagogues, or evidence that Surfside directly targeted religion in enacting the SZO. Under *Lukumi,* it is unnecessary to identify an invidious intent in enacting a law—only Justices Kennedy and Stevens attached significance to evidence of the lawmakers' subjective motivation. *See id.* at 540–42, 113 S.Ct. 2217 (Kennedy, J., concurring); *see also id.* at 558, 113 S.Ct. 2217 (Scalia, J., concurring in part and concurring in judgment).

17 This conclusion does not inhibit a zoning authority's right to adopt other reasonable "run of the mill" zoning regulations—such as those related to size, parking, safety and health concerns—even though such regulations may have the effect of distinguishing between assemblies or institutions. For example, Surfside may regulate the number of parking spaces required for each facility, *see* SZO § 90–226, or restrict the size of assemblies or institutions, as the SZO does by prohibiting them on the first floor of buildings in the business district. As long as restrictions or distinctions are unrelated to the religious characterization, RLUIPA is not implicated. *See also* Joint Statement, at *S7776 ("This Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay.").

18 As discussed above, SZO § 90–152 violates § (b) of RLUIPA, which also indicates that § 90–152 is neither neutral nor generally applicable. Because § 90–152 fails these two Free Exercise requirements, it has a "significant likelihood of being unconstitutional."

19 The Supreme Court has acknowledged that *Lemon* 's second and third prongs are often interrelated and the simplest way of evaluating whether a statute results in impermissible entanglement is to assess it using the same factors used to examine the "effect" prong. *See* *Agostini v. Felton,* 521 U.S. 203, 232–33, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). Evaluating *Lemon* 's second and third prongs together or separately does not affect our analysis; for purposes of clarity, we evaluate each separately.

20 Surfside's argument that RLUIPA violates the Establishment Clause echoes Justice Stevens' concurring opinion in *Boerne*, which indicated his belief that RFRA violated the Establishment Clause because the statute "provided the Church with a legal weapon that no atheist or agnostic can obtain." *Boerne,* 521 U.S. at 536–37, 117 S.Ct. 2157 (Stevens, J., concurring). Many circuits have held that RFRA continues to apply to the federal government. *See* *Kikumura v. Hurley,* 242 F.3d 950, 959–60 (10th Cir.2001); *In re Young,* 141 F.3d 854, 863 (8th Cir.1998); *Mockaitis v. Harcleroad,* 104 F.3d 1522, 1530 (9th Cir.1997); *Sasnett v. Sullivan,* 91 F.3d 1018, 1022 (7th Cir.1996), *vacated on other grounds,* 521 U.S. 1114, 117 S.Ct. 2502, 138 L.Ed.2d 1007 (1997); *EEOC v. Catholic Univ. of Am.,* 83 F.3d 455, 470 (D.C.Cir.1996); *Flores v. City of Boerne,* 73 F.3d 1352, 1364 (5th Cir.1996), *rev'd on other grounds,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). While we have not had occasion to decide this question for ourselves, the implication is that if RFRA were constitutionally infirm on Establishment Clause grounds as applied to the states, there would be no principled way to exempt the federal government from the same infirmity. Although we are evaluating RLUIPA's equal terms provision, which, unlike the substantial burden provision, does not have roots in RFRA, we note that the *Boerne* majority declined to adopt Justice Stevens' view of the Establishment Clause.

EXHIBIT “J”

768 So.2d 1114
District Court of Appeal of Florida,
Third District.

FIRST BAPTIST CHURCH OF PERRINE, Petitioner,
v.
MIAMI-DADE COUNTY, etc., Respondent.

No. 3D00-40.
|
June 28, 2000.
|
Rehearing Denied Oct. 18, 2000.

Synopsis

After the zoning appeals board denied church's application for special exceptions and non-use variances to expand school, the Circuit Court, Appellate Division, Miami-Dade County, Thomas M. Carney, William Johnson, and Scott J. Silverman, JJ., summarily denied certiorari reviewed. Church petitioned for writ of certiorari. The District Court of Appeal, Ramirez, J., held that: (1) church's traffic study was invalid and thus church failed to meet zoning criteria requiring consideration of neighborhood traffic impact, and (2) rejection of church's application did not violate Florida's Religious Freedom Restoration Act.

Petition denied.

West Headnotes (5)

[1] **Zoning and Planning** Schools and education

Traffic study of church that applied for special exception to expand its school was invalid and thus church failed to meet zoning criteria requiring consideration of neighborhood traffic impact, as its projections of future neighborhood traffic congestion were flawed in that they were based on figures which took into account less than 100% of the number of additional students permitted at school under the application, and most frequently used ingress and egress from school was by way of a non-arterial, neighborhood street, rather than county arterial street that bounded the church/school property.

[2] **Zoning and Planning** Certiorari

A petition for certiorari is not the proper procedural vehicle to challenge the constitutionality of a zoning ordinance, which must be determined in original proceedings before the circuit court.

8 Cases that cite this headnote

[3] **Civil Rights** Zoning, building, and planning; land use

Zoning and Planning Schools and education

Zoning board's rejection of church's application to expand school, on ground that application did not meet the zoning criteria for special exception, did not violate Florida's Religious Freedom Restoration Act, as zoning code was entirely secular, did not regulate belief instead of conduct, and was not aimed at impeding religion, application of zoning ordinances to preclude expansion of school did not prevent or seriously inhibit church's ability to provide a religious education, and county had a compelling interest in enacting and enforcing fair and reasonable zoning regulations. West's F.S.A. §§ 761.02-761.05.

3 Cases that cite this headnote

[4] **Civil Rights** Particular cases and contexts

To establish claim under Florida's Religious Freedom Restoration Act, interference with adherent's religious practice must be more than an inconvenience; the burden must be substantial. West's F.S.A. §§ 761.02 et seq.

2 Cases that cite this headnote

[5] **Zoning and Planning** Preservation below of grounds of review

As issue was never raised at trial court level, appellate court would not address church's equal protection-type argument on challenge to zoning board's denial of application for special

exception to expand church's school, based on claim that county had granted exemptions from its zoning requirements to several public schools in the area while refusing to grant an individualized exemption to church.

Attorneys and Law Firms

***1114** Liberty Counsel, and Mathew D. Staver and Erik W. Stanley, Longwood, for petitioner.

***1115** Robert A. Ginsburg, Miami-Dade County Attorney, and Jay W. Williams, Assistant Miami-Dade County Attorney, for respondent.

Before GERSTEN, and RAMIREZ, JJ., and NESBITT, Senior Judge.

Opinion

RAMIREZ, J.

This petition for certiorari review is brought by the unsuccessful applicant for zoning special exceptions and variances. The circuit court, appellate division summarily denied certiorari review and thus confirmed the denial of the application by the Community Zoning Appeals Board of Miami-Dade County. We conclude that the applicant did not present sufficient, competent evidence to satisfy its burden of showing that its request met the applicable standards and criteria for the granting of special exceptions and non-use variances set forth in the Comprehensive Development Master Plan and the Metropolitan Miami-Dade County Zoning Code. Because of this failure of proof by the applicant, we hold that the circuit court, appellate division properly applied the correct law when it refused to quash the Zoning Board's decision. Thus, we deny the petition.

Petitioner First Baptist Church of Perrine runs a church-related school for kindergarten through sixth grade on its church property in Perrine, Florida. It sought two special exceptions and a sign variance from the county zoning authorities in order to expand the school to include the seventh and eighth grades and increase the number of students attending the school from 500 to 650. The County's zoning and planning department recommended the approval of the proposal and the Church then brought the matter for hearing before the Zoning Board.

The Church presented testimony and studies that concluded that only a minimal potential traffic congestion increase could be expected in the neighborhood surrounding the Church if the proposed expansions were permitted. The Church had already changed the school day beginning time at the suggestion of traffic specialists in an effort to minimize early morning congestion. The Church also presented testimony showing that it considered having a religious-based school a central part of its religious ministry, and that it was important to extend that schooling into the adolescent years by having grades seven and eight.

[1] **[2]** The neighboring residents opposed the planned expansion based on the potential for increased traffic and crime in the neighborhood should middle school grades be allowed at the school. In fact-based testimony before the Zoning Board, representatives of the neighborhood pointed out, and we agree, that the Church's traffic study was invalid and thus not probative of the zoning code's traffic impact and neighborhood quality protection standards because its projections of future neighborhood traffic congestion were flawed. Those projections were based on figures which took into account less than 100% of the number of additional students permitted at the school under the application. The residents also presented fact-based testimony calling into question the validity of the traffic study and the County's zoning and planning department's recommendation based on that study because it showed that the most frequently used ingress and egress from the school was by way of a non-arterial, neighborhood street, SW 170 Street, rather than the County arterial street, SW 168 Street, which bounded the Church/school property. Thus, the applicant failed to meet the criteria which require consideration of the neighborhood traffic impact arising from a requested special exception. *See* § 33-311(A)(3), (F)(1),(5), Miami-Dade County Code; CDMP, Traffic Circulation Element, objective 5. [1]

***1116** In our recent decision in *Jesus Fellowship, Inc. v. Miami-Dade County,* 752 So.2d 708 (Fla. 3d DCA 2000), which admittedly involved similar issues and facts, we stated as follows:

An applicant seeking special exceptions and unusual uses need only demonstrate to the decision-making body that its proposal is consistent with the county's land use plan; that

> the uses are specifically authorized as special exceptions and unusual uses in the applicable zoning district; and that the requests meet with the applicable zoning code standards of review. If this is accomplished, then the application must be granted unless the opposition carries its burden, which is to demonstrate that the applicant's requests do not meet the standards and are in fact adverse to the public interest.

Id. at 709. Here, unlike in *Jesus Fellowship,* although the Church arguably demonstrated that its application was consistent with the land use plan and that the uses were specifically authorized, its flawed traffic impact study failed to meet the zoning standards of review. The recommendation for approval of the application by the County's zoning and planning department was likewise flawed because it was based upon the erroneous finding that the Church's evidence, including the suspect traffic study, satisfied the criteria for special exceptions. The invalid conclusions contained in this evidence did not constitute competent evidence in support of the Church's application, and, therefore, the burden never shifted to the objectors, as it did in *Jesus Fellowship,* to show that the request did not meet the standards and were adverse to the public interest. [2] Because of the inadequacy of the evidence presented by the applicant to satisfy the criteria for special exceptions, as a matter of law, the Zoning Board properly denied the application.

[3] **[4]** The Church also challenges the Zoning Board's rejection of its application by way of a claim that the decision violates Florida's Religious Freedom Restoration Act, §§ 761.02-.05, Fla. Stat. (1999). [3] The ***1117** Church contends that the Zoning Board's ruling restricts the free exercise of its well-founded religious beliefs which allegedly require it to educate its children in a religious setting. The Church argues that the Act requires the County to show a compelling government interest to justify the denial of the Church's requests for special exceptions and variances; or that, if such interest is shown, the County must find a less restrictive method to protect the governmental interest than complete denial of the Church's requests.

We do not agree that the County has the burden of showing it has a compelling interest requiring denial of the Church's zoning request. The United States Supreme Court, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), explained that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." In *Grosz v. City of Miami Beach, Fla.,* 721 F.2d 729 (11th Cir.1983), the court enunciated a three-part test to determine whether there has been a violation of the constitutional First Amendment Free Exercise Clause (which Florida's Act is obviously designed to protect): (1) the ordinance must regulate religious conduct, not belief; (2) the law must have a secular purpose and secular effect; and (3) once these threshold tests are met, the court must balance the competing governmental and religious interests.

In this case, the Church has not even attempted to show, nor could it show, that the zoning ordinances here, which preclude its requested expansion, regulate belief instead of conduct. The County's zoning code is entirely secular in purpose and effect. The record does not demonstrate that the County's zoning ordinances are aimed at impeding religion, that they are based on a disagreement with religious beliefs or practices, or that they negatively influence the pursuit of religious activity or expression of religious belief. *See Grosz,* 721 F.2d at 733-34. Further, the burden on the County of altering the enforcement of its zoning ordinances to accommodate the Church's requests would be much greater than any burden placed on the Church's religious activity by requiring that it comply with the Zoning Board's decision in this matter. In *First Assembly of God v. Collier Co.,* 775 F.Supp. 383, 386 (M.D.Fla.1991), the court recognized as a significant interest the preservation of a government's ability to regulate zoning. To impose on the County's zoning ordinances an exception based on religion could result in the breakdown of a community's zoning scheme and increase non-conforming uses each time religion is asserted as a basis for zoning requests. Even though the Church argues that religious education is central to its religion, the burden on the Church of conducting this activity elsewhere is less than the burden which would be placed on the County if it is forced to routinely grant exceptions to its zoning schemes for primarily residential neighborhoods when requested to do so for allegedly religious purposes.

[5] Application of the County's zoning ordinances to preclude expansion of First Baptist Church of Perrine's school does not prevent or seriously inhibit the Church's ability to provide a religious education. There are other less-traffic-

sensitive locations within Miami-Dade County for the Church to expand in order to teach seventh and eighth grades, if its religion so requires. It is not absolutely precluded from providing seventh and eighth grade classes by the Zoning Board's decision. ***1118** But, even assuming that the Church has demonstrated a substantial burden on its free exercise of religion, the County clearly has a compelling interest in enacting and enforcing fair and reasonable zoning regulations. *See Daytona Rescue Mission, Inc. v. City of Daytona Beach,* 885 F.Supp. 1554, 1560 (M.D.Fla.1995). For these reasons, the circuit court, appellate division also properly rejected the Church's contention that the Zoning Board's denial of its zoning request violated the Act. [4]

In conclusion, the circuit court, appellate division properly applied the correct law in this case when it denied the Church's attempts to overturn the Zoning Board's denial of its application. As a matter of law, the Church's evidence did not satisfy the zoning code criteria for the granting of special exceptions, nor did the Zoning Board's decision in any manner violate the Florida Religious Freedom Restoration Act.

Petition for writ of certiorari denied.

All Citations

768 So.2d 1114, 25 Fla. L. Weekly D1547

Footnotes

1 The Church attempts to challenge the constitutionality of section 33-311 of the Miami-Dade County Code, which section establishes the Zoning Board and creates the criteria to be used by the Zoning Board in its consideration of zoning application. We decline to address the merits of this issue because a petition for certiorari is not the proper procedural vehicle to challenge the constitutionality of this ordinance. *See City of Deerfield Beach v. Vaillant,* 419 So.2d 624, 626 (Fla.1982) (The district court, in reviewing the circuit court's judgment determines "whether the circuit court afforded procedural due process and applied the correct law."). The constitutionality of the ordinance must be determined in original proceedings before the circuit court, not by way of a petition for writ of certiorari. *See Nostimo, Inc. v. City of Clearwater,* 594 So.2d 779 (Fla. 2d DCA 1992). Furthermore, this issue was never brought before the circuit court in the proceedings below and should not be considered initially by this Court.

2 In addition to their extensive discussion of the Church's flawed traffic study projections and their experiences with increased traffic on their residential streets from the Church school, even without the proposed increase in student population, the opponents of the application presented testimony intended to prove that the increase in older students provided for under the application would also increase crime in the area. A high school principal with extensive training on "youth crime and crime prevention" testified using county-wide crime data about the increase in neighborhood crime when comparing areas having only elementary schools to those which have middle schools. While this testimony might have some factual validity, we believe that if such a concern were sufficient to justify denying this application, zoning authorities could always deny an application by a high school or middle school even though the zoning laws and the Master Plan contemplate schools being built within residential zones. Had the Church sustained its burden, we do not believe that this testimony about a potential for crime increase would have been competent to support denial of the application.

3 In 1998, Florida enacted the Religious Freedom Restoration Act modeled after the federal statute of the same title. *See* 42 U.S.C. §§ 2000bb-2000bb-4. Section 761.03, Florida Statutes provides that "the government shall not substantially burden a person's exercise of religion...." In *Vernon v. City of Los Angeles,* 27 F.3d 1385, 1393 (9th Cir.1994), the court explained that to show a free exercise violation, the religious adherent had the obligation to prove that a governmental action burdened the adherent's religious practice by pressuring him or her to commit an act forbidden by the religion or by preventing him or her from engaging

in conduct or having a religious experience which the faith mandates. This interference must be more than an inconvenience; the burden must be substantial. *See* *Dickerson v. Stuart,* 877 F.Supp. 1556 (M.D.Fla.1995).

4 The Church also advances an equal protection-type argument based on its assertions that the County has granted exemptions from its zoning requirements to several public schools in the area, while, at the same time, refusing to grant an individualized exemption to the Church. The Church argues that where a governmental agency has a law that provides a system of individualized exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason. *See* *Employment Div., Dep't of Human Resources of Or. v. Smith,* 494 U.S. 872, 884, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). This issue, however, was never raised at the circuit court level and we decline to address it here.

EXHIBIT “K”

504 F.3d 338
United States Court of Appeals, Second Circuit.

WESTCHESTER DAY SCHOOL, Plaintiff–Appellee,
v.
VILLAGE OF MAMARONECK, The Board of Appeals of the Village of Mamaroneck, Mauro Gabriele, In his official capacity as member of the Board of Appeals of the Village of Mamaroneck, George Mgrditchian, In his official capacity as member of the Board of Appeals of the Village of Mamaroneck, Peter Jackson, In his official capacity as member of the Board of Appeals of the Village of Mamaroneck, Barry Weprin, In his official capacity as member of the Board of Appeals of the Village of Mamaroneck, Clark Neuringer, In his official capacity as member of the Board of Appeals of the Village of Mamaroneck and Antonio Vozza, In his official capacity as a former member of the Board of Appeals of the Village of Mamaroneck, Defendants–Appellants, United States of America, Intervenor–Defendant.

Docket No. 06–1464–cv
|
Argued Dec. 1, 2006.
|
Decided Oct. 17, 2007.

Synopsis

Background: Operator of private religious day school brought action against village, its zoning board, and board members, in their official capacities, challenging denial of its application for special use permit to construct classroom building on its campus. Following bench trial, the United States District Court for the Southern District of New York, William C. Conner, J., 417 F.Supp.2d 477, ordered village to issue permit, ruling that village had violated Religious Land Use and Institutionalized Persons Act (RLUIPA). Village appealed.

Holdings: The Court of Appeals, Cardamone, Circuit Judge, held that:

[1] school's expansion project was religious exercise under RLUIPA;

[2] board's denial of permit application substantially burdened school's religious exercise;

[3] board violated RLUIPA by denying permit;

[4] RLUIPA's application was constitutional under Commerce Clause;

[5] RLUIPA does not violate Tenth Amendment;

[6] RLUIPA's land use provisions do not violate Establishment Clause; and

[7] village did not revive its right to jury trial when it filed amended answer.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (34)

[1] **Federal Courts** Questions of Law in General

Federal Courts "Clearly erroneous" standard of review in general

Court of Appeals reviews district court's findings of fact for clear error and its conclusions of law de novo.

1 Case that cites this headnote

[2] **Civil Rights** Zoning, building, and planning; land use

Expansion project for which operator of private religious day school sought special use permit was building and conversion of real property for purpose of religious exercise, and thus was "religious exercise" under Religious Land Use and Institutionalized Persons Act (RLUIPA), given that rooms which school planned to build and facilities to be renovated would all be used at least in part for religious education and practice. Religious Land Use and Institutionalized Persons Act of 2000, § 8(7)(A, B), 42 U.S.C.A. § 2000cc-5(7)(A, B).

