Correspondence

JARED G. ANDERSEN
DAX D. ANDERSON*
ROD N. ANDREASON
BRENT A. ANDREWSEN
RANDY T. AUSTIN
MATTHEW C. BALLARD
LORIN C. BARKER
SARA N. BECKER
JASON W. BEUTLER
KENNETH W. BIRRELL
CHRISTOPHER E. BRAMHALL
N. KENNETH BURRASTON*
TYLER L. BUSWELL
THOMAS K. CHECKETTS
CHRISTIAN S. COLLINS
DAVID R. CONKLIN*
CHARLES W. DAHLQUIST, II
NIKKI M. DAVIS
JERRY W. DEARINGER
KAREN T. DELPRIORE
LANCE A. DUNKLEY
ALEXANDER DUSHKU
JAMES E. ELLSWORTH
DAVID S. EVANS
WALLACE O. FELSTED
R. BRUCE FINDLAY
RYAN B. FRAZIER
STEPHEN W. GEARY
JULIE H. GHEEM*
DAVID L. GLAZIER
CHAD A. GRANGE
KIRK W. GRIMSHAW
R. SHAWN GUNNARSON
DAVID J. HARDY
BENSON L. HATHAWAY, JR.
READ R. HELLEWELL
DAVID A. HILDEBRANDT#
CHRISTOPHER S. HILL
KENNETH E. HORTON*
LOYAL C. HULME
DALE E. HULSE*
LEE FORD HUNTER
ROBERT C. HYDE
SCOTT E. ISAACSON
ALLISON P. JOHANSON
RANDY K. JOHNSON
RICHARD G. JOHNSON, JR.
MICHAEL D. JOHNSTON
VON G. KEETCH
BRYANT J. KELLER
RAEBURN G. KENNARD
MICHAEL F. KRIEGER*
KARINA F. LANDWARD
JAROD R. MARROTT*
DANIEL S. MCCONKIE
DAVID M. MCCONKIE
OSCAR W. MCCONKIE, III
LYNN C. MCMURRAY
WILLIAM A. MEADERS, JR.
THOMAS A. MECHAM
ANTONIO A. MEJIA
BARBARA V. MELENDEZ
CRAIG METCALF*
GREGORY S. MOESINGER

KIRTON & McCONKIE
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

60 EAST SOUTH TEMPLE, SUITE 1800
SALT LAKE CITY, UTAH 84111-1032

TELEPHONE (801) 328-3600
TOLL FREE (866) 867-5135
FAX (801) 321-4893
www.kmclaw.com

THOMAS L. MONSON
MERRILL F. NELSON
ERIC C. OLSON
R. WILLIS ORTON
ALEXANDER N. PEARSON
JACKIE PILLING
ROBERT S. PRINCE
STEPHANIE W. PUGSLEY
WILLIAM T. RALSTON*
MATTHEW K. RICHARDS
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JOSHUA S. RUPP*
C. GABRIEL SANCHEZ*
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M. THOMAS SCHOFIELD
PETER C. SCHOFIELD
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TIFFANY SMITH
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STEVEN L. WHITEHEAD
R. GARY WINGER
EVAN R. WITT*
MATTHEW D. WRIDE
JOEL D. WRIGHT
LEE A. WRIGHT
ELAINE C. YOUNG
TODD E. ZENGER*

OF COUNSEL:
EUGENE H. BRAMHALL
GREGORY G. CLARK¥
MICHAEL L. JENSEN
ROBERT B. LAMB
CHARLOTTE L. MILLER
JOHN A. ZACKRISON¶

* REGISTERED PATENT ATTORNEY
† LICENSED TO PRACTICE ONLY IN CALIFORNIA
# LICENSED TO PRACTICE ONLY IN DISTRICT OF COLUMBIA
★ LICENSED TO PRACTICE ONLY IN MEXICO
¥ LICENSED TO PRACTICE ONLY IN OKLAHOMA

WILFORD W. KIRTON
(1932-2008)
OSCAR W. McCONKIE, JR.
(RETIRED 2000)