8 Cases that cite this headnote

[3] **Civil Rights** Zoning, building, and planning; land use

To get immunity from land use regulation pursuant to Religious Land Use and Institutionalized Persons Act (RLUIPA), religious schools need to demonstrate more than that the proposed improvement would enhance the overall experience of its students. Religious Land Use and Institutionalized Persons Act of 2000, § 8(7)(A, B), 42 U.S.C.A. § 2000cc-5(7)(A, B).

2 Cases that cite this headnote

[4] **Civil Rights** Particular cases and contexts

"Substantial burden" on religious exercise exists, for purposes of Religious Land Use and Institutionalized Persons Act (RLUIPA), when an individual is required to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion on the other hand. Religious Land Use and Institutionalized Persons Act of 2000, § 2(a)(1), 42 U.S.C.A. § 2000cc(a)(1).

23 Cases that cite this headnote

[5] **Civil Rights** Zoning, building, and planning; land use

In determining whether government has imposed substantial burden on religious exercise within meaning of Religious Land Use and Institutionalized Persons Act (RLUIPA) when there has been a denial of a religious institution's building application, court looks to whether government action directly coerced religious institution to change its behavior, rather than to whether government action forces religious entity to choose between religious precepts and government benefits. Religious Land Use and Institutionalized Persons Act of 2000, § 2(a)(1), 42 U.S.C.A. § 2000cc(a)(1).

30 Cases that cite this headnote

[6] **Civil Rights** Zoning, building, and planning; land use

Conditional denial of religious institution's application to build facilities may represent a "substantial burden" on religious exercise, within meaning of Religious Land Use and Institutionalized Persons Act (RLUIPA), if the condition itself is a burden on free exercise, the required modifications are economically unfeasible, or a zoning board's stated willingness to consider a modified plan is disingenuous. Religious Land Use and Institutionalized Persons Act of 2000, § 2(a)(1), 42 U.S.C.A. § 2000cc(a)(1).

23 Cases that cite this headnote

[7] **Civil Rights** Zoning, building, and planning; land use

If there is a reasonable opportunity for religious institution to submit modified building application, denial of original application does not place substantial pressure on institution to change its behavior, and thus does not constitute a "substantial burden" on the free exercise of religion within meaning of Religious Land Use and Institutionalized Persons Act (RLUIPA). Religious Land Use and Institutionalized Persons Act of 2000, § 2(a)(1), 42 U.S.C.A. § 2000cc(a)(1).

21 Cases that cite this headnote

[8] **Civil Rights** Zoning, building, and planning; land use

When denial of religious institution's application to build facilities will have minimal impact on institution's religious exercise, it does not constitute a "substantial burden" within meaning of Religious Land Use and Institutionalized Persons Act (RLUIPA), even when denial is definitive; there must exist a close nexus between coerced or impeded conduct and institution's religious exercise for such conduct to be substantial burden on that religious exercise. Religious Land Use and Institutionalized Persons Act of 2000, § 2(a)(1), 42 U.S.C.A. § 2000cc(a)(1).

77 Cases that cite this headnote

[9] **Civil Rights** Particular cases and contexts

Burden on religious exercise need not be found insuperable to be held substantial under Religious Land Use and Institutionalized Persons Act (RLUIPA). Religious Land Use and Institutionalized Persons Act of 2000, § 2(a)(1), 42 U.S.C.A. § 2000cc(a)(1).

5 Cases that cite this headnote

[10] **Civil Rights** Zoning, building, and planning; land use

When religious school has no ready alternatives, or when the alternatives require substantial delay, uncertainty, and expense, a complete denial of school's application to expand its facilities might be indicative of substantial burden on religious exercise within meaning of Religious Land Use and Institutionalized Persons Act (RLUIPA). Religious Land Use and Institutionalized Persons Act of 2000, § 2(a)(1), 42 U.S.C.A. § 2000cc(a)(1).

9 Cases that cite this headnote

[11] **Zoning and Planning** Schools and education

Village zoning board's denial of application for special use permit by which private religious day school sought authorization to build classroom building on its campus was arbitrary and did not comply with New York law, given that board denied application based in part on unsupported accusation that school made willful attempt to mislead board, that board's allegations of deficiencies in school's traffic study were unsupported by evidence, that concern about adequacy of parking was based on board's own miscalculation, that board improperly relied on speculation about future expansion, and that resolution drafted by board's consultants, which would have approved application subject to certain conditions, was not circulated to entire board before board issued denial.

[12] **Zoning and Planning** Determination

Under New York law, zoning board decision based on grounds unrelated to the public's health, safety, or welfare is beyond the scope of the municipality's police power, and, thus, impermissible.

[13] **Zoning and Planning** Evidence and fact questions

Under New York law, even when a municipal zoning board considers permissible factors in deciding permit application, the law demands that its analysis be supported by substantial evidence.

[14] **Zoning and Planning** Churches and religious uses

Under New York law, municipality may not demand that a religious institution show that no ill effects will result from the proposed use to receive a special zoning permit, inasmuch as such a requirement fails to recognize that educational and religious uses ordinarily have inherent beneficial effects that must be weighed against their potential for harming the community.

[15] **Civil Rights** Zoning, building, and planning; land use

Village zoning board's denial of application for special use permit by which private religious day school sought authorization to build classroom building on its campus, which was arbitrary and unlawful under state law, substantially burdened school's religious exercise within meaning of Religious Land Use and Institutionalized Persons Act (RLUIPA), since school had no viable alternative to achieve its objectives and board's denial was final. Religious Land Use and Institutionalized Persons Act of 2000, §§ 2(a)(1), 4, 42 U.S.C.A. §§ 2000cc(a)(1), 2000cc-2.

2 Cases that cite this headnote

[16] **Civil Rights** Zoning, building, and planning; land use

In the context of municipality's burden, under Religious Land Use and Institutionalized Persons Act (RLUIPA), to prove that zoning decision substantially burdening religious institution's religious exercise was made in furtherance of compelling government interests, "compelling state interests" are interests of the highest order. Religious Land Use and Institutionalized Persons Act of 2000, § 4(b), 42 U.S.C.A. § 2000cc-2(b).

12 Cases that cite this headnote

[17] **Civil Rights** Zoning, building, and planning; land use

To satisfy its burden under provision of Religious Land Use and Institutionalized Persons Act (RLUIPA) requiring municipality to prove that it acts in furtherance of compelling government interest and its action is least restrictive means of furthering that interest when it makes zoning decision substantially burdening religious institution's religious exercise, municipality must show a compelling interest in imposing the burden on religious exercise in the particular case at hand, not a compelling interest in general. Religious Land Use and Institutionalized Persons Act of 2000, § 4(b), 42 U.S.C.A. § 2000cc-2(b).

26 Cases that cite this headnote

[18] **Civil Rights** Zoning, building, and planning; land use

Village zoning board violated Religious Land Use and Institutionalized Persons Act (RLUIPA) when it denied application for special use permit allowing private religious day school to construct classroom building on its campus, given that, notwithstanding substantial burden imposed on school's religious exercise, board did not act to further compelling state interest, as shown by lack of evidentiary support for its stated reasons for denying permit, but rather acted with undue deference to opposition of small group of neighbors, and that, even if compelling state interest was involved, board refused to consider approving application subject to conditions, and thus to use least restrictive means available to achieve such interest. Religious Land Use and Institutionalized Persons Act of 2000, § 4(b), 42 U.S.C.A. § 2000cc-2(b).

1 Case that cites this headnote

[19] **Civil Rights** Power to enact and validity

Commerce Subjects and regulations in general

When the relevant jurisdictional element is satisfied, Religious Land Use and Institutionalized Persons Act (RLUIPA) constitutes a valid exercise of congressional power under the Commerce Clause. U.S.C.A. Const. Art. 1, § 8, cl. 3; Religious Land Use and Institutionalized Persons Act of 2000, § 2(a)(2)(B), 42 U.S.C.A. § 2000cc(a)(2)(B).

2 Cases that cite this headnote

[20] **Civil Rights** Power to enact and validity

Commerce Subjects and regulations in general

Private religious day school's proposed construction of 44,000-square-foot classroom building on its campus, which had estimated cost of $9,000,000, would have effect on interstate commerce, such that Religious Land Use and Institutionalized Persons Act (RLUIPA) could constitutionally be applied, under Commerce Clause, to decision of village zoning board to deny school's application for special use permit for building's construction. U.S.C.A. Const. Art. 1, § 8, cl. 3; Religious Land Use and Institutionalized Persons Act of 2000, § 2(a)(2)(B), 42 U.S.C.A. § 2000cc(a)(2)(B).

1 Case that cites this headnote

[21] **Commerce** Activities affecting interstate commerce

Evidence need only demonstrate a minimal effect on commerce to satisfy jurisdictional element of claim validating exercise of congressional power

under Commerce Clause. U.S.C.A. Const. Art. 1, § 8, cl. 3.

3 Cases that cite this headnote

[22] **Civil Rights** Power to enact and validity
States Particular laws in general

Religious Land Use and Institutionalized Persons Act (RLUIPA) does not directly compel states to require or prohibit any particular acts, but instead leaves it to each state to enact and enforce land use regulations as it deems appropriate so long as state does not substantially burden religious exercise in the absence of a compelling interest achieved by least restrictive means, and thus does not violate Tenth Amendment. U.S.C.A. Const.Amend. 10; Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

2 Cases that cite this headnote

[23] **Constitutional Law** Establishment of Religion

To be valid under Establishment Clause, government action that interacts with religion must (1) have a secular purpose, (2) have a principal effect that neither advances nor inhibits religion, and (3) not bring about an excessive government entanglement with religion. U.S.C.A. Const.Amend. 1.

9 Cases that cite this headnote

[24] **Civil Rights** Power to enact and validity
Constitutional Law Zoning and Land Use

Land use provisions of Religious Land Use and Institutionalized Persons Act (RLUIPA) have a secular purpose, for purposes of determining their validity under Establishment Clause, that of lifting government-created burdens on private religious exercise. U.S.C.A. Const.Amend. 1; Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

2 Cases that cite this headnote

[25] **Civil Rights** Power to enact and validity
Constitutional Law Zoning and Land Use

Principal or primary effect of land use provisions of Religious Land Use and Institutionalized Persons Act (RLUIPA) neither advances nor inhibits religion, for purposes of determining their validity under Establishment Clause, in that RLUIPA merely permits religious practitioners the free exercise of their religious beliefs without being burdened unnecessarily by the government. U.S.C.A. Const.Amend. 1; Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

1 Case that cites this headnote

[26] **Constitutional Law** Advancement, endorsement, or sponsorship of religion; favoring or preferring religion

Law produces forbidden effects under *Lemon* test for Establishment Clause validity if the government itself has advanced religion through its own activities and influence. U.S.C.A. Const.Amend. 1.

[27] **Civil Rights** Power to enact and validity
Constitutional Law Religious organizations

Land use provisions of Religious Land Use and Institutionalized Persons Act (RLUIPA) do not foster an excessive government entanglement with religion, for purposes of determining their validity under Establishment Clause, in that RLUIPA simply requires that states not discriminate against or among religious institutions. U.S.C.A. Const.Amend. 1; Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

2 Cases that cite this headnote

[28] **Constitutional Law** Entanglement

Government entanglement becomes excessive, for Establishment Clause purposes, only when it advances or inhibits religion. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[29] **Jury** Operation and effect of waiver

Village did not revive its right to jury trial when it filed amended answer raising new affirmative defenses to private religious day school's claims alleging violation of Religious Land Use and Institutionalized Persons Act (RLUIPA), given that amended answer simply asserted new defense theories based on same facts. Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.; Fed.Rules Civ.Proc.Rule 38(b, d), 28 U.S.C.A.

4 Cases that cite this headnote

[30] **Jury** Operation and effect of waiver

Litigant who has waived a jury may nonetheless demand one with respect to new issues raised by later pleadings, unless the new issues are simply artful rephrasings of existing issues. Fed.Rules Civ.Proc.Rule 38(b, d), 28 U.S.C.A.

6 Cases that cite this headnote

[31] **Jury** Operation and effect of waiver

Amended complaint asserting new theories of recovery, based on same facts as original complaint, will not renew defendant's right to jury trial when that right was waived with respect to original complaint. Fed.Rules Civ.Proc.Rule 38(b, d), 28 U.S.C.A.

8 Cases that cite this headnote

[32] **Jury** Operation and effect of waiver

Amended answer that asserts new defense theories based on the same facts does not reestablish defendant's right to demand a jury trial. Fed.Rules Civ.Proc.Rule 38(b, d), 28 U.S.C.A.

15 Cases that cite this headnote

[33] **Jury** Time for making demand

Denial of village's request that district court exercise its discretion to order jury trial in civil rights action brought against village by private religious day school was not abuse of discretion when village admitted that it had earlier neglected to demand jury. Fed.Rules Civ.Proc.Rule 39(b), 28 U.S.C.A.

10 Cases that cite this headnote

[34] **Civil Rights** Judgment and relief in general

After determining that village had violated Religious Land Use and Institutionalized Persons Act (RLUIPA) by denying permit application of private religious day school, district court could, pursuant to RLUIPA, order village's zoning board to immediately and unconditionally issue special permit modification to school. Religious Land Use and Institutionalized Persons Act of 2000, § 4(a), 42 U.S.C.A. § 2000cc-2(a).

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E. Harrington, U.S. Department of Justice, Civil Rights Division, Appellate Section, Washington, D.C., of counsel), for Intervenor–Defendant and Amicus Curiae the United States of America.

Derek L. Gaubatz, Washington, D.C. (Anthony R. Picarello, Jr., Lori E. Halstead, The Becket Fund for Religious Liberty, Washington, D.C., of counsel), filed a brief on behalf of the Becket Fund for Religious Liberty, the Association of Christian Schools International, and the Council for Christian Colleges and Universities as Amici Curiae.

Before: CARDAMONE, and RAGGI, Circuit Judges, and BERMAN, District Judge [*].

Opinion

CARDAMONE, Circuit Judge:

The appeal before us is from a judgment entered March 3, 2006 in the United States ***344** District Court for the Southern District of New York (Conner, J.) that ordered the defendant Village of Mamaroneck to issue a permit to plaintiff Westchester Day School to proceed with the expansion of its facilities. For nearly 60 years Westchester Day School (plaintiff, WDS, day school, or school) has been operating an Orthodox Jewish co-educational day school with classes from pre-school to eighth grade. Believing it needed to expand, the school submitted construction plans to the Village of Mamaroneck and an application for the required special permit. When the village zoning board turned the application down, the present litigation ensued.

In the district court the school argued that the zoning board in denying its application for a permit violated the Religious Land Use and Institutionalized Persons Act (RLUIPA or Act), 42 U.S.C. § 2000cc *et seq.,* by substantially burdening its religious exercise without a compelling government interest to justify its action. Following a bench trial, the district court ordered the zoning board to approve the school's application, agreeing that RLUIPA had been violated.

BACKGROUND

A. *Westchester Day School's Property*

Westchester Day School is located in the Orienta Point neighborhood of the Village of Mamaroneck, Westchester County, New York. Its facilities are situated on 25.75 acres of largely undeveloped land (property) owned by Westchester Religious Institute. Westchester Religious Institute allows the school and other entities to use the property.

The school's buildings are far from typical. The original structures were built in the late nineteenth century, one as a summer home and another as a stable. The day school, which opened in 1948, renovated the summer home and the stable to create classrooms. The school constructed Wolfson Hall in the 1960s and in 1979 Westchester Hebrew High School, a separate entity from WDS, built a two-story high school building on the property. Thus, currently there are four principal buildings on the property: the summer home (Estate House or Castle), the stable (Carriage House), Wolfson Hall, and the high school building.

The Mamaroneck Village Code permits private schools to operate in "R–20 Districts" if the Zoning Board of Appeals of the Village of Mamaroneck (ZBA or zoning board) grants them a special permit. The property is in an R–20 district and WDS operates subject to obtaining such a permit which must be renewed every three years. Most recently the day school's permit was unanimously renewed on November 2, 2000, before the dispute giving rise to this litigation began. Several other schools are located in the vicinity of Orienta Point, including the Liberty Montessori School and Mamaroneck High School. Numerous large properties border the school property, including the Orienta Beach Club, the Beach Point Club, the Hampshire Country Club, and several boat yards.

B. *Westchester Day School's Aims*

As a Jewish private school, Westchester Day School provides its students with a dual curriculum in Judaic and general studies. Even general studies classes are taught so that religious and Judaic concepts are reinforced. In the nursery and kindergarten classes no distinction exists between Judaic and general studies; the dual curriculum is wholly integrated. In grades first through eighth, students spend roughly half their day on general subjects such as mathematics and social studies and half on Judaic studies that ***345** include the Bible, the Talmud, and Jewish history.

In an effort to provide the kind of synthesis between the Judaic and general studies for which the school aims, the curriculum of virtually all secular studies classes is permeated with religious aspects, and the general studies faculty actively collaborates with the Judaic studies faculty in arranging

such a Jewish-themed curriculum. For example, the General Studies Curriculum Guide describes how social studies is taught in grades 6, 7, and 8, explaining that WDS tries "to develop an understanding of humanistic, philosophical thought, the nature of cause and effect in history, and *the application of ethical Judaic principles to history and daily life* " (emphasis added). The Guide further notes that "[s]tudying the history of *Eretz Yisrael* [the land of Israel] has become an increasingly prominent feature of assemblies and social studies lessons." And, the Guide's Science Curriculum Map notes that in science class first graders are taught about "the world around them [and] *the seasonal changes and connections to the Jewish holidays* " (emphasis added).

The school's physical education teachers confer daily with the administration to ensure that during physical education classes Jewish values are being inculcated in the students. This kind of integration of Jewish and general culture is made possible when a school actively and consciously designs integrated curricular and extracurricular activities on behalf of its student body. *See* Jack Bieler, *Integration of Judaic and General Studies in the Modern Orthodox Day School,* 54:4 Jewish Education 15 (1986), *available at* http://www.lookstein.org/integration/bieler.htm. Thus, the school strives to have every classroom used at times for religious purposes, whether or not the class is officially labeled Judaic. A Jewish day school like WDS exists, at least in part, because Orthodox Jews believe it is the parents' duty to teach the Torah to their children. Since most Orthodox parents lack the time to fulfill this obligation fully, they seek out a school like WDS.

C. *The Expansion Project*

By 1998 WDS believed its current facilities inadequate to satisfy the school's needs. The district court's extensive findings reveal the day school's existing facilities are deficient and that its effectiveness in providing the education Orthodox Judaism mandates has been significantly hindered as a consequence. The school's enrollment has declined since 2001, a trend the district court attributed in part to the zoning board's actions. As a result of the deficiencies in its current facilities the school engaged professional architects, land planners, engineers, and an environmental consulting firm to determine what new facilities were required. Based on these professionals' recommendations, WDS decided to renovate Wolfson Hall and the Castle and to construct a new building, Gordon Hall, specifically designed to serve the existing student population. The renovations would add 12 new classrooms; a learning center; small-group instructional rooms; a multi-purpose room; therapy, counseling, art and music rooms; and computer and science labs. All of them were to be used from time to time for religious education and practice.