UTAH COUNTY OFFICE
PINEHURST BUSINESS PARK
518 WEST 800 NORTH, SUITE 204
OREM, UTAH 84057
TELEPHONE (801) 426-2100
FAX (801) 426-2101

May 25, 2010

Amy Kimball-Murley, Planning Director
Members of the Planning Review Committee
City of Key West Planning Department
PO Box 1409
Key West, FL 33041-1409

RE: ***Application for Variance to Allow Steeple, 3424 Northside Drive***

Dear Ms. Kimball-Murley and Members of the Development Review Committee:

This firm represents Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints, on behalf of The Church of Jesus Christ of Latter-day Saints, an unincorporated association, (hereafter, collectively, the "Church" or "LDS Church"). We submit this letter in support of the above-referenced application for a variance to Ordinance 122.238(3) to allow a steeple approximately twenty-five feet tall.

As explained further below, the Church doctrinally requires a steeple of appropriate height, and the height restriction imposed by Ordinance 122.238(3), if enforced, would violate the Church's and its members' religious exercise under The Religious Land Use and Institutionalized Persons Act ("RLUIPA" or the "Act"), the federal constitution, and Florida law.

Of course, RLUIPA and constitutional mandates need not come into play. As Congress noted, the best way to "avoid the preemptive force" of RLUIPA is to grant a variance, construe discretionary land use criteria in favor of the steeple, or impose reasonable conditions of approval that do not substantially burden religious exercise. 42 U.S.C. § 2000cc-3(e).

I. RLUIPA REQUIRES REASONABLE ACCOMMODATION OF THE CHURCH'S AND ITS MEMBERS' RELIGIOUS EXERCISE.

RLUIPA protects churches from unduly burdensome land use regulations. The Act creates a private right of action for aggrieved churches to challenge ordinances that burden religion in the civil courts, 42 U.S.C. § 2000cc-2(a), and compels the government to pay the attorneys' fees of churches that successfully assert RLUIPA claims. *Id.* § 1988(b). RLUIPA subjects land use regulations to the most exacting judicial scrutiny in that it prohibits any land use regulation that substantially burdens the exercise of religion, except in extraordinary circumstances where the government can demonstrate that the regulation is "the least restrictive means" of furthering a "compelling" government interest. 42 U.S.C. § 2000cc(a)(1)(B). The Act also prohibits governments from (1) treating religious assemblies on less than "equal terms" with nonreligious assemblies, (2) discriminating on the basis of religion, and (3) imposing land use regulations that exclude or unreasonably limit religious assemblies from a jurisdiction. *Id.* § 2000cc(b).1

RLUIPA applies to the Church's variance application because the Church is a "religious claimant" under the statute, *id.* § 2000cc-5(5), and its application requires an "individualized assessment" by the City. *Id.* § 2000cc(a)(2)(A)-(C).[2]

---

1 Construction of the steeple is also protected under Florida's Religious Freedom Restoration Act of 1998, which essentially mirrors a claim under RLUIPA's section (a). *See* Fla. Stat. ch. 761.01; *Warner v. City of Boca Raton*, 887 So.2d 1023 (Fla. 2004).

[2]For a court to exercise jurisdiction, a RLUIPA claimant must show either: (1) that the challenged decision involves an "individualized assessment[ ] of the proposed uses for the property involved," or (2) that the challenged regulation(s) affect interstate or foreign commerce. 42 U.S.C. § 2000cc(a)(2)(A)-(C). In this case, both tests are met. First, the City's decision to grant or deny the Church's application for a variance clearly involve an individualized assessment. Federal courts have held that "zoning ordinances . . . by their nature impose individual assessment regimes." *Freedom Bapt. Church of Del. v. Tp. of Middleton*, 204 F. Supp. 2d 857, 868 (E.D. Pa. 2002); *accord, e.g., Church of the Hills of Twp. of Bedminster v. Twp. of Bedminster*, 2006 U.S. Dist. LEXIS 9488, *12 (D.N.J. 2006). In other words, "land use regulations through zoning codes necessarily involve case-by-case evaluations of the propriety of proposed activity against extant land use regulations." *Freedom Bapt. Church*, 204 F. Supp. 2d at 868.

Moreover, the land use regulation(s) at issue impact interstate commerce because construction of the proposed steeple would employ labor and materials that originate out of state or are transported via interstate carriers, and construction would be financed through tithe moneys donated by Church members from across the United States. *See Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203,1221 (C.D. Cal. 2002) (stating that churches "are 'major participants in interstate markets'" and "[t]he construction of the church will affect a large quantity of construction workers, construction materials, transportation vehicles and commercial financial transactions, all of which affect commerce") (citation omitted); *accord Rocky Mountain Christian Church v. Board of County Com'rs of Boulder County*, 612 F.Supp.2d 1163, 1173 (D. Colo. March 30, 2009). The effect on commerce need only be minimal for RLUIPA to apply. *See, e.g., Westchester Day Sch. v. Mamaroneck*, 504 F.3d 338, 354 (2d Cir. 2007); *Town of Foxfield v. Archdiocese of Denver*, 148 P.3d 339, 343-44 (Colo. Ct. App. 2006), *cert. denied*, 2007 Colo. LEXIS 385 (May 1, 2007).

A. The Church Doctrinally Requires a Steeple of Appropriate Height.

While understated in design and in keeping with the surrounding neighborhood, the proposed steeple will be the chapel's most distinctive architectural feature. The steeple expresses symbolically core doctrinal teachings of the Church, including the idea of ascension to God. It bespeaks devotion to God and lifts the adherent's eye heavenward. It has no other functional purpose but to convey a religious message. As a recent Church prophet taught:

> "Latter-day Saint chapels are more than just houses of worship. The stakes and districts of Zion are symbolic of the holy places spoke of by the Lord where His Saints are to gather in the last days as a refuge from the storm. You and your children will gather here to worship; to do sacred ordinances, to socialize, to learn, to perform in music, dance, drama, athletics, and to generally improve yourselves and one another. It is often thought significant that our chapels have on them a steeple, with spires toward the heavens symbolic of how our lives ought to be ever moving upward toward God." (Ezra Taft Benson, *Teachings of Ezra Taft Benson*, p. 151-52)

Or as stated long ago by one of the Church's founding leaders:

> "We can say to our friends, that this morning as we were coming to the office, we passed by [the church building], and not a stone was out of place, every one filling the place assigned it, presenting a majestic appearance to the eye of the beholder ... with ... its elevated steeple pointing to heaven, as much as to say, 'I stand here in honor of that God who created the heavens and the earth, and who framed the materials of which I am composed." (Oliver Cowdery, *Messenger and Advocate* (Feb. 1835), p.75)

Indeed, courts have recognized the importance of steeples in Church beliefs. *See Martin v. Corp. of Presiding Bishop of The Church of Jesus Christ of Latter-day Saints*, 747 N.E.2d 131, 137 (Mass. 2001) ("It is clearly part of Mormon theology to reflect, in their buildings, the belief of an ascension towards heaven" and "that steeples, by pointing towards heaven, serve the purpose of lifting Mormons' eyes and thoughts towards heaven") (internal quotations omitted).

Moreover, the steeple is readily recognizable and identifies to all that the chapel is a place of worship. It is an age-old symbol of Christianity, a part of the universal iconography.[3]

[3]Although a few older Church chapels have steeples mounted to the side of the chapel instead of on the roof, experience has taught that those steeples do not effectively identify the chapel as a place of worship or express the Church's intended message of devotion to God. Thus, per ecclesiastical policy, all new chapels are constructed with roof-mounted steeples.

B. Denial of the Proposed Steeple Would Substantially Burden the Church's and Its Members' Religious Exercise.

RLUIPA protects a broad range of religious activity, including "[t]he use, building, or conversion of real property for the purpose of religious exercise." 42 U.S.C. § 2000cc-5(7)(B). In enacting the statute, Congress emphasized that "[c]hurches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements." 146 Cong. Rec. S7774 (daily ed. July 27, 2000).