In October 2001 the day school submitted to the zoning board an application for modification of its special permit to enable it to proceed with this $12 million expansion project. On February 7, 2002 the ZBA voted unanimously to issue a "negative declaration," which constituted a finding that the project would have no significant adverse environmental impact and ***346** thus that consideration of the project could proceed. After the issuance of the negative declaration, a small but vocal group in the Mamaroneck community opposed the project. As a result of this public opposition, on August 1, 2002 the ZBA voted 3–2 to rescind the negative declaration. The effect of the rescission was to require WDS to prepare and submit a full Environmental Impact Statement.

D. *Prior Legal Proceedings*

Instead, the school commenced the instant litigation on August 7, 2002 contending the rescission of the negative declaration violated RLUIPA and was void under state law. The suit named as defendants the Village of Mamaroneck, its ZBA, and the members of the zoning board in their official capacities (collectively, the Village or defendant).

On December 4, 2002 the district court granted WDS's motion for partial summary judgment and held that the negative declaration had not been properly rescinded, and therefore remained in full force and effect. *See Westchester Day Sch. v. Vill. of Mamaroneck,* 236 F.Supp.2d 349 (S.D.N.Y.2002). The Village did not appeal this ruling. Instead, the ZBA proceeded to conduct additional public hearings to consider the merits of the application. The ZBA had the opportunity to approve the application subject to conditions intended to mitigate adverse effects on public health, safety, and welfare that might arise from the project. Rather, on May 13, 2003 the ZBA voted 3–2 to deny WDS's application in its entirety.

The stated reasons for the rejection included the effect the project would have on traffic and concerns with respect to parking and the intensity of use. Many of these grounds were conceived after the ZBA closed its hearing process, giving the school no opportunity to respond. The district court found the stated reasons for denying the application were not supported

by evidence in the public record before the ZBA, and were based on several factual errors. It surmised that the application was in fact denied because the ZBA gave undue deference to the public opposition of the small but influential group of neighbors who were against the school's expansion plans. It also noted that the denial of the application would result in long delay of WDS's efforts to remedy the gross inadequacies of its facilities, and substantially increase construction costs.

On May 29, 2003 the school filed an amended complaint challenging the denial of its application. It asserted claims under RLUIPA, 42 U.S.C. § 1983, and the All Writs Act. Neither party demanded a jury trial. WDS moved for partial summary judgment, and on September 5, 2003 the district court granted that motion, holding that the Village had violated RLUIPA. *See Westchester Day Sch. v. Vill. of Mamaroneck,* 280 F.Supp.2d 230 (S.D.N.Y.2003). When the Village appealed, we vacated the district court's order and remanded the case for further proceedings. *See Westchester Day Sch. v. Vill. of Mamaroneck,* 386 F.3d 183 (2d Cir.2004). After remand, the Village, for the first time, demanded a jury trial, which the district court denied. *See Westchester Day Sch. v. Vill. of Mamaroneck,* 363 F.Supp.2d 667 (S.D.N.Y.2005). The Village moved for summary judgment, which the trial court denied as to WDS's RLUIPA and All Writs Act claims, but granted as to the school's claim under 42 U.S.C. § 1983. *See Westchester Day Sch. v. Vill. of Mamaroneck,* 379 F.Supp.2d 550 (S.D.N.Y.2005).

A seven-day bench trial began on November 14, 2005 and resulted in the March ***347** 2006 judgment. The district court ordered the Village to issue WDS's special permit immediately, but reserved decision on damages and attorneys' fees pending appellate review. *See Westchester Day Sch. v. Vill. of Mamaroneck,* 417 F.Supp.2d 477 (S.D.N.Y.2006). From this ruling the Village appeals. [1]

DISCUSSION

I Standard of Review

[1] We review the district court's findings of fact for clear error and its conclusions of law *de novo. See Guiles ex rel. Guiles v. Marineau,* 461 F.3d 320, 323–24 (2d Cir.2006).

II Application of RLUIPA

RLUIPA prohibits the government from imposing or implementing a land use regulation in a manner that

> imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1). This provision applies only when the substantial burden imposed (1) is in a program that receives Federal financial assistance; (2) affects commerce with foreign nations, among the several states, or with Indian tribes; or (3) "is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved." 42 U.S.C. § 2000cc(a)(2).

A. *Religious Exercise*

[2] Religious exercise under RLUIPA is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc–5(7)(A). Further, using, building, or converting real property for religious exercise purposes is considered to be religious exercise under the statute. § 2000cc–5(7)(B). To remove any remaining doubt regarding how broadly Congress aimed to define religious exercise, RLUIPA goes on to state that the Act's aim of protecting religious exercise is to be construed broadly and "to the maximum extent permitted by the terms of this chapter and the Constitution." § 2000cc–3(g).

[3] Commenting at an earlier stage in this litigation on how to apply this standard, we expressed doubt as to whether RLUIPA immunized all conceivable improvements proposed

by religious schools. That is to say, to get immunity from land use regulation, religious schools need to demonstrate more than that the proposed improvement would enhance the overall experience of its students. *Westchester Day Sch.,* 386 F.3d at 189. For example, if a religious school wishes to build a gymnasium to be used exclusively for sporting activities, that kind of expansion would not constitute religious exercise. Or, had the ZBA denied the Westchester Religious Institute's 1986 request for a special permit to construct a headmaster's residence on a portion of the property, such a denial would not have implicated religious exercise. Nor would the school's religious exercise have been burdened by the denial of ***348** a permit to build more office space. Accordingly, we suggested the district court consider whether the proposed facilities were for a religious purpose rather than simply whether the school was religiously-affiliated. *Id.*

On remand, the district court conducted the proper inquiry. It made careful factual findings that each room the school planned to build would be used at least in part for religious education and practice, finding that Gordon Hall and the other facilities renovated as part of the project, in whole and in all of their constituent parts, would be used for "religious education and practice." In light of these findings, amply supported in the record, the expansion project is a "building [and] conversion of real property for the purpose of religious exercise" and thus is religious exercise under § 2000cc–5(7)(B).

Hence, we need not now demarcate the exact line at which a school expansion project comes to implicate RLUIPA. That line exists somewhere between this case, where every classroom being constructed will be used at some time for religious education, and a case like the building of a headmaster's residence, where religious education will not occur in the proposed expansion.

B. *Substantial Burden*

Since substantial burden is a term of art in the Supreme Court's free exercise jurisprudence, we assume that Congress, by using it, planned to incorporate the cluster of ideas associated with the Court's use of it. *See, e.g., Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1226 (11th Cir.2004), *cert. denied,* 543 U.S. 1146, 125 S.Ct. 1295, 161 L.Ed.2d 106 (2005) ("The Supreme Court's definition of 'substantial burden' within its free exercise cases is instructive in determining what Congress understood 'substantial burden' to mean in RLUIPA."). *But see San Jose Christian Coll. v. City of Morgan Hill,* 360 F.3d 1024, 1034 (9th Cir.2004) (applying dictionary meanings to define substantial burden as "something that is oppressive" and "considerable in quantity"). Further, RLUIPA's legislative history indicates that Congress intended the term substantial burden to be interpreted "by reference to Supreme Court jurisprudence." 146 Cong. Rec. S7774, S7776 (2000).

[4] Supreme Court precedents teach that a substantial burden on religious exercise exists when an individual is required to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion ... on the other hand." *Sherbert v. Verner,* 374 U.S. 398, 404, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). A number of courts use this standard as the starting point for determining what is a substantial burden under RLUIPA. *See, e.g., Lovelace v. Lee,* 472 F.3d 174, 187 (4th Cir.2006) (For RLUIPA purposes, a substantial burden is something that "puts substantial pressure on an adherent to modify his behavior."). In the context in which this standard is typically applied—for example, a state's denial of unemployment compensation to a Jehovah's Witness who quit his job because his religious beliefs prevented him from participating in the production of war materials, *see Thomas v. Review Bd. of Ind. Employment Sec. Div.,* 450 U.S. 707, 709, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981)—it is not a difficult standard to apply. By denying benefits to Jehovah's Witnesses who follow their beliefs, the state puts undue pressure on the adherents to alter their behavior and to violate their beliefs in order to obtain government benefits, thereby imposing a substantial burden on religious exercise.

[5] But in the context of land use, a religious institution is not ordinarily faced ***349** with the same dilemma of choosing between religious precepts and government benefits. When a municipality denies a religious institution the right to expand its facilities, it is more difficult to speak of substantial pressure to change religious behavior, because in light of the denial the renovation simply cannot proceed. Accordingly, when there has been a denial of a religious institution's building application, courts appropriately speak of government action that directly *coerces* the religious institution to change its behavior, rather than government action that forces the religious entity to choose between religious precepts and government benefits. *See, e.g., Midrash Sephardi,* 366 F.3d at 1227 ("[A] substantial burden is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."). Here, WDS contends that the

denial of its application in effect coerced the day school to continue teaching in inadequate facilities, thereby impeding its religious exercise.

[6] **[7]** Yet, when the denial of a religious institution's application to build is not absolute, such would not necessarily place substantial pressure on the institution to alter its behavior, since it could just as easily file a second application that remedies the problems in the first. As a consequence, as we said when this case was earlier before us, "rejection of a submitted plan, while leaving open the possibility of approval of a resubmission with modifications designed to address the cited problems, is less likely to constitute a 'substantial burden' than definitive rejection of the same plan, ruling out the possibility of approval of a modified proposal." *Westchester Day Sch.,* 386 F.3d at 188. Of course, a conditional denial may represent a substantial burden if the condition itself is a burden on free exercise, the required modifications are economically unfeasible, or where a zoning board's stated willingness to consider a modified plan is disingenuous. *Id.* at 188 n. 3. However, in most cases, whether the denial of the application was absolute is important; if there is a reasonable opportunity for the institution to submit a modified application, the denial does not place substantial pressure on it to change its behavior and thus does not constitute a substantial burden on the free exercise of religion.

[8] We recognize further that where the denial of an institution's application to build will have minimal impact on the institution's religious exercise, it does not constitute a substantial burden, even when the denial is definitive. There must exist a close nexus between the coerced or impeded conduct and the institution's religious exercise for such conduct to be a substantial burden on that religious exercise. Imagine, for example, a situation where a school could easily rearrange existing classrooms to meet its religious needs in the face of a rejected application to renovate. In such case, the denial would not substantially threaten the institution's religious exercise, and there would be no substantial burden, even though the school was refused the opportunity to expand its facilities.

[9] **[10]** Note, however, that a burden need not be found insuperable to be held substantial. *See Saints Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin,* 396 F.3d 895, 901 (7th Cir.2005). When the school has no ready alternatives, or where the alternatives require substantial "delay, uncertainty, and expense," a complete denial of the school's application might be indicative of a substantial burden. *See id.*

We are, of course, mindful that the Supreme Court's free exercise jurisprudence signals caution in using effect alone to determine substantial burden. *See generally* ***350** *Lyng v. Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439, 451, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988) (observing that the "line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs ... cannot depend on measuring the *effects* of a governmental action on a religious objector's spiritual development" (emphasis added)). This is because an effect focused analysis may run up against the reality that "[t]he freedom asserted by [some may] bring them into collision with [the] rights asserted by" others and that "[i]t is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin." *Braunfeld v. Brown,* 366 U.S. 599, 604, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961). Accordingly, the Supreme Court has held that generally applicable burdens, neutrally imposed, are not "substantial." *See Jimmy Swaggart Ministries v. Bd. of Equalization,* 493 U.S. 378, 389–91, 110 S.Ct. 688, 107 L.Ed.2d 796 (1990).

This reasoning helps to explain why courts confronting free exercise challenges to zoning restrictions rarely find the substantial burden test satisfied even when the resulting effect is to completely prohibit a religious congregation from building a church on its own land. *See Christian Gospel Church, Inc. v. City and County of S.F.,* 896 F.2d 1221, 1224 (9th Cir.1990); *Messiah Baptist Church v. County of Jefferson,* 859 F.2d 820, 824–25 (10th Cir.1988); *Grosz v. City of Miami Beach,* 721 F.2d 729, 739–40 (11th Cir.1983); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood,* 699 F.2d 303, 304 (6th Cir.1983); *cf. Islamic Ctr. of Miss., Inc. v. City of Starkville,* 840 F.2d 293, 302–03 (5th Cir.1988) (finding substantial burden where city intentionally discriminated against Muslims and ordinance "leaves no practical alternatives for establishing a mosque in the city limits").

A number of our sister circuits have applied this same reasoning in construing RLUIPA's substantial burden requirement. For example, the Seventh Circuit has held that land use conditions do not constitute a substantial burden under RLUIPA where they are "neutral and traceable to municipal land planning goals" and where there is no evidence that government actions were taken "*because*

[plaintiff] is a *religious* institution." *Vision Church v. Vill. of Long Grove,* 468 F.3d 975, 998–99 (7th Cir.2006). Similarly, the Ninth Circuit has held that no substantial burden was imposed, even where an ordinance "rendered [plaintiff] unable to provide education and/or worship" on its property, because the plaintiff was not "precluded from using other sites within the city" and because "there [is no] evidence that the City would not impose the same requirements on any other entity." *San Jose Christian Coll.,* 360 F.3d at 1035. The Eleventh Circuit has also ruled that "reasonable 'run of the mill' zoning considerations do not constitute substantial burdens." *Midrash Sephardi,* 366 F.3d at 1227–28 & n. 11.

The same reasoning that precludes a religious organization from demonstrating substantial burden in the neutral application of legitimate land use restrictions may, in fact, support a substantial burden claim where land use restrictions are imposed on the religious institution arbitrarily, capriciously, or unlawfully. The arbitrary application of laws to religious organizations may reflect bias or discrimination against religion. Thus, in *Saints Constantine and Helen,* the Seventh Circuit concluded that a substantial burden was demonstrated in circumstances where the "decision maker cannot justify" the challenged ruling and where "repeated legal ***351** errors by the City's officials casts doubt on their good faith." 396 F.3d at 899–901. Similarly, in *Guru Nanak Sikh Soc'y v. County of Sutter,* 456 F.3d 978, 989–91 (9th Cir.2006), the Ninth Circuit held that a substantial burden was shown where government officials "inconsistently applied" specific policies and disregarded relevant findings "without explanation." Where the arbitrary, capricious, or unlawful nature of a defendant's challenged action suggests that a religious institution received less than even-handed treatment, the application of RLUIPA's substantial burden provision usefully "backstops the explicit prohibition of religious discrimination in the later section of the Act." *Saints Constantine and Helen,* 396 F.3d at 900.

[11] Accordingly, we deem it relevant to the evaluation of WDS's particular substantial burden claim that the district court expressly found that the zoning board's denial of the school's application was "arbitrary and capricious under New York law because the purported justifications set forth in the Resolution do not bear the necessary substantial relation to public health, safety or welfare," and the zoning board's findings are not supported by substantial evidence. *Westchester Day Sch.,* 417 F.Supp.2d at 564. Although the Village disputes this finding, we conclude that it is amply supported by both the law and the record evidence.

[12] **[13]** **[14]** As the New York Court of Appeals has made plain, a zoning board decision based on grounds "unrelated to the public's health, safety or welfare" is "beyond the scope of the municipality's police power, and, thus, impermissible." *Cornell Univ. v. Bagnardi,* 68 N.Y.2d 583, 597, 510 N.Y.S.2d 861, 503 N.E.2d 509 (1986). Even when a board considers permissible factors, the law demands that its analysis be supported by substantial evidence. *Twin County Recycling Corp. v. Yevoli,* 90 N.Y.2d 1000, 1002, 665 N.Y.S.2d 627, 688 N.E.2d 501 (1997) (mem.). Moreover, under New York law, a municipality may not demand that a religious institution show that "*no* ill effects will result from the proposed use in order to receive a special permit," because such a requirement "fails to recognize that educational and religious uses ordinarily have inherent beneficial effects that must be weighed against their potential for harming the community." *Bagnardi,* 68 N.Y.2d at 597, 510 N.Y.S.2d 861, 503 N.E.2d 509.

The district court reasonably concluded that the ZBA failed to comply with these legal mandates in several respects. For example, the zoning board denied WDS's application based, in part, on an accusation that the school made "a willful attempt" to mislead the zoning board. In fact, the accusation was unsupported by the evidence and based on the zoning board's own error with respect to certain relevant facts. *Westchester Day Sch.,* 417 F.Supp.2d at 531, 571. The ZBA's allegations of deficiencies in the school's traffic study were also unsupported by the evidence before it. *See id.* at 564–66. The concern about lack of adequate parking was based on the zoning board's own miscalculation. *See id.* at 567. Indeed, the ZBA impermissibly based its decision on speculation about future expansion, without a basis in fact. *See id.* at 568. In each of these instances, the ZBA's assumptions were not only wrong; they were unsupported by its own experts. *See id.* at 532, 566, 567, 569. Indeed, the resolution drafted by the ZBA's consultants, which would have *approved* WDS's application subject to conditions addressing various ZBA concerns, was never circulated to the whole zoning board before it issued the challenged denial. *See id.* at 569. In sum, the record convincingly demonstrates that the zoning ***352** decision in this case was characterized not simply by the occasional errors that can attend the task of government but by an arbitrary blindness to the facts. As the district court correctly concluded, such a zoning ruling fails to comply with New York law.

[15] While the arbitrary and unlawful nature of the ZBA denial of WDS's application supports WDS's claim that it has sustained a substantial burden, two other factors drawn from our earlier discussion must be considered in reaching such a burden determination: (1) whether there are quick, reliable, and financially feasible alternatives WDS may utilize to meet its religious needs absent its obtaining the construction permit; and (2) whether the denial was conditional. These two considerations matter for the same reason: when an institution has a ready alternative—be it an entirely different plan to meet the same needs or the opportunity to try again in line with a zoning board's recommendations—its religious exercise has not been substantially burdened. The plaintiff has the burden of persuasion with respect to both factors. *See* § 2000cc–2 (putting burden on plaintiff to prove that government's action substantially burdened plaintiff's exercise of religion).

Here, the school could not have met its needs simply by reallocating space within its existing buildings. The architectural firm it hired determined that certain essential facilities would have to be incorporated into a new building, because not enough space remained in the existing buildings to accommodate the school's expanding needs. Further, experts hired by WDS determined that the planned location for Gordon Hall was the only site that would accommodate the new building. The answer to the first factor is there were not only no quick, reliable, or economically feasible alternatives, there were no alternatives at all.

In examining the second factor—whether the Village's denial of the school's application was conditional or absolute—we look at several matters: (a) whether the ZBA classified the denial as complete, (b) whether any required modification would itself constitute a burden on religious exercise; (c) whether cure of the problems noted by the ZBA would impose so great an economic burden as to make amendment unworkable; and (d) whether the ZBA's stated willingness to consider a modified proposal was disingenuous. *See Westchester Day Sch.,* 386 F.3d at 188 n. 3.

For any of the following reasons, we believe the denial of WDS's application was absolute. First, we observe that the ZBA could have approved the application subject to conditions intended to mitigate adverse effects on public health, safety, and welfare. Yet the ZBA chose instead to deny the application in its entirety. It is evident that in the eyes of the ZBA's members, the denial was final since all of them discarded their notes after voting on the application. Second, were WDS to prepare a modified proposal, it would have to begin the application process anew. This would have imposed so great an economic burden as to make the option unworkable. Third, the district court determined that ZBA members were not credible when they testified they would give reasonable consideration to another application by WDS. When the board's expressed willingness to consider a modified proposal is insincere, we do not require an institution to file a modified proposal before determining that its religious exercise has been substantially burdened.

Consequently, we are persuaded that WDS has satisfied its burden in proving that there was no viable alternative to achieve its objectives, and we conclude ***353** that WDS's religious exercise was substantially burdened by the ZBA's arbitrary and unlawful denial of its application.

C. *Least Restrictive Means to Further a Compelling State Interest*

[16] **[17]** **[18]** Under RLUIPA, once a religious institution has demonstrated that its religious exercise has been substantially burdened, the burden of proof shifts to the municipality to prove it acted in furtherance of a compelling governmental interest and that its action is the least restrictive means of furthering that interest. § 2000cc–2(b). Compelling state interests are "interests of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). The Village claims that it has a compelling interest in enforcing zoning regulations and ensuring residents' safety through traffic regulations. However, it must show a compelling interest in imposing the burden on religious exercise in the particular case at hand, not a compelling interest in general. *See, e.g., Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 432, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006) ("Under the more focused inquiry required by RFRA and the compelling interest test, the Government's mere invocation of the *general* characteristics of Schedule I substances ... cannot carry the day.... [T]here is no indication that Congress ... considered the harms posed by the *particular* use at issue here ...." (emphases added)).

The district court's findings reveal the ZBA's stated reasons for denying the application were not substantiated by evidence in the record before it. The court stated the application was denied not because of a compelling governmental interest that would adversely impact public

health, safety, or welfare, but was denied because of undue deference to the opposition of a small group of neighbors.

Further, even were we to determine that there was a compelling state interest involved, the Village did not use the least restrictive means available to achieve that interest. The ZBA had the opportunity to approve the application subject to conditions, but refused to consider doing so.

III Constitutionality of RLUIPA

Given our conclusion that the ZBA violated RLUIPA by denying WDS's application, the question remains whether RLUIPA was constitutionally applied. The Village challenges RLUIPA on the grounds that it exceeds Congress' Fourteenth Amendment (§ 5) and Commerce Clause powers and that the Act is unconstitutional under the Tenth Amendment and the Establishment Clause.

RLUIPA states that it only applies when (1) "the substantial burden is imposed in a program or activity that receives Federal financial assistance ...," (2) "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes ...," or (3) "the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved." § 2000cc(a)(2).

By limiting RLUIPA's scope to cases that present one of these jurisdictional nexuses, Congress alternatively grounded RLUIPA, depending on the facts of a particular case, in the Spending Clause, the Commerce Clause, and § 5 of the Fourteenth Amendment. There is no claim here that the ZBA receives federal financial ***354** assistance, but WDS does assert both that the substantial burden on its religious exercise affects interstate commerce and that it is imposed through formal procedures that permit the government to make individualized assessments of the proposed uses for the property involved. Thus, we must examine whether RLUIPA is constitutionally applied under Congress' Commerce Clause power or whether it is constitutionally applied under Congress' power to create causes of action vindicating Fourteenth Amendment rights.

A. *Congress' Power Under the Commerce Clause*

The Constitution grants Congress the power "[t]o regulate Commerce ... among the several States." U.S. Const. art. I, § 8, cl. 3. As noted above, Congress made explicit reference to this grant by limiting the application of RLUIPA to cases in which, *inter alia,* "the substantial burden affects, or removal of that substantial burden would affect, commerce ... among the several States." § 2000cc (a)(2)(B).

[19] As the Supreme Court has made plain, the satisfaction of such a jurisdictional element—common in both civil and criminal cases—is sufficient to validate the exercise of congressional power because an interstate commerce nexus must be demonstrated in each case for the statute in question to operate. *See United States v. Morrison,* 529 U.S. 598, 611–12, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) ("Such a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce."); *United States v. Lopez,* 514 U.S. 549, 561, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (noting that statute in question "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the [activity] in question affects interstate commerce"). Following suit, this Court has consistently upheld statutes under the Commerce Clause on the basis of jurisdictional elements. *See, e.g., United States v. Griffith,* 284 F.3d 338, 346–48 (2d Cir.2002); *United States v. Santiago,* 238 F.3d 213, 216 (2d Cir.2001) (per curiam). Consistent with this precedent, we now hold that, where the relevant jurisdictional element is satisfied, RLUIPA constitutes a valid exercise of congressional power under the Commerce Clause. *See, e.g., United States v. Maui County,* 298 F.Supp.2d 1010, 1015 (D.Haw.2003) (reaching same conclusion); *Freedom Baptist Church v. Twp. of Middletown,* 204 F.Supp.2d 857, 866–68 (E.D.Pa.2002) (same).

[20] **[21]** In this case, the district court found the jurisdictional element satisfied by evidence that the construction of Gordon Hall, a 44,000 square-foot building with an estimated cost of $9 million, will affect interstate commerce. We identify no error in this conclusion. As we have recognized, the evidence need only demonstrate a minimal effect on commerce to satisfy the jurisdictional element. *See Griffith,* 284 F.3d at 347. Further, we have expressly noted that commercial building construction is activity affecting interstate commerce. *See Reich v. Mashantucket Sand & Gravel,* 95 F.3d 174, 181 (2d Cir.1996)

("[C]onstruction efforts ... have a direct effect on interstate commerce.").

In light of our determination that RLUIPA's application in the present case is constitutional under the Commerce Clause, there is no need to consider or decide whether its application could be grounded alternatively in § 5 of the Fourteenth Amendment.

B. *Tenth Amendment*

[22] The Tenth Amendment provides that "the powers not delegated to the United States by the Constitution, nor prohibited ***355** by it to the States, are reserved to the States respectively, or the people." As the Supreme Court has explained, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York v. United States,* 505 U.S. 144, 156, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). The power to regulate interstate commerce was delegated to Congress in the Constitution. Nonetheless, in *New York,* the Court said that even in situations where Congress has the power to pass laws requiring or prohibiting certain acts, it has no power "directly to compel the States to require or prohibit those acts." *Id.* at 166, 112 S.Ct. 2408. We do not believe RLUIPA directly compels states to require or prohibit any particular acts. Instead, RLUIPA leaves it to each state to enact and enforce land use regulations as it deems appropriate so long as the state does not substantially burden religious exercise in the absence of a compelling interest achieved by the least restrictive means.

C. *Establishment Clause*

[23] **[24]** In determining whether a particular law violates the Establishment Clause, which provides in the First Amendment that "Congress shall make no law respecting an establishment of religion," U.S. Const. amend. I, we examine the government conduct at issue under the three-prong analysis articulated by the Supreme Court in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Under *Lemon,* government action that interacts with religion must: (1) have a secular purpose, (2) have a principal effect that neither advances nor inhibits religion, and (3) not bring about an excessive government entanglement with religion. *Id.* at 612–13, 91 S.Ct. 2105. RLUIPA's land use provisions plainly have a secular purpose, that is, the same secular purpose that RLUIPA's institutionalized persons provisions have: to lift government-created burdens on private religious exercise. *See Cutter v. Wilkinson,* 544 U.S. 709, 720, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005). As the Supreme Court explained in *Cutter,* such purpose is "compatible with the Establishment Clause." *Id.*

[25] **[26]** Similarly, the principal or primary effect of RLUIPA's land use provisions neither advances nor inhibits religion. As the Supreme Court has explained, a law produces forbidden effects under *Lemon* if "the government itself has advanced religion through its own activities and influence." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos,* 483 U.S. 327, 337, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987). Under RLUIPA, the government itself does not advance religion; all RLUIPA does is permit religious practitioners the free exercise of their religious beliefs without being burdened unnecessarily by the government.

[27] **[28]** Finally, RLUIPA's land use provisions do not foster an excessive government entanglement with religion. Although the Village contends that RLUIPA fails every part of the *Lemon* test, it makes no argument that the land use provisions foster intolerable levels of interaction between church and state or the continuing involvement of one in the affairs of the other. *Agostini v. Felton,* 521 U.S. 203, 232–33, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); *Walz v. Tax Comm'n of N.Y.,* 397 U.S. 664, 674–75, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). Further, entanglement becomes excessive only when it advances or inhibits religion. *Agostini,* 521 U.S. at 233, 117 S.Ct. 1997 (treating entanglement prong as aspect of effects prong under *Lemon* test); *Skoros v. City of N.Y.,* 437 F.3d 1, 36 (2d Cir.2006). RLUIPA ***356** cannot be said to advance religion simply by requiring that states not discriminate against or among religious institutions. *See Midrash Sephardi,* 366 F.3d at 1241.

Accordingly, we find that RLUIPA's land use provisions do not violate the Establishment Clause.

IV Jury Waiver

[29] **[30]** **[31]** We turn finally to the question of whether defendant waived its right to trial by jury. Under Federal Rule of Civil Procedure 38(b), "[a]ny party may demand a trial by jury of any issue triable of right by a jury." Failure to serve a demand constitutes a waiver of that right. Fed.R.Civ.P. 38(d).

Here, the Village initially failed to demand a jury trial. A litigant who has waived a jury may nonetheless demand one with respect to new issues raised by later pleadings, unless the new issues are simply "artful rephrasings" of existing issues. *See Rosen v. Dick,* 639 F.2d 82, 94 (2d Cir.1980). When the same parties are the litigants before and after an amended pleading, we are unlikely to find a new issue has been raised. *Id.* at 96. An amended complaint asserting new theories of recovery, based on the same facts as the original complaint, will not renew a defendant's right to a jury trial when that right was waived with respect to the original complaint. 8 James Wm. Moore, *Moore's Federal Practice* § 38.50[8][d] (3d ed.2006).

The Village declares its amended answer—filed a year and a half after commencement of the suit—raised new issues, and that it therefore had a right to demand a new trial on those issues. But its amended answer was identical to its initial answer except that it added a number of affirmative defenses not asserted earlier. The new affirmative defenses alleged that defendant's denial of WDS's application was not a complete denial, that it did not substantially burden WDS's free exercise of religion, that the denial was based on compelling state interests, and that RLUIPA if applied to WDS's activities is unconstitutional. By denying plaintiff's contrary allegations, the defendant had already raised the first three issues in its initial answer.

[32] We are left with the Village's affirmative defense that RLUIPA if applied to WDS's activities would be unconstitutional. But the defendant was on notice that the court would be deciding all issues relating to the general dispute. The Village should reasonably have known at the time it initially waived its jury trial right that the constitutionality of RLUIPA could constitute a part of the dispute. Like an amended complaint that simply asserts new theories of recovery, an amended answer that asserts new defense theories based on the same facts does not reestablish the defendant's right to demand a jury trial. Hence, the district court correctly ruled the Village had not revived its right to such under Rule 38(b).

[33] The Village also insists that the district court abused its discretion by not ordering a jury trial under Rule 39(b). Rule 39(b) provides that "notwithstanding the failure of a party to demand a jury ..., the court in its discretion upon motion may order a trial by a jury of any or all issues." We have ruled that "inadvertence in failing to make a timely jury demand does not warrant a favorable exercise of discretion under Rule 39(b)." *Noonan v. Cunard S.S. Co.,* 375 F.2d 69, 70 (2d Cir.1967) (Friendly, J.); *see also Higgins v. Boeing Co.,* 526 F.2d 1004, 1006 n. 2 (2d Cir.1975) (per curiam) ("[D]espite the discretionary language of Rule 39(b) some cause beyond mere inadvertence must be shown to permit granting an untimely demand."). Here, the Village admits that it neglected to demand a jury in June 2003. ***357** Accordingly, it was not an abuse of discretion for the district court to deny the Village's 2004 request for a favorable exercise of its discretion under Rule 39(b).

V All Writs Act and Supplemental State Law Claims

[34] After determining the Village violated RLUIPA, the district court ordered the ZBA immediately and unconditionally to issue WDS's special permit modification. Such relief is proper under RLUIPA. *See* § 2000cc–2(a) (parties asserting RLUIPA claims may obtain "appropriate relief" against a government). As a consequence, there is no need for us to examine the alternative bases the district court provided to justify this relief.

CONCLUSION

Accordingly, for the foregoing reasons, the judgment of the district court is affirmed.

All Citations

504 F.3d 338, 226 Ed. Law Rep. 595

Footnotes

* Hon. Richard M. Berman, United States District Judge for the Southern District of New York, sitting by designation.

1 The United States, as intervenor and amicus curiae, and the Becket Fund for Religious Liberty, the Association of Christian Schools International, and the Council for Christian Colleges and Universities, as amici curiae, filed briefs in support of plaintiff.

EXHIBIT “L”

832 F.Supp. 1329
United States District Court,
W.D. Missouri, Western Division.

Larry WHITTON, Plaintiff,
v.
The CITY OF GLADSTONE, MISSOURI, Defendant.

No. 92–0848–CV–W–1
|
Sept. 17, 1993.

Synopsis

Candidate for political office brought action challenging constitutionality of city's sign ordinance and moved for summary judgment. The District Court, Whipple, J., held that ordinance was unconstitutional.

Motion granted.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (15)

[1] Constitutional Law Mootness

Although election was over, candidate stated that he planned to run for office in the future and thus, candidate's challenge to constitutionality of city's sign ordinance was not moot because it involved issues capable of repetition, yet evading review. U.S.C.A. Const.Amend. 1.

[2] Summary Judgment Favoring nonmovant; disfavoring movant

When considering summary judgment motion, court must scrutinize evidence in light most favorable to nonmovant and nonmovant must be given the benefit of all reasonable inferences. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[3] Summary Judgment Shifting burden

If party moving for summary judgment meets its burden of proof, burden shifts to nonmovant who must set forth specific facts showing that there is genuine issue for trial so as to defeat summary judgment motion. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[4] Summary Judgment Viability of Claim or Defense

If rational trier of fact considering record as a whole could not find in favor of party opposing summary judgment motion, then trial is unnecessary. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[5] Summary Judgment Effect of applicable substantive law

Substantive law identifies which facts are material for summary judgment purposes. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[6] Summary Judgment What constitutes "genuine" issue or dispute

In assessing whether material fact is subject to genuine dispute for summary judgment purposes, court should employ a standard essentially identical to that governing motion for directed verdict. Fed.Rules Civ.Proc.Rules 50(a), 56(c), 28 U.S.C.A.

[7] Summary Judgment Drastic or extreme remedy; use of caution

Court should always be mindful that summary judgment is an extreme remedy. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[8] Constitutional Law Signs

Posting of political signs constitutes speech. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law Content-Neutral Regulations or Restrictions

Constitutional Law Narrow tailoring requirement; relationship to governmental interest

Constitutional Law Existence of other channels of expression

Time, place or manner test for analyzing restrictions on speech is appropriate if restrictions are justified without reference to content of regulated speech, they are narrowly tailored to serve significant governmental interest and they leave open ample alternative channels for communication of information. U.S.C.A. Const.Amend. 1.

[10] **Constitutional Law** Signs

City's sign ordinance prohibiting residential or commercial owner from placing political sign on her property more than 30 days before election to which sign pertains and requiring sign to be removed within seven days of election was content-based regulation under any common sense understanding of the term; ordinance favored commercial speech over noncommercial speech and distinguished between permissible and impermissible signs on basis of signs' content. U.S.C.A. Const.Amend. 1.

1 Case that cites this headnote

[11] **Constitutional Law** Signs

Content-based city sign ordinance which attempted to regulate property owner's posting of political signs in her own yard demanded more exacting strict scrutiny standard than court would apply in analyzing content-based regulation in public forum case and thus, sign ordinance, in order to pass constitutional muster, had to be necessary to serve compelling state interest and be narrowly drawn to achieve that interest. U.S.C.A. Const.Amend. 1.

1 Case that cites this headnote

[12] **Constitutional Law** Signs

Election Law Independent communications; express advocacy

Content-based city sign ordinance prohibiting property owner from placing political sign on her property more than 30 days before election to which sign pertains and requiring sign to be removed within seven days of election failed strict scrutiny test and therefore, ordinance was unconstitutional; although traffic safety and aesthetics were significant interests, they were not compelling and restrictions were not narrowly tailored to enhance traffic safety or to achieve city's interest in preserving its aesthetics. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[13] **Constitutional Law** Political speech, beliefs, or activity in general

Courts give political speech the highest degree of protection. U.S.C.A. Const.Amend. 1.

[14] **Constitutional Law** Signs

Election Law Independent communications; express advocacy

Even assuming that city's sign ordinance prohibiting property owner from placing political sign on her property more than 30 days before election to which sign pertains did not regulate speech on basis of content, ordinance would still fail time, place and manner test; ordinance did not narrowly tailor 30–day durational requirement to achieve city's interests in traffic safety and aesthetics and ordinance did not leave open adequate channels of communication. U.S.C.A. Const.Amend. 1.

1 Case that cites this headnote

[15] **Constitutional Law** Signs

To extent that city allowed business to externally illuminate commercial signs on its property, city had to also allow business to externally illuminate political signs. U.S.C.A. Const.Amend. 1.

Attorneys and Law Firms

***1330** W. Joseph Hatley, Cooperating Atty., ACLU of Kansas and Western MO, Overland Park, KS, and William C. Odle, Cooperating Atty., ACLU of Kansas and Western MO, Kansas City, MO, for plaintiff.

Linda Salfrank, Swanson, Midgley, Kansas City, MO, for defendant.

ORDER

WHIPPLE, District Judge.

There are cross motions for summary judgment before the court. The court will grant plaintiff's motion and deny defendant's motion for the reasons stated below.

I. Background

Plaintiff Larry Whitton asks this court to hold that certain provisions of the City of Gladstone's (Gladstone) Sign Ordinance violate the United States Constitution's First and Fourteenth Amendments. Whitton lives in Gladstone and also owns a business there. Whitton contends that the Sign Ordinance unconstitutionally hampers his ability to use his residential and commercial property in running and assisting others in running for political office.

Whitton's original complaint challenged the constitutionality of the Sign Ordinance's (1) fifteen-day durational limitation on the posting of political signs prior to an election; (2) five-day removal requirement of political signs after an election; (3) regulation of the number of political signs that could be placed in each residential or commercial lot and (4) regulation of external illumination of political signs. Whitton, at the same time he filed the complaint, also asked the court for a Temporary ***1331** Restraining Order (TRO) and a Preliminary Injunction to allow him to post political signs that promote his candidacy for sheriff of Gladstone in violation of the Sign Ordinance.

The day before the court held a hearing on the TRO and the Preliminary Injunction, Gladstone repealed the Sign Ordinance and enacted a new one. The New Sign Ordinance removes the provision which limited the placement of all political signs [1] to one sign per candidate or issue per residential or commercial lot, restricts the total allowable square footage sign space per lot, extends the pre-election posting of signs from fifteen days to thirty days, extends the removal requirement from five to seven days and adds a section explaining the legislative purpose of the New Sign Ordinance. The New Sign Ordinance does not differ from the previous ordinance in any other respect. The court, at the TRO and Preliminary Injunction hearing, ruled in Gladstone's favor finding that Whitton failed to show he would suffer irreparable harm if the city enforced the New Sign Ordinance.

[1] Whitton now challenges the constitutionality of §§ 25–45, 25–46 and 25–47(b) of the New Sign Ordinance. Although the election is over, Whitton states that he plans to run for other offices in the future. [2] The relevant part of § 25–45 prohibits a residential or commercial owner from placing a political sign on his or her property more than thirty days before an election to which the sign pertains. [3] The section also requires that the sign be removed within seven days after the election. Section 25–47(b) makes the owner of the property, the candidate and the chairperson of a political committee responsible for removing the signs. Section 25–46 prohibits the illumination of all political signs.