While the Act does not define "substantial burden," the concept was treated extensively in the United States Supreme Court's constitutional rulings for decades before RLUIPA's passage. And Congress intended that jurisprudence to inform any interpretation of the statutory text. *See* 100 Cong Rec S7774-76 (daily ed July 27, 2000). The Supreme Court defined a "substantial burden" to mean anything that has a "tendency to inhibit" religious exercise. *Sherbert v. Verner*, 374 U.S. 398, 406 n.6 (1963); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981). Accordingly, most courts applying RLUIPA interpret the term "substantial burden" to mean conduct that "pressures" or "influences" the free exercise of religion. *See, e.g., Guru Nanak Sikh Soc. v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006); *Midrash Sephardi v. Town of Surfside*, 366 F.3d 121 (11th Cir. 2004); *Adkins v. Kaspar*, 393 F.3d 559 (5th Cir. 2004). Thus, preventing or making it unreasonably difficult to build a worship site, restricting the size of a congregation, or otherwise limiting religious observance have all been held to be "substantial burdens."[4]

As explained above, constructing a steeple that adequately expresses its religious tenets is an integral part of and central to the religious exercise of the Church and its members. It is true that the proposed steeple will not impact the functionality of the existing chapel as a gathering place for members. However, a separate, equally important purpose of a house of worship is to express, symbolically, the Church's faith to members and others. "[C]hurches have long built steeples to 'express elevation toward the infinite, [their] spires soaring into the heavens,' J. Sallis, Stone 63 (Ind. Univ. Press 1994), and a steeple is the precise architectural feature that most often makes the public identify the building as a religious structure." *Martin*, 747 N.E.2d at 140 (overturning denial of height variance to build steeple on existing Church temple). To members of The Church of Jesus Christ of Latter-day Saints, an appropriate steeple affirms faith. To those not of the Church, the steeple proclaims faith. It bespeaks a universally recognized message of reverence and ascension to God, literally lifting the eye heavenward.

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[4] *See id.*; *see also Westchester Day Sch. v. Mamaroneck*, 504 F.3d 338, 350-53 (2d Cir. 2007); *Rocky Mountain Christian Church v. Board of County Com'rs of Boulder County*, 612 F.Supp.2d 1163, 1172 (D. Colo. March 30, 2009); *Grace Church v. City of San Diego*, 2008 U.S. Dist. LEXIS 38227, **31-37 (S. D. Cal. May 9, 2008); *Reaching Hearts Int'l, Inc. v. Prince George's County*, 584 F. Supp. 2d 766, 784 (D. Md. 2008); *Lighthouse Comty. Church of God v. City of Southfield*, 2007 U.S. Dist. LEXIS 28, *24 (E.D. Mich. Jan. 3, 2007); *Mintz v. Roman Catholic Bishop*, 424 F. Supp. 2d 309, 320-21 (D. Mass. 2006); *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1226-27 (C.D. Cal. 2002).

Moreover, it is part of worship for Church members to speak with a united voice to proclaim a religious vision. The Church takes literally the biblical edict to "preach the gospel to every creature," Mark 16:15, including to "proclaim [the gospel] upon the housetops." Luke 12:3. Though it speaks symbolically — and through an understated design — the steeple intends to partly fulfill this command on behalf of the congregations who will meet in the proposed chapel. In contrast, a shorter steeple would not communicate the inspirational message the Church intends to convey or distinguish the chapel as a place of worship.

For these reasons, denial of the Church's variance application to allow a steeple of appropriate height would substantially burden the Church's and its members' religious exercise.

C. Denying the Variance Would Not Further a Compelling Governmental Interest Through the Least Restrictive Means.

Once a religious claimant shows that a land use decision substantially burdens religion, the burden shifts to the government to prove that the challenged regulation is the least restrictive means of furthering a compelling government interest. 42 U.S.C. § 2000cc-2(b). The compelling interest standard poses a formidable obstacle: "a law restrictive of religious practice must advance interests of the highest order" because "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *accord Sherbert*, 374 U.S. at 406. Thus, the "compelling interest standard ... is not 'water[ed] ... down' but 'really means what it says.'" *Lukumi*, 508 U.S. at 546 (quoting *Smith*, 494 U.S. at 888). For example, "lack of harmony with the character of the neighborhood, incompatibility with the surrounding area, [and] incompatibility with the [Town's] comprehensive plan," "although legitimate in many senses, do not constitute compelling governmental interests." *Rocky Mountain Christian Church*, 612 F. Supp.2d 1175. *Accord Westchester*, 504 F.3d at 353 (generalized "interest in enforcing zoning [and] traffic regulations" not compelling).