II. Motion for Summary Judgment

A. Summary Judgment Standard

[2] **[3]** A movant is entitled to summary judgment under Fed.R.Civ.P. 56(c), "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Thus, the moving party bears the burden of proof. *Aetna Life Ins. Co. v. Great Nat'l Corp.,* 818 F.2d 19, 20 (8th Cir.1987). When considering a motion for summary judgment, the court must scrutinize the evidence in the light most favorable to the non-moving party and the non-moving party "must be given the benefit of all reasonable inferences." *Mirax Chem. Prods. Corp. v. First Interstate Commercial Corp.,* 950 F.2d 566, 569 (8th Cir.1991) (citation omitted). If the moving party meets its burden of proof, the burden shifts to the non-moving party who must set forth specific facts showing that there is a genuine issue for trial to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510–11, 91 L.Ed.2d 202, 211–12 (1986).

***1332** **[4]** **[5]** **[6]** The two requirements of Rule 56(c) are that there be (1) no genuine issue of (2) material fact. The United States Supreme Court explains that to establish a genuine issue of fact sufficient to warrant trial, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986). If a rational trier of fact considering the record as a whole could not find in favor of the non-moving party, then a trial is unnecessary. *Id.* Substantive law identifies which facts are material. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson,* 477 U.S. at 248, 106 S.Ct. at 2510, 91 L.Ed.2d at 211. In assessing whether a material fact is subject to a genuine dispute, a court should employ a standard essentially identical to that governing a motion for directed verdict under Rule 50(a). *Id.,* at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.

[7] Finally, in *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), the Supreme Court concluded by encouraging the use of summary judgment in appropriate cases: "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Id.,* at 327, 106 S.Ct. at 2554, 91 L.Ed.2d at 276 (citations omitted). *See also, City of Mt. Pleasant v. Associated Elec. Coop. Inc.,* 838 F.2d 268, 273 (8th Cir.1988) ("The motion for summary judgment can be a tool of great utility in removing factually insubstantial cases from crowded dockets, free courts' trial time for those cases that really do raise genuine issues of material fact."). However, a court should always be mindful that summary judgment is an extreme remedy. *Inland Oil & Transp. Co. v. United States,* 600 F.2d 725, 727 (8th Cir.), *cert. denied,* 444 U.S. 991, 100 S.Ct. 522, 62 L.Ed.2d 420 (1979).

The parties agree that there are no genuine issues of material fact for a trier of fact to resolve. The present case is thus an appropriate one for the court to decide on a motion for summary judgment.

B. Durational Limitations and Removal Requirements

"Congress shall make no law ... abridging the freedom of speech...." U.S. Const. amend. I. The Fourteenth Amendment, of course, secures the freedom of speech against states as well. *Burson v. Freeman,* 504 U.S. 191, ——, 112 S.Ct. 1846, 1849–50, 119 L.Ed.2d 5, 12 (1992).

[8] Section 25–45 of the New Sign Ordinance prohibits a residential or commercial owner from placing a political sign on his or her property more than thirty days before an election to which the sign pertains and requires the sign be removed within seven days of the election. Section 25–45, in essence, constitutes a complete ban on posting political signs which is temporarily lifted thirty days before an election and reinstated after an election takes place. *City of Antioch v. Candidates' Outdoor Graphic Serv.,* 557 F.Supp. 52, 55 (N.D.Cal.1982). The posting of political signs constitutes speech. *Arlington County Republican Comm. v. Arlington County,* 983 F.2d 587, 593–94 (4th Cir.1993); *Baldwin v. Redwood City,* 540 F.2d 1360, 1366 (9th Cir.1976), *cert denied,* 431 U.S. 913, 97 S.Ct. 2173, 53 L.Ed.2d 223 (1977). Section 25–45 burdens speech, thus the next issue is which test the court should use in analyzing the constitutionality of § 25–45.

1. The Appropriate Test for Analyzing Section 25–45

[9] Gladstone argues that the appropriate test for analyzing the constitutionality of § 25–45 is the time, place and manner test. A time, place or manner test is appropriate if the restrictions are "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." ***1333** *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221, 227 (1984).

The court cannot use the time, place and manner test in analyzing the thirty-day durational limitation and the seven-day removal requirement if Gladstone regulates speech on the basis of its content. A plurality of the Supreme Court in *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), articulated two tests it uses to determine if a restriction is content-based. Although the Supreme Court was sharply divided, it did not divide on the issue of what constitutes a content-based regulation. The first test is whether Gladstone gives commercial speech a greater degree of protection than noncommercial speech. If it does then the New Sign Ordinance is content-based and the

court cannot analyze the thirty-day durational limitation and the seven-day removal requirement under a time, place and manner standard. *Id.,* at 513, 101 S.Ct. at 2895, 69 L.Ed.2d at 818. The second test is whether the section "distinguishes ... between permissible and impermissible signs ... by reference to their content." *Id.,* at 516, 101 S.Ct. at 2897, 69 L.Ed.2d at 820.

[10] Section 25–45 fails both tests and is thus, not content-neutral. First, Gladstone favors commercial speech over noncommercial speech. Gladstone argues that it favors noncommercial speech over commercial speech because some commercial signs are subject to application, permit, fee or insurance requirements, but political signs are not. Gladstone does require some commercial signs to undergo several requirements that political signs do not. However, in residential areas, a homeowner may post a "For Sale" or "For Rent" sign indefinitely and post a construction sign for up to ninety days prior to construction without having to meet the application, permit, fee or insurance requirements. A homeowner may also post a sign advertising a garage sale although the parties have not provided the court with information as to whether such signs must meet any administrative requirements. Further, as discussed earlier, § 25–45 imposes a ban on political speech except during the thirty-day period before the election while allowing commercial owners to post permanent signs indefinitely. The New Sign Ordinance, thus does treat some commercial signs more favorably than political signs. In regards to removal, the political sign must be removed within seven days of the election, but a construction sign may remain standing an additional three days, or a total of ten days.

Second, assuming that the New Sign Ordinance does not treat commercial signs more favorably than noncommercial signs, § 25–45 distinguishes between permissible and impermissible signs on the basis of the signs' content. The Supreme Court recently determined that prohibiting newsracks that distribute handbills, but not newspapers regulates on the basis of content. *City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, ——–——, 113 S.Ct. 1505, 1517–18, 123 L.Ed.2d 99, 115–17 (1993). There the Supreme Court found that the city did not regulate on the basis of any hostility toward a particular viewpoint, but recognized that "[u]nder the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban in this case is 'content-based.' " *Id.,* at ——, 113 S.Ct. at 1516–17, 123 L.Ed.2d at 116. Similarly, in the present case, a sign that reads "For Sale" thirty days before an election is permissible, but one that reads "Vote for Whitton" is not. What distinguishes between a permissible and an impermissible sign rests upon the content of the sign. Section 25–45, is content-based under any "commonsense understanding of the term." *Id.*

Further, a political sign that states "Whitton is Honest" or "Pro–Choice" is impermissible if an election on the candidate or issue is not pending, [4] but is permissible if an election ***1334** is pending within thirty-days from the posting of the signs. Again, what distinguishes between an impermissible and a permissible sign rests upon the content of the sign. *See, Burson,* 504 U.S. at ——, 112 S.Ct. at 1850, 119 L.Ed.2d at 13 ("Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign.").

Gladstone points to language in *Ward v. Rock Against Racism,* 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), for its argument that § 25–45 is content-neutral. The *Ward* Court stated that the "principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.,* at 791, 109 S.Ct. at 2753, 105 L.Ed.2d at 675. Gladstone argues it did not adopt § 25–45 because of any disagreement with the message the political signs convey thus, § 25–45 is content-neutral. In short, Gladstone argues that because it did not adopt the section to suppress a particular viewpoint, § 25–45 is content-neutral. The court accepts that Gladstone did not adopt § 25–45 because of a dislike of a particular viewpoint, but § 25–45 still prohibits the posting of political signs that pertain to an election more than thirty days before the election. Recently, the Supreme Court held that "content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic." *Burson,* 504 U.S. at ——, 112 S.Ct. at 1850, 119 L.Ed.2d at 13. Likewise, the Supreme Court held that a ban on utility bill inserts discussing controversial issues of public policy such as nuclear power is not content-neutral even though the ban suppressed all points of view of an issue. *Consolidated Edison Co. v. Public Serv. Comm'n,* 447 U.S. 530, 537–44, 100 S.Ct. 2326, 2333–37, 65 L.Ed.2d 319, 327–33 (1980).

The Supreme Court's decision in *Renton v. Playtime Theaters, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), also does not help Gladstone. There, the ordinance prohibited

adult movie theaters from locating within 1,000 feet of a residential zone, church, park or school. *Id.,* at 43, 106 S.Ct. at 926–27, 89 L.Ed.2d at 35. The *Renton* Court upheld the regulation because the regulation was aimed not at suppressing adult films, but at the secondary effects that adult movie theaters have on residential zones, churches, parks and schools. *Id.,* at 47–49, 106 S.Ct. at 928–30, 89 L.Ed.2d at 37–39. The ordinance could distinguish between adult movie theaters and other theaters because the city was concerned with the secondary effects that adult movie theaters caused, but which other movie theaters did not cause. In the present case, Gladstone distinguishes between political and nonpolitical signs and between political signs that are posted within thirty days of an election and those that are not within thirty days of an election. Unlike the situation in *Renton,* political signs do not cause any secondary effects that distinguish them from other temporary or permanent signs and political signs posted more than thirty days of an election ***1335** do not cause any secondary effects that distinguish them from political signs posted within thirty days of an election. In short, *Renton* does not apply to the present case because the political signs that Gladstone prohibits do not cause any secondary effects that distinguish them from the signs Gladstone permits. *See, Cincinnati,* 507 U.S. at ——– ––––, 113 S.Ct. at 1516–18, 123 L.Ed.2d at 116–17 (*Renton* does not apply because the newsracks the city prohibits do not cause any secondary effects that distinguish them from the newsracks the city permits.).

2. Section 25–45 Fails Strict Scrutiny

[11] **[12]** Whitton cites the *Burson* Court for the test to analyze a content-based regulation. The *Burson* Court states that a content-based regulation must be (1) necessary to serve a compelling state interest and (2) that it be narrowly drawn to achieve that interest. *Burson,* 504 U.S. at ——, 112 S.Ct. at 1850–52, 119 L.Ed.2d at 13–14. The test that *Burson* articulates is used to analyze content-based restrictions on speech in *public forum* and not on private property. *Id.,* at ——, 112 S.Ct. at 1850, 119 L.Ed.2d at 13. However, that Gladstone attempts to regulate a resident's exercise of speech in his or her own yard demands that the court apply more exacting, not less scrutiny than it would in analyzing a content-based regulation in public forum cases. *Cf. Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 811, 104 S.Ct. 2118, 2132, 80 L.Ed.2d 772, 791 (1984) ("So here, the validity of the aesthetic interest in the elimination of signs on public property is not compromised by failing to extend the ban to private property. The private citizen's interest in controlling the use of his own property justifies the disparate treatment."). Thus, because the strict scrutiny that *Burson* articulates is the minimum scrutiny that this court should use in analyzing a content-based regulation of political signs on private property, the court will use the test that *Burson* articulates.

[13] Gladstone argues that its interest in traffic safety and aesthetics are compelling interests. Traffic safety and aesthetics are significant interests, *Metromedia,* 453 U.S. at 507–08, 101 S.Ct. at 2892–93, 69 L.Ed.2d at 814–15, but they are not compelling interests, especially given the nature of the First Amendment rights at stake. Courts give political speech the highest degree of protection. *E.g., Boos v. Barry,* 485 U.S. 312, 319, 108 S.Ct. 1157, 1162–63, 99 L.Ed.2d 333, 343–44 (1988) (The Supreme Court carefully scrutinizes freedom of speech restrictions on public issues.). Gladstone does not cite any cases holding that traffic safety or aesthetics or both are compelling interests.

The restrictions also are not narrowly tailored to enhance traffic safety. Section 25–50, entitled "Legislative Purpose and Intent of Political Sign Sections" states in subsection "C" that durational limits are necessary because the severe weather conditions will adversely affect temporary political signs creating aesthetic and safety issues. Gladstone already requires in §§ 25–10 and 25–12 that signs be clean, free from hazards and if insecure, the property owner or the person maintaining the sign must fix the sign. Gladstone has ordinances that address the same safety concerns that § 25–45 purports to address. Further, other than Gladstone's legislative statements that the restrictions on political signs are designed to further traffic safety, Gladstone does not provide any evidence that political signs cause problems with traffic safety or that removing political signs will improve traffic safety. Once Gladstone allows political signs for thirty days, "it is difficult to imagine how prohibiting political signs at other times significantly promotes highway safety." *Van v. Travel Info. Council,* 52 Or.App. 399, 628 P.2d 1217, 1224 (1981).

Gladstone also has not narrowly tailored the restrictions on political signs to achieve its interest in preserving the city's aesthetics. The city fails to show the court how its interest in aesthetics justifies a thirty-day time limit on posting political signs, but not on commercial signs. As the concurring Justices in *Metromedia* stated, "before deferring to a city's judgment, a court must be convinced that the

city is seriously and comprehensively addressing aesthetic concerns." *Metromedia,* 453 U.S. at 531, 101 S.Ct. at 2905, 69 L.Ed.2d at 829 (Brennan, J. concurring). Regarding both traffic safety and ***1336** aesthetics, the city could regulate the construction of the signs, amount of signage [5] and the duration of time a temporary political sign can remain before the candidate or committee must remove or replace the sign. The Supreme Court also recognizes that "private property owners' aesthetic concerns will keep the posting of signs on their property within reasonable bounds." *Taxpayers for Vincent,* 466 U.S. at 811, 104 S.Ct. at 2132, 80 L.Ed.2d at 791.

Regarding the seven-day removal requirement, Whitton's interest in maintaining signs promoting his candidacy declines greatly after the election. *Baldwin,* 540 F.2d at 1374–75 (dicta). As discussed above, however, Gladstone does not have a content-neutral, post-event removal restriction. Instead, Gladstone allows signs such as construction signs to remain longer than political signs. Gladstone does not offer any justification for such a distinction. Again, the Supreme Court agrees that aesthetics and traffic safety are significant interests, but they are not compelling even though Whitton has less an interest in maintaining the signs after the election. Further, Gladstone did not narrowly tailor the restriction. Without offering any justification for treating the signs differently, Gladstone allows construction signs to remain ten days after the construction is completed and real estate signs to remain indefinitely while allowing political signs to remain only seven days after the election. While a content-neutral restriction on post-event removal of signs might survive constitutional scrutiny, [6] the present content-based restriction on speech does not.

The facts in the present case are not those that can support content-based restrictions. In *Burson,* the Supreme Court upheld a statute that prohibited the solicitation of votes within 100 feet of a polling place even though the statute regulated on the basis of the content of the speech. *Burson,* 504 U.S. at ——, 112 S.Ct. at 1857–58, 119 L.Ed.2d at 22. The Supreme Court recognized that rarely will a content-based restriction on freedom of speech survive, but held that given the compelling interest in protecting the political process, the restriction on the freedom of speech was narrowly tailored. *Id.,* at —— – ——, 112 S.Ct. at 1851–58, 119 L.Ed.2d at 14–22. The present case differs fundamentally from *Burson.* In the present case, the interests in traffic safety and aesthetics are significant, but they pale in comparison to an interest in protecting the political process which is one of the most vital rights an individual has in a democratic society. *Id.,* at ——, 112 S.Ct. at 1851, 119 L.Ed.2d at 14. The 100–foot restriction on soliciting votes on the day of an election also differs considerably from Gladstone's ban on political speech that is lifted only for thirty days before an election and is reinstated seven days after the election. In short, the present case is not one of those rare cases that survives strict scrutiny.

3. Section 25–45 Fails Time, Place and Manner

[14] Even assuming § 25–45 does not regulate speech on the basis of content, the thirty-day durational requirement would still fail the time, place and manner test. Again, a time, place or manner test requires that Gladstone narrowly tailor significant interests and that the restrictions "leave open ample alternative channels for communication of the information." *Clark,* 468 U.S. at 293, 104 S.Ct. at 3068, 82 L.Ed.2d at 227. Gladstone's interests in traffic safety and aesthetics are significant thus, the only remaining issues are whether Gladstone narrowly tailored its restrictions to achieve these interests and whether Gladstone left alternative channels for communicating the information.

Gladstone did not narrowly tailor the thirty-day durational requirement to achieve its interests in traffic safety and aesthetics. The court does not require Gladstone to follow the least restrictive approach to meet its interests, rather, Gladstone must make sure its restrictions are narrowly tailored. The court in *Antioch* held that an ordinance ***1337** which prohibited political signs except for a sixty-day period before the election to which the signs pertain is unconstitutional. *Antioch,* 557 F.Supp. at 61. There, the court noted that "Instead of a general ban, the City might regulate the size, design, and construction of the posters...." *Id.,* at 60–61. Gladstone could do the same. First, the city could regulate the construction and design of the signs. Second, the city could limit the square feet of signs on any one lot. Third, if Gladstone does not believe that its existing ordinances regulating the condition of signs is sufficient, it could limit the duration of time a temporary political sign can remain before the candidate or committee must remove or replace the sign.

Gladstone also does not leave open adequate channels of communication. Even ignoring the importance of permanent political signs, temporary political signs offer:

> special advantages to the candidate seeking public office and to the

> advocate promoting a particular position on a state ballot measure. These signs are relatively inexpensive means of campaigning. Their use can be localized so that certain areas which the advocate wishes especially to reach may be targeted. A candidate or partisan can use the temporary sign to place a name or an issue before the public.

City of Antioch, 557 F.Supp. at 59.[7] Thus, the restrictions do not leave open ample alternatives to Whitton the candidate or to the committee advocating an issue for vote. Further, the restrictions do not leave open ample alternative to Whitton the homeowner to post signs promoting the candidates or issues he favors. The *Vincent* Court held the ban on posting political signs on public property was constitutional partly because one could still "exercise the right to speech and to distribute literature in the same place where the posting of signs on public property is prohibited." *Vincent,* 466 U.S. at 812, 104 S.Ct. at 2132–33, 80 L.Ed.2d at 792. In the present case, Whitton the homeowner does not have such an alternative on his property. Thus, not only does § 25–45 fail to leave open other alternatives to Whitton the candidate, it also fails to do so for Whitton the homeowner.

The thirty-day durational requirement and seven-day removal requirements of § 25–45 do not pass strict scrutiny and to that extent, § 25–45 is unconstitutional. The thirty-day durational requirement of § 25–45 also does not pass time, place and manner scrutiny and is therefore unconstitutional for that reason as well. The only remaining provision of the New Sign Ordinance in dispute concerns illumination.

C. Illumination

[15] Whitton wishes to erect a permanent ground sign to advertise his business and to also use the sign to promote political candidates. Reading §§ 25–17 and 25–38 together, one may externally illuminate a permanent sign thirty square feet in area or less unless another section states otherwise. Section 25–46 states that "no political sign in any area of any zoned use may be lit by external sources with the sole purpose to light said sign." Thus, Whitton may erect an externally illuminated commercial sign no greater than thirty square feet in area or less on his commercial property, but not one that promotes his candidacy for office. As the court discussed earlier, such a restriction regulates speech on the basis of its content and will not withstand constitutional scrutiny in the present case. Thus, to the extent that Gladstone allows a business to externally illuminate commercial signs on its property, Gladstone must also allow the business to externally illuminate political signs.

The New Sign Ordinance does not provide for external illumination of any sign on residential property, thus prohibiting external illumination of political signs on residential property does not regulate on the basis of content. The ban on external illumination, but still allowing internal illumination, is narrowly ***1338** tailored to meet Gladstone's interests in traffic safety and aesthetics. Also, a ban on external illumination in residential areas still leaves open ample alternative channels for communicating Whitton's political messages. The court refuses to not allow a business to externally illuminate similar signs that promote a political candidate or issue.

All Citations

832 F.Supp. 1329

Footnotes

1 Section 25–8 of the New Sign Ordinance defines political signs as: "Any sign promoting, supporting, or opposing any candidate, office, issue or proposition to be voted upon at any public election."

2 Thus, the case is not moot because it involves issues "capable of repetition, yet evading review." *Moore v. Ogilvie,* 394 U.S. 814, 816, 89 S.Ct. 1493, 1494, 23 L.Ed.2d 1, 4 (1969) (citation omitted).

3 Section 25–45 entitled, “Restriction of political signs within zones,” reads:

> A. Political signs located in an area zoned for residential use shall not exceed two (2) feet by two (2) feet on each side. In residential areas exposed political sign face shall not exceed an aggregate gross surface area of sixty-four (64) square feet per lot. No sign within such area shall be placed or erected more than thirty (30) days prior to the election to which such sign pertains and such sign shall be removed within seven (7) days after such election.
>
> B. Political signs located in an area zoned for industrial or commercial use shall not exceed thirty-two (32) square feet in total and shall not have any side greater than eight (8) linear feet. In industrial and commercial areas exposed political sign face shall not exceed an aggregate gross surface area of five hundred twelve (512) square feet per lot. No sign within such area shall be placed or erected more than thirty (30) days prior to the election to which such sign pertains and such sign shall be removed within seven (7) days after such election.

4 There is some confusion as to whether the ordinance prohibits a homeowner or a business from posting a sign advocating, for example, a position on abortion. Whether the New Sign Ordinance bans such speech does not change the court's analysis, the court discusses this issue only to discuss a possible contradiction within the ordinance.

Stuart Borders, who interprets and enforces the New Sign Ordinance for Gladstone, testified in deposition that the New Sign Ordinance allows a homeowner to post a sign advocating a position on abortion even though it is not an issue to be voted on within thirty days. If Mr. Border's reading of the New Sign Ordinance is correct, Whitton could post a sign advocating a position on abortion all year long, regardless of whether abortion is an issue the voters will decide in an upcoming election or not. This reading conflicts with § 25–45, because if abortion is an issue the voters will decide in an election, Whitton may not post a sign advocating a position on abortion until thirty days before the election and he must remove the sign within seven days after the election. Mr. Borders' reading would make the New Sign Ordinance impermissibly vague. *E.g.,* *N.A.A.C.P. v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

This reading also conflicts with the language of the New Sign Ordinance. The only permanent signs allowed in residential areas are name plate signs, real estate signs, church signs, construction signs, subdivision development signs, subdivision entrance signs and in some residential areas, ground signs. § 25–28. Gladstone also prohibits temporary signs in residential areas. § 25–39. The city does allow political signs as discussed in this Order, but political signs do not include general ideological speech under the New Sign Ordinance. Political signs include only signs that promote a “candidate, office, issue or proposition to be voted upon at any public election.” § 25–8.

5 The city recognizes this because § 25–45 limits the square footage of signs in residential areas to 64 square feet per lot and in commercial areas to 512 square feet per lot.

6 Theodore Y. Blumoff, *After Metromedia: Sign Controls and the First Amendment,* 28 St. Louis U.L.J. 171, 195 (1984).

7 Gladstone offers an affidavit that questions the effectiveness of temporary political signs, however, courts generally recognize the unique advantages that temporary political signs have over other alternatives such as canvassing, radio and television. *E.g., Baldwin,* 540 F.2d at 1368 (Political posters have unique advantages and are less expensive than most other alternatives.); *John Donnelly & Sons v. Campbell,* 639 F.2d 6, 16 (1st Cir.1980) (same), *aff'd,* 453 U.S. 916, 101 S.Ct. 3151, 69 L.Ed.2d 999 (1981).

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EXHIBIT “M”

671 F.Supp. 515
United States District Court, N.D. Illinois, Eastern Division.

LOVE CHURCH, an Illinois not-for-profit corporation, Plaintiff,
v.
CITY OF EVANSTON, an Illinois municipal corporation, Defendant.

No. 86 C 9850.
|
Sept. 3, 1987.

Synopsis

Church brought action challenging city zoning ordinance. On church's motion for summary judgment, the District Court, Grady, Chief Judge, held that zoning ordinance requiring churches to obtain special use permit violated equal protection.

Motion granted.

See also 671 F.Supp. 508.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (1)

[1] **Constitutional Law** Zoning and Land Use
Zoning and Planning Churches and religious uses

City zoning ordinance requiring churches to obtain special use permit violated equal protection, where meeting halls, theatres and schools were permitted uses under the ordinance. U.S.C.A. Const.Amend. 14.

11 Cases that cite this headnote

Attorneys and Law Firms

***515** John W. Mauck, Richard Baker, Thomas Cameron, Friedman and Mauck, Chicago, Ill., for plaintiff.

Jack Siegel, Siegel and Warnock, Chicago, Ill., for defendant.

***516 MEMORANDUM OPINION**

GRADY, Chief Judge.

This case is before us on the motion of plaintiff Love Church, Inc. ("Love Church" or "plaintiff") for summary judgment on the ground that defendant City of Evanston's ("Evanston") zoning ordinance violates the Equal Protection Clause of the Fourteenth Amendment. For the reasons below, plaintiff's motion is granted.

FACTS

We set forth the facts of this case in our previous memorandum opinion and reprint them here for convenience's sake:

> Plaintiff Love Church is a not-for-profit corporation established in June 1985. Complaint, Affidavit of Marzell Gill at ¶ 2. Love Church's congregation is comprised of approximately 30 young "working class" black men and women residing in and around Evanston. [1] *Id.* The church is not affiliated with any denomination, although it believes in traditional Christian teachings. *Id.* at ¶¶ 4, 5. Love Church's congregation meets every Sunday to practice its religion but has no permanent house of worship and instead has convened in public halls and private homes. Complaint at ¶¶ 8, 16, 17. Since April 1986, Love Church has sought to lease property on which to hold services and run a Sunday/nursery school. *Id.* at ¶ 18.
>
> Love Church has yet to obtain a lease and has been meeting in a 900 square foot apartment of one of its congregants. *Id.,* Affidavit of Gill at ¶ 2. [2]
>
> Plaintiffs allege that Evanston's Zoning Ordinance ("Ordinance") has made it impossible for Love Church to obtain a suitable lease. Complaint at ¶¶ 19, 20. Churches are not permitted uses anywhere in the city of Evanston, although Evanston allows churches in any residential or business/commercial district provided they secure special use permits. *Id.* at ¶ 7; Ordinance §§ 6–5–2(b); 6–7–2–2; 6–7–3–16(B). [3] To obtain a permit, the applicant files a detailed plan for the proposed special use and pays a fee of between $370 and $480. *Id.* at ¶ 10. Evanston's Zoning Board then publishes notices concerning the proposed use and holds a hearing "within a reasonable time," approving

or denying the use. *Id.* at ¶¶ 12, 13; *see also* Ordinance § 6–12–4(B). A decision is usually rendered in four to six months. *Id.* at ¶ 14. Ordinance § 6–11–13 provides for misdemeanor fines of $25 to $500 a day for each violation of the ordinance.

Plaintiffs claim that because of their limited finances they must include a contingency clause in any lease they negotiate. The clause would have the effect of voiding the lease should Evanston deny plaintiffs the special use permit. Gill states that none of the landlords he has negotiated with would agree to a contingency clause because they would have had to take their property off the market for four to six months with no certainty of leasing. *Id.,* Affidavit of Gill at ¶¶ 11, 12; *see also* Supplemental Affidavit at ¶ 1.

Love Church v. City of Evanston, 671 F.Supp. 508, at 509–510 (N.D. Ill. 1987) ("March Memorandum"). In the March Memorandum, we narrowed plaintiff's challenge of the ordinance to one of equal protection. We noted that churches are not permitted as a matter of right anywhere in Evanston but must obtain a special use permit in order to lease, own, and operate property as a church. *Id.* at 514 ***517** Meeting halls, theatres, schools, funeral parlors, community centers, and not-for-profit recreational buildings, however, are permitted as of right in some of Evanston's districts. *Id.* From the face of the ordinance, we concluded that Evanston gave secular assembly users preference over substantially similar religious assembly users in possible violation of the Equal Protection Clause. *Id.* at 514–515. We asked the parties to brief the issue, paying particular attention to the basis of the ordinance's classification and the appropriate level of scrutiny. *Id.*

DISCUSSION

The Equal Protection Clause of the Fourteenth Amendment mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws" and is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985) (quoting *Plyler v. Doe,* 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982)). Unequal treatment among similarly situated individuals, no matter how subtle, is anathema under the Equal Protection Clause. *Cf. Hamm v. Virginia Board of Elections,* 230 F.Supp. 156, *aff'd* 379 U.S. 19, 85 S.Ct. 157, 13 L.Ed.2d 91 (1964) (law requiring separate lists of blacks and whites in voting, property, and tax records invalid). The standards for determining the validity of state legislation, such as a zoning ordinance, under the Equal Protection Clause are well established:

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classifications challenged be rationally related to a legitimate state interest.

New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516, 49 L.Ed.2d 511 (1976). But where the legislative classification disadvantages a constitutionally suspect class, then "courts may uphold the classification only if it is 'precisely tailored to serve a compelling governmental interest.' " *Sklar v. Byrne,* 727 F.2d 633, 636 (7th Cir.1984) (quoting *Plyler v. Doe,* 457 U.S. 216–17 & n. 14, 102 S.Ct. at 2395 & n. 14).

Therefore, in order to apply the proper standard of review, we must determine the basis of the ordinance's classification. Evanston contends that "[t]he City is clearly not basing its classification on the basis of religion [but] purely on land use aspects." Defendant Memorandum in Opposition at 1 ("Def. Mem."). The uses which find themselves in the same category as churches, that is, excluded from all districts except upon obtaining a special use permit, are "nursing homes, child care institutions, retirement homes, shelter care homes, hospitals, airports, amusement establishments, cemeteries, food cooperatives in churches, not-for-profit recreational buildings, community centers, private clubs and lodges, golf courses, truck gardening, nurseries and greenhouses, shelters for the temporary homeless, group care homes, institutions for the aged, retirement hotels, and [fast food] restaurants." *Id.* at 2. Thus, Evanston concludes, the classification is not —on the basis of religion but on the basis of the "special effect" these uses have upon their neighborhoods. *Id.* In other words, Evanston argues that because some secular land uses as well as religious land uses are classified in the same way, the classification is not based on religion but on legitimate municipal interest. To paraphrase Justice Marshall, when legislation burdens members of a class entitled to protection under the Fourteenth Amendment, the fact that the legislation

also burdens members of unprotected classes is irrelevant. *Palmer v. Thompson,* 403 U.S. 217, 272, 91 S.Ct. 1940, 1968, 29 L.Ed.2d 438 (1971) (Marshall, J., dissenting). So when Evanston excludes churches from all its municipal zoning districts in the absence of special use permits, the fact that other land users must also obtain special use permits does not resolve the question of the basis of the ordinance's classification.

Rather than focus on what other land uses Evanston has chosen to conditionally ***518** exclude, we must look to how Evanston treats land uses "similarly situated" to churches. *See Cleburne,* 473 U.S. at 448, 105 S.Ct. at 3259 (in denying a special use permit, city violated Equal Protection Clause by disparately treating similar land uses). If all land uses similarly situated to churches must obtain special use permits, then Evanston's argument that the classification is not based on religion may have some merit.

The ordinance does not define the term "churches" but Webster's Ninth New Collegiate Dictionary gives the following definition: "a building for public and especially Christian worship." Interestingly, Evanston states that "[c]hurches now serve as community centers, schools, occasionally shelters for the homeless, food distribution centers and other social functions in addition to the traditional function of religious services and instruction." Def. Mem. at 12. We note that contrary to Evanston's reading of its ordinance, community centers (and not-for-profit recreation buildings) are permitted in residential zones 6 and 7. Schools are also permitted in those zones. It appears, then, that Evanston, by its own admission, treats churches differently than these uses because of "occasional other social functions" churches perform in addition to their traditional ones. As for traditional church use, clearly a land use similar to that is a meeting hall. At meeting halls, people assemble on a regular basis to attend speeches, lectures, or other ceremonies. At meeting halls, people socialize. Meeting halls are permitted uses in all business and commercial districts. Theatres, for zoning purposes, are not unlike churches, in that large groups of people of all ages assemble to participate in a common experience. Theatres are permitted uses in all commercial and most business zones. Funeral parlors are permitted uses in some business and commercial zones. Schools, as mentioned before, are permitted in two residential zones and certain types of schools are allowed in business and commercial zones.

More striking are the differences between churches and the other uses which must obtain special use permits. Airports, cemeteries, golf courses, green houses, nurseries, truck gardening, and hospitals are all land-intensive and sometimes noise-intensive uses which do not compare to a church use. Likewise, fast food restaurants and amusement establishments often keep round-the-clock hours and cater to needs altogether different from a church. Nursing homes, retirement homes, shelter care homes, group care homes, institutions for the aged, and retirement hotels are also residential uses generally incomparable to a church. Private clubs and lodges do appear to be uses similar to a church. However, this fact is not enough to establish that Evanston has not classified on the basis of religion. Other assembly uses are not subjected to the same treatment as churches. If meeting halls as well as theatres had to get special use permits, then Evanston could assert that it zoned on the basis of something other than religion. [4]

Evanston's claim that it has zoned purely on land use aspects and not on the basis of religion is not supported by the facts. Evanston argues further that because we previously ruled that the ordinance neither established religion nor impinged on its free exercise, the ordinance could not be based on a religious classification. Def. Mem. at 3–4. Defendant's conclusion is hasty. Suppose, for example, a group of people wished to assemble on a regular basis in Evanston to discuss and hear lectures on classical literature. This group might also wish to have seminars for young people after school or on weekends to expose them to "great books." These people could rent a building in any business or commercial zone and have their meetings. But if that same group of people wished to assemble for the purpose of religious worship and to hold classes for its young people to educate them about religion, they would have to get special permission from Evanston. The only distinguishable feature of the groups in our hypothetical is the purpose and content of ***519** the assembly. Because Evanston's ordinance distinguishes between religious assembly uses and non-religious assembly uses, it classifies on the basis of religion.

Having concluded that the ordinance classifies on the basis of religion, we will uphold it only if it is narrowly tailored to serve a compelling governmental interest. Evanston suggests "there are many bases for classifying churches separate and apart from hotels, meeting halls, theatres, auction rooms and funeral parlors." Def. Mem. at 11. We glean from Evanston's brief four reasons. One distinction Evanston suggests is that churches are noncommercial entities while business uses

are obviously commercial. Since a church is a "community use," Evanston argues that it "could well conclude that it would be totally inappropriate to permit ... a church to be located in a business and commercial district without the necessary examination and conditional approval that a special use permit allows." *Id.* at 13. That a church needs the city's permission to operate because it is not a commercial enterprise, while a funeral parlor, because it charges for its services, does not, is unprincipled. The absence of commercial exchange in the case of a church does not threaten any compelling interest of Evanston. Evanston might intend to argue that segregating noncommercial uses from commercial uses is a fundamental zoning interest, since it cites *People v. Morton Grove,* 16 Ill.2d 183, 157 N.E.2d 33 (1959). *Morton Grove* was a challenge to a municipality's authority to prohibit residential uses from intruding into commercial and industrial zones. It was a fundamental attack on the concept of Euclidian zoning. Plaintiffs here do not suggest that Evanston may not exclude residential uses from commercial or industrial zones. Rather, they complain that their assembly use is treated differently than other assembly uses. In this context, we find the noncommercial/commercial distinction irrelevant. Evanston has not offered any reason why a church's noncommercial nature requires it to obtain special approval.

Evanston argues next that the "traffic generated by a church both with respect to volume and time may be substantially different than that generated by a hotel, meeting hall, funeral parlor or an auction room." Def. Mem. at 13. While traffic concerns are legitimate, we could hardly call them compelling. In any event, Evanston does not indicate how a church poses a greater traffic problem than, say, a funeral parlor. As plaintiffs point out, funeral parlor and church traffic depend on the vagaries of who died and who is preaching. Plaintiff Reply at 8. A sufficiently narrow way of protecting the city's interest is through parking and seating capacity regulations. Evanston requires all commercial and business uses to comply with these regulations in order to control traffic congestion caused by the uses. Evanston proffers no reason why churches could not be similarly regulated.

A closely related concern of Evanston's is the "introduction of large numbers of people travelling on foot." Def. Mem. at 12. While pedestrian safety is certainly a legitimate, even compelling interest, all business, commercial, and residential uses attract pedestrians. Many people walk to a theatre or meeting hall. If pedestrians do not threaten the city's interest while walking to attend a show or a meeting, why should it be different when they are walking to attend a religious service? The answer is it should not. The ordinance is not narrowly drawn to serve the interest of pedestrian safety.

Lastly, Evanston argues that the presence of young children "may be totally out of character in certain commercial as well as residential areas." *Id.* at 12. We find the phrase "totally out of character" to be laden with ambiguity. If by "totally out of character," Evanston relates to the health and safety of children, then Evanston's concern may be valid. However, to require churches to obtain special use permits because children may be present is overbroad. Evanston has permitted schools, not-for-profit recreation buildings, and community centers—uses which attract large numbers of children—to operate without special use permits. Furthermore, children attend theatres, go shopping and play in ***520** parks, uses that are found in virtually every district in Evanston. Evanston has not required these uses to get special permission. Again, Evanston has offered no reason why the presence of children associated with church use presents any greater threat than the presence of children associated with any other permitted use.

Evanston argues that it may exclude any land use from the entire municipality, provided the exclusion bears a substantial relationship to the preservation of public health, safety, morals or general welfare. Def. Mem. at 10. For this position, Evanston relies on two Illinois cases, *High Meadows Park, Inc. v. City of Aurora,* 112 Ill.App.2d 220, 250 N.E.2d 517 (2d Dist.1969) and *Village of Bourbonnais v. Herbert,* 86 Ill.App.2d 367, 229 N.E.2d 574 (3d Dist.1967). These cases are distinguishable on their facts and are even contrary to defendant's position.[5] *High Meadows Park* concerned an ordinance which banned trailers; *Village of Bourbonnais* involved an ordinance which conditionally excluded fire stations. Neither of those ordinances concerned the exclusion of a use protected under the constitution. In *Village of Bourbonnais,* the court did note that "municipalities ... are not required to set aside portions of territory within their boundaries to accommodate every land use, if some uses are wholly inconsistent with the existing and developing character of the municipality." 229 N.E.2d at 577. As a general statement, we do not disagree. But Evanston does not argue, nor could it, that churches are wholly incompatible with *every* district in Evanston. Furthermore, the court went on to say it disapproved of conditional exclusion when land uses could be accommodated within ordinary zoning classifications. *Id.* While arguing that churches are too mercurial to be accommodated by ordinary zoning techniques, Evanston has been able to accommodate similarly

situated assembly uses without much ado. Evanston cites *High Meadows Park* for the proposition that "there would appear to be no constitutional limitation on a municipality's power to exclude uses from a particular district...." 250 N.E.2d at 522. As quoted, not only is this proposition incomplete, it is wrong. *See City of Cleburne,* 473 U.S. at 447–50, 105 S.Ct. at 3258–60 (under the Equal Protection Clause, a district which accommodates multiple dwellings cannot exclude a group home for the mentally retarded). The court in *Bourbonnais* continued that "it would seem equally apparent [that zoning] must be exercised in a nondiscriminatory manner and based upon the reasonable exercise of police power...." *Id.* This is the pith of plaintiff's case—that Evanston's ordinance is discriminatory, that it treats similarly situated uses unequally and unreasonably.