The Church is aware of no compelling governmental interest that would justify denial of the proposed steeple. Concerns about the alleged aesthetic impact of the steeple, even if such were established, do not amount to compelling state interests. *See Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (8th Cir. 1995) ("asserted interests in . . . aesthetics, while significant, have never been held to be compelling"); *Westchester Day School v. Village of Mamaronek et al.*, 417 F. Supp. 2d 477, 554 (S.D.N.Y. 2006) (neighbors' concern about the "adverse visual impact[]" of renovations/construction of religious school "does not implicate a compelling government interest"), *aff'd*, 504 F.3d 338 (2d. Cir. 2007); *accord Munns v. Martin*, 930 P.2d 318, 322 (Wash. 1997). And even assuming a compelling interest were established, outright denial of the Church's application is not the least restrictive means of achieving that goal where the City can make reasonable conditions of approval. RLUIPA requires that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Sherbert*, 374 U.S. at 407.

II. CONSTRUCTION OF THE STEEPLE IS PROTECTED BY FEDERAL AND STATE CONSTITUTIONAL LAW.

A denial of the requested variance would invoke constitutional protections for two reasons. First, because the Church doctrinally requires a steeple of appropriate height, a denial would impermissibly interfere with the Church's free exercise of religion. U.S. Const. Amend. 1; *Lukumi*, 508 U.S. at 540-47. Second, the steeple expresses an identifiable message; therefore, construction of the steeple is a constitutionally protected form of speech. U.S. Const. Amend. 1. The United States Supreme Court has acknowledged that symbolic speech, including architectural elements, is a constitutionally protected right. *See West Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 632 (1942) ("Symbolism is a primitive but effective way of communicating ideas. . . . [Just as t]he State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment."); *see also Widmar v. Vincent,* 454 U.S. 263, 269 & n. 6 (1981) (holding that symbolic speech is no less protected than political or commercial speech); *First Covenant Church v. Seattle*, 840 P.2d 174, 182 (Wash. 1992) ("The relationship between theological doctrine and architectural design is well recognized.") (citations omitted).

As discussed above, a steeple conveys an unmistakable message of belief in God that is of particular importance to Church members. As no compelling state interest can be advanced to justify impinging on the Church's right to religious expression, *see Lukumi,* 508 U.S. at 546, a denial of the variance would amount to a federal constitutional violation. These rights are independently protected under Florida state law. *See* Fla. Const. Art. I, § 3 (religious freedom); Art. I, § 4 (freedom of speech and press).

Again, however, RLUIPA and constitutional mandates need not come into play. The variance application meets the requirements of the City's "standards for considering variances" and should be approved on that basis. As Congress noted, the best way to "avoid the preemptive force" of RLUIPA is to grant the requested variance and/or construe discretionary land use criteria in favor of the steeple. 42 U.S.C. § 2000cc-3(e). The Church affirms its willingness to accept reasonable conditions of approval, if needed.

Sincerely yours,

KIRTON & McCONKIE

James E. Ellsworth

JARED G. ANDERSEN
DAX D. ANDERSON*
ROD N. ANDREASON
BRENT A. ANDREWSEN
RANDY T. AUSTIN
MATTHEW C. BALLARD
LORIN C. BARKER
SARA N. BECKER
JASON W. BEUTLER
KENNETH W. BIRRELL
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GREGORY S. MOESINGER

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60 EAST SOUTH TEMPLE, SUITE 1800
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TELEPHONE (801) 328-3600
TOLL FREE (866) 867-5135
FAX (801) 321-4893
www.kmclaw.com