Evanston maintains we must apply to its ordinance the more deferential test of rational relationship. After considering Evanston's argument, we are convinced that the ordinance cannot pass even that test. In light of *Cleburne,* unless Evanston can articulate a reason why a church use would threaten legitimate interests of the city in a way that other similarly situated permitted uses would not, then the ordinance is invalid. 473 U.S. at 448, 105 S.Ct. at 3259. Again, the interests Evanston says are rationally related to the ordinance are traffic congestion, pedestrian safety, and child safety. Evanston has provided no evidence that churches pose any greater threats to those interests than do the similarly situated permitted uses of meeting halls, theatres, and schools.

***521** In sum, although Evanston has articulated some interests that we can characterize as legitimate, sometimes compelling, in every instance we find the legislative response to be overinclusive. Not only do we find the ordinance much broader than necessary to serve any compelling interest, it is not even rationally related to a legitimate interest. Evanston has failed to demonstrate the existence of any genuine issue of material fact. We therefore grant plaintiff's motion for summary judgment and hold that the special use permit requirement of Evanston's zoning ordinance, as it relates to churches, is invalid in that it violates the Equal Protection Clause. [6]

Neither party has briefed the issue of relief. Love Church in its complaint has prayed for declaratory, injunctive and monetary relief, including attorney's fees and costs under 42 U.S.C. § 1988. Since the basis of our holding is that the ordinance unreasonably discriminates between similarly situated uses, we think the proper remedy may be to require Evanston to permit churches wherever similarly situated uses are permitted, that is, in all business and commercial districts. [7] However, we want the benefit of the parties' views and would prefer that they structure the specifics of relief. Accordingly, we set this case for a status conference on September 24, 1987, at 10:30 a.m. The parties should come prepared to discuss the appropriate injunctive and monetary relief.

CONCLUSION

We grant plaintiff's motion for summary judgment and declare the special use permit requirement of Evanston's zoning ordinance §§ 6–7–2–2, 6–7–3–2, as it applies to churches, to be violative of the Equal Protection Clause in that it discriminates on the basis of religion. The case is set for a status conference on September 24, 1987, at 10:30 a.m.

All Citations

671 F.Supp. 515

Footnotes

1 Gill states the congregation now consists of 11 members because the church lacks proper facilities; at one time 250 people attended Love Church's services. Supplemental Affidavit of Gill at ¶¶ 2, 3.

2 Plaintiffs now convene at a Holiday Inn in Skokie, Illinois. Supplemental Affidavit of Gill at ¶ 7.

3 Churches are not singled out for this procedure; nursing homes, retirement homes, shelter care homes, shelters for the homeless, group care homes, institutions for the aged, retirement hotels, child care institutions, airports, private clubs, golf courses, truck gardening, nurseries and greenhouses and fast-food

restaurants are not permitted uses anywhere in Evanston and must also obtain a special use permit in order to operate. *See* Ordinance §§ 6–5–1—6–8–5.

4 While such an ordinance would not be violative of the Equal Protection Clause, it might run afoul at the Free Speech Clause. *See infra* note 5.

5 There are cases which have held a municipality may not exclude churches from every district within its boundary. *Mooney v. Village of Orchard Lake,* 333 Mich. 389, 53 N.W.2d 308 (1952); *North Shore Unitarian Soc. v. Village of Plandome,* 200 Misc. 524, 109 N.Y.S.2d 803 (1951). Both of these cases held that such an exclusion was an unreasonable exercise of police power. Additionally, the Supreme Court has suggested that a municipality may not totally exclude a land use that the First Amendment protects. *See City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (total ban on adult theatres may not be constitutional); *Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) (municipality may not ban "live entertainment" from its boundaries); *Young v. American Mini Theatres,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (total ban on adult theatres may not be constitutional).

6 Evanston claims that the ordinance cannot be struck down under the Fourteenth Amendment unless plaintiff proves Evanston had discriminatory intent. Def. Mem. at 4. Evanston is wrong. When a statute on its face discriminates on the basis of race, national origin, religion or fundamental rights, discriminatory intent need not be shown. *Strauder v. West Virginia,* 100 U.S. (10 Otto) 303, 25 L.Ed. 664 (1880). Only when a law is facially neutral must any discrimination be proven purposeful. *Arlington Heights v. Metropolitan Housing Corporation,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). Evanston's ordinance on its face discriminates on the basis of religion and therefore there is no need to prove discriminatory intent.

7 We do not decide, nor should anything in this opinion by construed to suggest, that churches which house the temporarily homeless or have food cooperatives may not be subject to the special use technique. This issue is not before us.

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EXHIBIT “N”

896 F.2d 1082
United States Court of Appeals,
Seventh Circuit.

LOVE CHURCH, an Illinois not-for-profit corporation, Plaintiff–Appellee, Cross–Appellant,
v.
CITY OF EVANSTON, an Illinois municipal corporation, Defendant–Appellant, Cross–Appellee.

Nos. 88–2960, 88–3065.
|
Argued Sept. 6, 1989.
|
Decided March 1, 1990.
|
Rehearing and Rehearing En Banc Denied June 13, 1990.

Synopsis

Church brought action against city to challenge constitutionality of ordinance requiring special use permit. The United States District Court for the Northern District of Illinois, John F. Grady, Chief Judge, entered judgment in favor of church. City appealed. The Court of Appeals, Bauer, Chief Judge, held that church lacked Article III standing to challenge validity of ordinance.

Vacated and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (1)

[1] **Municipal Corporations** Proceedings concerning construction and validity of ordinances

Church's difficulty acquiring rental property for its ministry and congregation was not fairly traceable to unenforced ordinance requiring special use permit and was not likely to be redressed by favorable decision, and, thus, church lacked Article III standing to challenge validity of ordinance; church had repeatedly violated ordinance without any municipal retaliation; pastor merely claimed that price of lease was increased due to need to obtain contingency clause providing for termination of lease if special use permit was not issued; and ordinance applied to art galleries, libraries, and museums. 42 U.S.C.A. § 1983; U.S.C.A. Const. Art. 3, § 1 et seq.; Amends. 1, 5, 14.

40 Cases that cite this headnote

Attorneys and Law Firms

***1082** John W. Mauck, Richard Baker, Thomas Cameron, Mauck & Baker, Chicago, Ill., for plaintiff-appellee, cross-appellant.

Jack A. Siegel, Siegel & Warnock, Chicago, Ill., for defendant-appellant, cross-appellee.

Before BAUER, Chief Judge, and CUDAHY and KANNE, Circuit Judges.

Opinion

BAUER, Chief Judge.

The City of Evanston appeals a judgment providing injunctive relief and monetary damages to the Love Church under 42 U.S.C. § 1983 for violations of the right to equal protection under the fourteenth amendment. Appellants argue that Love Church lacked standing to bring this claim and, in the alternative, that summary judgment for plaintiffs was inappropriate. Appellees have filed a cross-claim declaring that the injunctive relief granted was too narrow to address properly the alleged injury suffered by Love Church. Because we find that plaintiff lacked standing to bring this action, we vacate the judgment below and remand with directions to dismiss this claim.

I.

Marzell Gill founded Love Church, a fundamentalist, Pentacostal Church, in Evanston, Illinois, in June of 1985. [1] Pastor Gill and his family began holding services at the Fleetwood–Jourdaine Community Center, a city-owned facility, in the summer of 1985. Approximately eleven people, including Pastor Gill's family, attended these meetings. Later services were moved to an auditorium in the Washington School in southwest Evanston. Six people attended these services. When school began in September of 1985, the Gills moved their church to a meeting room in the Evanston ***1083**

Holiday Inn. The Love Church continued to meet in the Holiday Inn until March of 1986. The final service held there, Easter Sunday of 1986, attracted 250 people, the highest attendance the church was ever to achieve.

From March through October of 1986, Pastor Gill held services at the Ridgeville Park District in south Evanston. Attendance at this site averaged 35 to 40 people each Sunday. During that time, Gill began to look unsuccessfully for permanent facilities for his congregation. In the fall of 1986, the Ridgeville Park District informed Gill that the rent would be increased. Gill also testified that Ridgeville authorities informed him that they would require a city permit for future church use of the facilities even if this use was only temporary. Gill, however, never applied for the permit. In November and December of 1986, the Love Church held its services in the Gills' two-bedroom apartment in Evanston. Finally, in January of 1986, the Love Church began meeting in the Skokie Holiday Inn.

On December 17, 1986, Pastor Gill and the Love Church filed the complaint from which this appeal stems. The complaint alleged that the Evanston Zoning Ordinance requiring churches to apply for special use permits had made it impossible for the Love Church to secure permanent meeting facilities.

The Evanston Zoning Ordinance (the "Ordinance") does not limit the location of church facilities to specifically designated areas. Ordinance §§ 6–5–2(b); 6–7–2–2; 6–7–3–16(B).[2] Rather, a church, synagogue, or other religious institution may be located anywhere in the city, regardless of the underlying zoning purpose, provided the interested parties apply for and receive a special use permit. *Id.*[3] To secure a permit, an applicant must file a detailed plan for the use of the facilities and pay a fee of between $370 and $480. *Id.* The Evanston Zoning Board then holds a hearing and issues a decision. § 6–12–4(B). The entire process takes between four and six months. The Ordinance provides for misdemeanor fines of $25 to $500 a day for each violation. § 6–11–13.

Love Church and Pastor Gill claimed that, due to the requirements of the Ordinance, they were unable to obtain a lease for their church. Thus, they filed suit under 42 U.S.C. § 1983 for injunctive relief, declaratory judgment and compensatory damages. Plaintiffs alleged, *inter alia,* that Evanston had violated their first amendment right to the free exercise of their religious beliefs as well as their rights to equal protection and due process under the fourteenth amendment. Evanston subsequently filed a motion to dismiss these claims.

On March 3, 1987, Judge Grady issued a memorandum opinion partially granting Evanston's motion to dismiss. Initially addressing the question of standing, Judge Grady held that the Love Church had alleged sufficient economic hardship under the Ordinance to establish standing. However, Pastor Gill was dismissed as a plaintiff for lack of standing since his claims simply derived from the independent claims of his church. Explaining its reasoning, the district court stated:

> Evanston's ordinance is presumptively valid. *Cosmopolitan National Bank v. County of Cook,* 116 Ill.App.3d 1089, 1094 [72 Ill.Dec. 564–569], 452 N.E.2d 817, 822 (1st Dist.1983). Plaintiffs have neither leased property nor applied for a special use permit. We presume Evanston will fairly apply the ordinance; if plaintiffs apply for a permit at an appropriate site, a permit presumably will issue.

***1084** 671 F.Supp. at 511. Turning to the remaining substantive claims, the district court dismissed plaintiff Love Church's first amendment and due process challenges. The equal protection claims, however, were allowed to stand. Judge Grady then directed Evanston to provide a justification for the disparate treatment of religious organizations under its Ordinance.

Following additional briefing by the parties, the court entered summary judgment for plaintiffs on the equal protection claims on September 3, 1987. *Love Church v. Evanston,* 671 F.Supp. 515 (N.D.Ill.1987). The court held that Evanston improperly applied a different set of zoning requirements to churches and religious facilities than similarly situated facilities such as movie theatres, funeral homes, hotels, and community centers. These buildings, the court stated, were capable of creating the same traffic, parking, and safety concerns as churches, yet they were not required to obtain special use permits. Evanston had not provided a compelling justification for this distinction. Thus, Love Church's right to equal protection was violated. The court then requested

additional briefing prior to determining damages or any injunctive relief.

Complicating the court's assessment of the appropriate relief was Love Church's continued inability to secure permanent facilities. The court noted with some frustration at a hearing on September 22, 1987:

> We do not want ... this case for their own entertainment. This is a real life lawsuit. I have treated it as one from the beginning and I still regard it as such. So let's get down to brass tacks and see what it is you people (Love Church) want to do.

On March 15, 1988, nearly 15 months after the onset of this litigation, Love Church finally entered into a lease for space at 823 Davis Street in Evanston. The district court entered an injunction on that date barring Evanston from requiring a special use permit at that site.

Finally, on August 22, 1988, following several days of hearings and additional briefing by the parties, the court assessed damages against Evanston in the amount of $17,782.89. In his memorandum opinion, Chief Judge Grady noted that, in determining the level of damages in this case, "(m)ore than the usual degree of speculation is involved." Nonetheless, the district court held that a reasonable estimate was possible and found that Love Church was entitled to these damages as compensation for lost contributions, musical services and the costs of general disruption and inconvenience. Evanston subsequently appealed this judgment. For the following reasons we now vacate that judgment.

II.

Our threshold determination on this appeal is whether plaintiff Love Church has proper standing to bring this suit. As the Supreme Court has firmly stated, "of one thing we may be sure: Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States." *Valley Forge College v. Americans United for the Separation of Church and State,* 454 U.S. 464, 475–76, 102 S.Ct. 752, 760–61, 70 L.Ed.2d 700 (1982). Constitutional standing is limited to actual "cases" or "controversies." For, as has often been recognized, "Federal courts are not courts of general jurisdiction; they have only the power that is authorized by article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 541, 106 S.Ct. 1326, 1331, 89 L.Ed.2d 501 (1986). If such a case or controversy is lacking, the district court cannot properly exercise jurisdiction, and our role on appeal is merely to correct this error—we may not reach the merits. *Bender,* 475 U.S. at 541, 106 S.Ct. at 1331; *Foster v. Center Township of LaPorte County,* 798 F.2d 237, 241 (7th Cir.1986). In its initial memorandum opinion in this matter, the district court held that Love Church had standing to litigate its claim. For the reasons explained below, we disagree.

The concept of standing does not lend itself easily to strict rules and facile application. Yet, the Supreme Court has recognized ***1085** certain constitutional and prudential limitations on its exercise. *See Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 343 (1975). As the Court stated in *Valley Forge*

> at an irreducible minimum, article III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 99 [99 S.Ct. 1601, 1608, 60 L.Ed.2d 66] (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' *Simon v. Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 38, 41 [96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450] (1976).

454 U.S. at 472, 102 S.Ct. at 758. *See also Franchise Tax Board of California v. Alcan Aluminium Limited,* 493 U.S. 331, ——, 110 S.Ct. 661, 663, 107 L.Ed.2d 696 (1990); *Meese v. Keene,* 481 U.S. 465, 476, 107 S.Ct. 1862, 1868, 95 L.Ed.2d 415 (1987); *Bender,* 475 U.S. at 542, 106 S.Ct. at 1331; *Frank Rosenberg, Inc. v. Tazewell County,* 882 F.2d 1165, 1168 (7th Cir.1989). In order to make our determination on the issue of standing, therefore, we must focus on the qualifications of the party bringing the suit rather than the underlying merits of the case. Our review of the district court's determination of standing is *de novo. See Frank Rosenberg, Inc.,* 882 F.2d at 1167; *Waste Management, Inc. v. Weinberger,* 862 F.2d 1393, 1396 (9th Cir.1988). Further, we are required, as was the district court in reviewing a motion to dismiss for want of standing, to "accept as true all material allegations in the complaint, and construe the complaint in favor of the

complaining party." *Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975); *Frank Rosenberg, Inc.,* 882 F.2d at 1167–68.

Reviewing the facts before us with these principles in mind, we must determine whether Love Church has (1) suffered personal injury; (2) fairly traceable to the defendant's allegedly unlawful conduct; and (3) likely to be redressed by the requested relief. *Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984); *Frank Rosenberg,* 882 F.2d at 1168; *FMC Corporation v. Boesky,* 852 F.2d 981 at 987 (7th Cir.1988); *Shakman v. Dunne,* 829 F.2d 1387, 1394 (7th Cir.1987). The Supreme Court has also noted that plaintiff's alleged injury must be more than a generalized grievance. *See Valley Forge,* 454 U.S. at 475, 102 S.Ct. at 760. The complaint must describe a "distinct and palpable" injury. *See Meese v. Keene,* 481 U.S. 465, 472, 107 S.Ct. 1862, 1867, 95 L.Ed.2d 415 (1987); *Warth,* 422 U.S. at 490, 95 S.Ct. at 2197; *Frank Rosenberg, Inc.,* 882 F.2d at 1168–69; *see also Freedom from Religion Foundation, Inc. v. Zielke,* 845 F.2d 1463, 1467 (7th Cir.1988). Plaintiff cannot allege harm which is merely "abstract" or "conjectural" or "hypothetical." *See Los Angeles v. Lyons,* 461 U.S. 95, 101–02, 103 S.Ct. 1660, 1664–65, 75 L.Ed.2d 675 (1983); *O'Shea v. Littleton,* 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974).

Love Church claims that due to the Evanston Zoning Ordinance, they have been unable to locate permanent facilities for their congregation. In support of this allegation, Love Church offers the affidavit of Pastor Gill stating that on four occasions suitable rental properties were unavailable solely due to the technical requirements of the special use permit. Gill's affidavit does not set forth where these properties were located. Nor does he explain what constitutes "affordable" rent. Significantly, the record does not contain any affidavits from landlords refusing to rent to Love Church. Even accepting Pastor Gill's allegations as true, as we must, they simply do not demonstrate a "distinct and palpable injury" for purposes of establishing standing.

The Supreme Court discussed the economic ramifications of zoning decisions in *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). In *Warth,* petitioners claimed that due to the exclusionary policies of Penfield, New York, they were unable to obtain low- and moderate-income housing in that municipality. Accepting as true petitioners allegations of ***1086** exclusionary acts by local officials, the Court denied standing, stating:

> Petitioners here ... rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief.

422 U.S. at 507, 95 S.Ct. at 2210. Similarly, Love Church relies on the mere possibility that, absent the Ordinance, it could have more easily acquired rental property in Evanston. Such speculative claims cannot constitute distinct and palpable injury for purposes of standing. Claims of such vague economic harm are precisely the type of "abstract" or "conjectural" allegations spurned by the Supreme Court in *Warth.* Love Church never applied for a special use permit, nor was threatened with punishment for operating a church facility in violation of the Ordinance. Thus, any alleged fear of enforcement or increased difficulty in securing housing does not present any real controversy before the court.

Love Church has undoubtedly had difficulty acquiring rental property for its ministry and congregation. This difficulty has caused much hardship and inconvenience for all concerned. Yet, even accepting this as "injury" for purposes of standing, Love Church has failed to show how its claim satisfies the second prong of the standing inquiry, i.e. that this injury "fairly can be traced to the challenged action." *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976); *see also Valley Forge,* 454 U.S. at 472, 102 S.Ct. at 758. Evanston has never enforced this ordinance against any religious organization. There are over 70 churches currently holding services within the city limits. Love Church met at five locations within Evanston prior to this litigation without any objection from the city. One location, the Fleetwood–Jourdaine Community Center, was, in fact, a city-owned facility. Moreover, Love Church never even applied for a special use permit. Plaintiffs correctly assert that such application may not be necessary to establish standing. *Entertainment Concepts, Inc., III v. Maciejewski,* 631 F.2d 497 (7th Cir.1980). In *Maciejewski,* however, we held that a party must "reasonably assert that it fears enforcement" in order to establish constitutional standing. *Id.* at 500. Here, given Evanston's historic policy of non-enforcement and Love Church's repeated violation of the Ordinance without

any municipal retaliation, plaintiffs cannot reasonably assert that they fear enforcement.

Finally, Love Church has failed to demonstrate that the alleged injury "is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. at 38, 96 S.Ct. at 1924. The possibility that Love Church would be better able to locate rental property absent the special use requirements of the Ordinance is wholly conjectural. Pastor Gill, by his own admission, spent over 14 months trying to rent property. Despite repeated attempts, he was unable to obtain a lease. According to his affidavit, on four occasions an "affordable" lease was available but for the provisions of the Ordinance. At other times, Gill complained that potential landlords would not include a contingency clause providing for the termination of the lease if a special use permit was not issued by the city. Significantly, Gill does not contend that no contingency clause was available, but merely that the requirement of one increased the price of a lease. Presumably, Gill could have obtained such a clause if he was willing to pay the cost of one.

Yet whatever specific difficulties Gill claims to have encountered, they are the same ones that face all rentors, not merely churches. The harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them. Evanston's special permit requirements apply not only to religious facilities but to art galleries, libraries, and museums as well. If Evanston were enjoined from enforcing its Ordinance, an Ordinance they have never enforced to begin with, there is simply no indication that Love Church could have obtained rental property more easily. Indeed, when Pastor Gill finally ***1087** secured a location for Love Church at 823 Davis, the injunction had not taken effect. Beyond this, services were held at five locations in Evanston without any compliance with the Ordinance. When Love Church vacated these sites it was for reasons unrelated to the Ordinance. Clearly, Gill was able to locate property for his ministry in the face of this Ordinance, and any attendant difficulties were those suffered by any under-financed rentor.

As Love Church states quite eloquently in its brief:

> New churches do not spring "full blown" into existence as enormous congregations with huge choirs and imposing tabernacles. Many churches start as groups meeting in homes or local schools. Then they become large or stable enough to lease or purchase a small permanent facility. In time the congregation may establish a building fund to erect a facility. Some congregations never progress beyond certain levels while others shrink and consolidate.

Love Church, unfortunately, stumbled on the path to an "enormous congregation." With over 70 churches, Evanston is a difficult religious market in which to negotiate such a path. But any allegation that Love Church foundered due to the long shadow of a dormant Evanston Zoning Ordinance is far too speculative to find a hearing in the federal courts. As the Supreme Court stated in *Warth:*

> (P)etitioners' descriptions of their individual financial situations and housing needs suggest ... that their inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts.

422 U.S. at 506, 95 S.Ct. at 2209. Similarly, Love Church suffered an alleged crisis within its congregation, not because of Evanston's purportedly harsh requirements for religious institutions, but rather because they lacked the wherewithal to locate rental property. No injunction could undo this hardship. No federal court can address this situation. [4]

III.

Love Church has failed to allege a "distinct and palpable" injury fairly traceable to Evanston's actions or properly redressable by a favorable ruling. We, therefore, hold that it lacks constitutional standing to sue. As there is no "case" or "controversy" at issue for resolution by the federal courts, the district court had no jurisdiction to hear this complaint. The judgment below is VACATED, and we now REMAND with directions to DISMISS the claim.

All Citations

896 F.2d 1082

Footnotes

1 The district court described Love Church as a “congregation comprised of approximately 30 young ‘working class' black men and women residing in and around Evanston.” *Love Church v. Evanston,* 671 F.Supp. 508, 509 (N.D.Ill.1987) (footnote omitted). The court further noted that Love Church “is not affiliated with any denomination, although it believes in traditional Christian teachings.” *Id.* Appellees brief, however, describes Love Church as Pentacostal in nature. The discrepancy is immaterial for purposes of this appeal.

2 By contrast, some public facilities in Evanston are confined to designated “commercial” or “manufacturing” sections of the city under the Evanston Zoning Ordinance. These include hotels, meeting halls, music schools, funeral homes, and movie theatres. While these facilities do not require special use permits to operate, they may operate in only limited designated areas. *See Love Church,* 671 F.Supp. at 514.

3 Churches are not singled out for this treatment. Evanston also requires special use permits for libraries, museums, and art galleries. Ordinance §§ 6–5–2(b); 6–7–2–2; 6–7–3–16(B); *See also Love Church,* 671 F.Supp. at 510 & n. 3.

4 Because we hold that Love Church has not presented a “case” or “controversy” sufficient to establish constitutional standing under Article III, we do not reach the prudential limitations on standing recognized by the Supreme Court. *See Freedom from Religion Foundation, Inc. v. Zielke,* 845 F.2d 1463 (7th Cir.1988) (where constitutional standing is not established prudential limitations need not be explored).

EXHIBIT “O”

JEFFREY N. KATIMS, AICP, CNU-A

PROFESSIONAL QUALIFICATIONS

EDUCATION

Master's Degree: Urban and Regional Planning
Florida State University, Tallahassee, FL

Bachelor of Arts Degree: Psychology
State University of New York, College at Oneonta, Oneonta, NY

Virginia Polytechnic Institute
Academy for the New Urbanism, Form-Based Codes Institute

University of Miami, School of Architecture
Principles and Practices of New Urbanism, CNU Accreditation

Office of the Attorney General
Florida Crime Prevention Training Institute

PROFESSIONAL MEMBERSHIPS OR DESIGNATIONS

American Institute of Certified Planners (AICP)
Membership Number 012252 – Effective 1996
This is the highest level of earned professional planning certification

American Planning Association (APA) – National Chapter
Membership Number 076051 - Effective 1990

Florida American Planning Association (FAPA)
Membership effective 1990

Broward County Section of American Planning Association (BAPA)
Membership effective 1993

Congress for the New Urbanism-Accredited
Membership effective 2009

Florida Planning and Zoning Association
Membership effective 2014

PROFESSIONAL AFFILIATIONS

Urban Land Institute (1999-2001)
Florida League of Cities, Broward County Technical Advisory Committee Secretary (1997-1998)

AWARDS OR RECOGNITIONS

City of Hallandale, FL – Employee of the Year Award, 1995

TEACHING OR LECTURING

Guest Panelist – Florida Chapter of the American Planning Association Annual Conference, West Palm Beach, FL (2018), *Context Sensitive Sign Regulations*

Guest Panelist—Florida Planning & Zoning Association Annual Conference, Naples, FL
Effective and Defensible Sign Regulations

Guest Panelist –Miami-Dade County League of Cities Conference (2015)
Sign Regulation after Reed v. Town of Gilbert

Guest Panelist—Florida Planning & Zoning Association Annual Conference, Orlando, FL
One Size Fits All: Incentive Zoning Districts for Strip Commercial Areas

AUTHORED ZONING CODES AND LAND DEVELOPMENT REGULATIONS

City of Marco Island, FL
Audited Code of Ordinances (2023)

City of West Palm Beach, FL
Prepared sign code (expected adoption summer 2023)

City of Pinellas Park, FL
Updated sign regulations (expected adoption summer 2023)

Town of Southwest Ranches, FL
Prepared planned business district regulations (2020)

City of Boynton Beach, Palm Beach County, FL
Prepared Community Standards Ordinance (2019)

City of New Port Richey, Pasco County, FL
Prepared new sign provisions (2017)

City of Boca Raton, Palm Beach County, FL
Prepared sign code (2017)

Town of Lauderdale-By-The-Sea
Updated zoning regulations (2017)

City of Delray Beach, Palm Beach County, FL
Prepared amendments to land development regulations (2016)

City of Parkland, Broward County, FL
Rewrote entire land development code (2015)

City of Wilton Manors, Broward County, FL
Prepared form based code for Transit Oriented Corridor (2012)

City of Coconut Creek, Broward County, FL
Prepared sign code (2011)

City of Dania Beach, Broward County, FL
Rewrote entire land development code (2010)

City of Miami Gardens, Miami Dade County, FL
Updated land development regulations (2010)

City of Dania Beach, Broward County, FL
Prepared form based code (2009)

City of Plant City, Hillsborough County, FL
Prepared form based code (2009)

Town of Davie, Broward County, FL
Prepared form based code(2008)

City of Pinellas Park, Pinellas County, FL
Prepared comprehensive update to zoning regulations (2005)

Town of Southwest Ranches, Broward County, FL
Prepared new land development code (2004)

Town of Lauderdale-By-The-Sea. Broward County, FL
Prepared unified zoning and land development regulations (2003)

City of Wilton Manors, Broward County, FL
Rewrote entire land development code (2003)

City of Boynton Beach, Palm Beach County, FL
Prepared new zoning districts to implement redevelopment plan (2001)

Town of Davie, Broward County, FL
Prepared the Griffin Corridor District and other new zoning standards and land development regulations (1996-2001)

CO-AUTHORED ZONING CODES AND LAND DEVELOPMENT REGULATIONS

Village of Estero, Lee County, FL
Consulted with Village to evaluate and revise proposed regulations for new zoning regulations (2016)

Town of Loxahatchee Groves. Palm Beach County, FL

Assisted in preparing the entire unified zoning and land development regulations (2010)

Miami Shores Village. Miami-Dade County, FL

Assisted in preparing the unified zoning and land development regulations (2008)

AUTHORED REDEVELOPMENT PLANS AND COMPREHENSIVE PLANS

"Evaluation and Appraisal Amendments" to the Comprehensive Plan, Sunny Isles Beach, FL (2022)

"Evaluation and Appraisal Amendments" to the Comprehensive Plan, Aventura, FL (2022)

"Evaluation and Appraisal Amendments" to the Comprehensive Plan, Hallandale Beach, FL(2018)

"Evaluation and Appraisal Report of the Comprehensive Plan, Southwest Ranches, FL (2016)

"Regional Activity Center," Pompano Beach, FL (2010)

"Regional Activity Center," Dania Beach, FL (2009)

"Regional Activity Center," Davie, FL (2008)

"Evaluation and Appraisal Report" of the Comprehensive Plan. Miami Shores Village, FL (2005)

"Evaluation and Appraisal Report" of the Comprehensive Plan. North Miami Beach, FL (2005)

"Evaluation and Appraisal Report" of the Comprehensive Plan. Sunrise, FL (2005)

"Evaluation and Appraisal Report" of the Comprehensive Plan. Parkland, FL (2005)

"Evaluation and Appraisal Report" of the Comprehensive Plan. Tamarac, FL (2005)

"Southwest Ranches Comprehensive Plan." Review and commentary on proposed provisions. Town of Southwest Ranches, FL (2002)

"Town of Davie Comprehensive Plan Evaluation and Appraisal Report Amendments." Davie, FL (1996)

"City of Hallandale Beach Comprehensive Plan Evaluation and Appraisal Report."(Future Land Use Element and Coastal Element). Hallandale Beach, FL (1996)

"County Line Road Corridor Plan." Hallandale Beach, FL (1995)

"Fashion Row District Plan." Hallandale Beach, FL (1993)

CO-AUTHORED COMPREHENSIVE PLANS

"Comprehensive Plan: Future Land Use Element," City of Margate, FL (2021)

"Evaluation and Appraisal Amendments" to the Comprehensive Plan, City of Parkland, FL (2015)

"Comprehensive Plan", City of Parkland, FL (2015)

"Comprehensive Plan", City of North Miami, FL (2015)

"Local Activity Center," Tamarac, FL (2010)

"Comprehensive Plan", City of North Miami, FL (2008)

"Comprehensive Plan", City of North Miami Beach, FL (2007)

"Comprehensive Plan", Miami Shores Village, FL (2007)

"Evaluation and Appraisal Report" of the Comprehensive Plan. Sunrise, FL (2006)

"Evaluation and Appraisal Report" of the Comprehensive Plan. Parkland, FL (2006)

"Evaluation and Appraisal Report" of the Comprehensive Plan. Tamarac, FL (2006)

"Evaluation and Appraisal Report" of the Comprehensive Plan. Wilton Manors, FL (2006)

"Evaluation and Appraisal Report" of the Comprehensive Plan. Miami Shores Village, FL (2005)

"Evaluation and Appraisal Report" of the Comprehensive Plan. North Miami Beach, FL (2005)

"Southwest Ranches Comprehensive Plan "Review and commentary on proposed provisions. Town of Southwest Ranches, FL (2002)

"Federal Highway Corridor Community Redevelopment Plan." Boynton Beach, FL (2001)

"Evaluation and Appraisal Amendments" of the Comprehensive Plan. Davie, FL (1997)

OTHER AUTHORED DOCUMENTS AND MONOGRAPHS

"Potable Water Level of Service Standards", (Minch, Katims) *Florida Planning* (2009)

"Concurrency Management System for North Miami Beach (2004)

"Justification for the Davie Regional Activity Center." (1997)

"County Line Road Corridor Plan." (1995)

"Fashion Row Plan." (1994)

"Albany-Dougherty County Paratransit Plan." (1992)

EXPERT WITNESS TESTIMONY

Mr. Katims has qualified an expert witness in Circuit Court in the 17th Judicial District. He has served as an expert witness in or for the following municipalities, with the nature of the matter shown:

Town of Southwest Ranches, FL *(2020*) *(zoning and land use) (representing Town)*

City of Fort Lauderdale, FL *(2020) (zoning and land use) (representing private client)*

City of Hallandale Beach, FL *(2018) (property related dispute) (representing private client)*

City of Fort Lauderdale, FL *(2017) (zoning and land use) (representing private client)*

City of Miami Beach, FL (2016) (zoning and land use) (*representing private client)*

City of Fort Lauderdale, FL *(2016) (zoning and land use) (representing private client)*

City of Hollywood, FL *(2013) (eminent domain) (representing private client)*

City of Hollywood, FL *(2014) (eminent domain) (representing private client)*

City of Hollywood, FL *(2015) (eminent domain) (representing private client)*

City of Pompano Beach, FL *(2013) (land use amendment challenge) (representing private client)*

City of Oakland Park, FL *(2006) (zoning and land use) (representing private client)*

Highlands County, FL *(2005) (zoning and land use) (representing private client)*

City of North Miami Beach *(2005) (zoning and land use) (representing City)*

PROFESSIONAL EXPERIENCE

Jeff Katims, AICP, CNU-A has 30 years of public and private sector experience in urban planning, zoning and land use, including providing expert witness testimony. He is a Senior Planning Manager with TranSystems Corp's. land planning practice group, which provides professional planning, zoning, land use and expert witness consulting services to the public and private sectors.

Mr. Katims has current extensive experience in all phases of planning, zoning and land use matters. He has consulted for more than 35 local governments and scores of private clients in addition to his early public sector career. His current experience routinely includes undertaking land use plan amendments; rezonings; variances; development research; zoning code and land development code preparation, interpretation and application; and, providing expert witness testimony. Mr. Katims has qualified as an expert witness in State of Florida Administrative Hearings and Circuit Court in the 17th Judicial District. He also serves as the planning and zoning official for the Town of Southwest Ranches, Florida, including serving as the Town's expert witness in quasi-judicial land use matters, as necessary.

Prior to his private sector consulting career, Mr. Katims worked from 1996 to 2001 for the Town of Davie, where he was ultimately the Planning and Zoning Manager. In that capacity, he was responsible for preparing and administering the comprehensive plan, the zoning code and land development regulations.

He also reviewed and made recommendations for numerous land use related applications, many of them in a quasi-judicial setting as an expert witness for the Town. These applications included site development plans, land use plan amendments, rezonings, variances, special permits, plats and delegation requests.

Prior to joining the Town of Davie, Mr. Katims worked from 1993 to 1996 for the City of Hallandale Beach as Associate Planner. In this capacity, he undertook a variety of planning projects. Mr. Katims was responsible for analyzing development requests; writing and implementing segments of the comprehensive plan; amending and administering the zoning code; and, preparing redevelopment plans and assisting in their implementation.

Before relocating to Florida, Mr. Katims provided professional planning services to the Albany Dougherty Planning Commission in Albany, Georgia from 1991 to 1993. For this City/County Planning Commission, he administered multiple city and county zoning and subdivision regulations; analyzed land development applications; and, prepared and implemented the County's first ADA Paratransit Plan.

EXHIBIT “P”

TRAFTECH ENGINEERING, INC.

Joaquin E. Vargas, P.E.

Senior Transportation Engineer

Education

Master of Science in Civil Engineering (Transportation Engineering) – Georgia Institute of Technology, 1987

Bachelor of Science in Civil Engineering – Santo Domingo Institute of Technology (INTEC), 1986

Registration

Professional Engineer – Florida (PE# 44174), 1991

Professional Traffic Operations Engineer (PTOE# 1262), 2003

Private Sector Experience

Joaquin Vargas is an accomplished transportation engineer specializing in traffic engineering, parking studies, traffic impact studies, access, internal-site circulation and queuing, traffic concurrency, safety studies, and signal warrant studies. He has conducted over 2,000 traffic studies in Southeast Florida. His studies have been reviewed and approved by the Florida Department of Transportation (FDOT), numerous municipalities, counties, and other consulting firms acting as consultants to public agencies.

Florida Department of Transportation (FDOT) Experience

Between 1996 and 2006, Mr. Vargas served as traffic operations and safety consultant to the Florida Department of Transportation (FDOT). During this period, he conducted over 200 traffic engineering assignments for the FDOT, including the Florida Keys Hurricane Evacuation Study completed in 2001.

Mr. Vargas has also presented at the FDOT's scoping committee, attended meetings, city commission meetings, and public workshops on behalf of the FDOT. Furthermore, he conducted over 100 fatal crash studies throughout Miami-Dade and Monroe Counties. He has also served as expert witness for the public and private sectors. For the FDOT, Mr. Vargas served as expert witness on several cases involving parking, access, and internal site circulation.

Municipal Experience

Mr. Vargas has served as traffic consultant to more than 15 municipalities in South Florida. He is currently providing traffic engineering services to the cities of Coral Springs, Sunrise, Tamarac and Pompano Beach. In Monroe County, Mr. Vargas has provided hurricane evacuation assistance to the cities of Key West, Marathon and Islamorada. He has also provided traffic engineering services to the cities of Ocala and Destin. Mr. Vargas has reviewed hundreds of traffic studies and site plans on behalf of municipalities.

International Experience

Joaquin Vargas has also worked on overseas projects. He completed a traffic evaluation associated with the expansion of the Port of Ghana, Africa. He also evaluated transportation options for a resort development in the State of Quintana Roe, Mexico. Mr. Vargas also provided transportation and planning assistance to two large commercial development located in San Pedro Sula, Honduras. Mr. Vargas recently completed a transportation master plan for the Turks and Caicos Islands (TCI). The master plan evaluated existing traffic conditions within the Country and provide recommendations to the future roadway needs at six (6) TCI islands; Providenciales, North Caicos, Middle Caicos, South Caicos, Grand Turks and Salt Cay.