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R. WILLIS ORTON
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OF COUNSEL:
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GREGORY G. CLARK▽
MICHAEL L. JENSEN
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CHARLOTTE L. MILLER
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* REGISTERED PATENT ATTORNEY
¶ LICENSED TO PRACTICE ONLY IN CALIFORNIA
# LICENSED TO PRACTICE ONLY IN DISTRICT OF COLUMBIA
★ LICENSED TO PRACTICE ONLY IN MEXICO
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WILFORD W. KIRTON
(1922-2000)
OSCAR W. McCONKIE, JR.
(RETIRED 2009)

UTAH COUNTY OFFICE
PINEHURST BUSINESS PARK
518 WEST 800 NORTH, SUITE 204
OREM, UTAH 84057
TELEPHONE (801) 426-2100
FAX (801) 426-2101

June 14, 2010

VIA EMAIL AND FIRST CLASS MAIL

Larry R. Erskine
Chief Assistant City Attorney
P.O. Box 1409
Key West, FL 33041-1409

RE: Application for Variance to Allow Steeple, 3424 Northside Drive

Dear Larry:

Thank you for inquiry regarding the cases attached to your email. We appreciate the opportunity to respond. We have reviewed those cases and do not believe that any of them undermine the Church's position that enforcement of Key West's height ordinance would substantially burden the Church's religious exercise under RLUIPA's section (a).[1]

The first case you referenced, *Primera v. Broward County*, is not a section (a) case. That case was decided under a different section of RLUIPA, section (b)(1), the so-called "Equal Terms" provision. 450 F. 3d 1295, 1307-08 (11th Cir. 2006). Its reasoning therefore does not apply to a substantial burden claim. The Church does not contend at this point that the City has treated the Church "on less than equal terms" with a nonreligious assembly. 42 U.S.C. § 2000cc(b)(1). Rather, the Church asserts that it doctrinally requires a steeple of adequate height, and that enforcement of Key West's height ordinance would work a substantial burden on the Church and its members because it would stifle its ability to identify the building as a house of

[1] As stated in footnote 1 of our letter dated May 25, 2010, we agree with you that FRFRA's language essentially mirrors RLUIPA's, so any argument under RLUIPA would apply equally to FRFRA. *See* Fla. Stat. ch. 761.01; *Warner v. City of Boca Raton*, 887 So.2d 1023 (Fla. 2004).

worship and to symbolically express core religious precepts of the Church, namely, the belief in ascension to God. Again, RLUIPA's section (a) precludes any denial — *even a denial resulting from a neutral or generally applicable regulation* — if the impact of the denial constitutes a "substantial burden" on religious exercise. 42 U.S.C. § 2000cc(a)(1).[2]

The second case you referenced, *Williams v. City of Adventura*, is a section (a) substantial burden case, but it is nevertheless inapposite because the court found that the so-called "problems" the church sought to alleviate in that case, including disruption from tardy congregants, could either be "solved in [its] current location" or that the problems amounted to mere "distractions" that did not rise to substantial burdens under RLIUPA. 358 F. Supp. 2d 1207, 1215 (S.D. Fla. 2005). In contrast, Church prophets and leaders have long emphasized the significance of Church steeples. The steeple bespeaks devotion to God, lifts the adherent's eye heavenward, and reminds members that their "lives ought to be ever moving upward toward God." (Ezra Taft Benson, Teachings of Ezra Taft Benson, p. 151-52; *see also* Oliver Cowdery, Messenger and Advocate (Feb. 1835), p.75). The steeple has no other functional purpose but to convey a religious message. Courts have already recognized the importance of steeples in Church beliefs. *See Martin v. Corp. of Presiding Bishop of The Church of Jesus Christ of Latter-day Saints*, 747 N.E.2d 131, 137 (Mass. 2001) ("It is clearly part of Mormon theology to reflect, in their buildings, the belief of an ascension towards heaven" and "that steeples, by pointing towards heaven, serve the purpose of lifting Mormons' eyes and thoughts towards heaven") (internal quotations omitted). The significance of the steeple, and the consequent burden that a denial of the requested variance would impose, is such that it cannot reasonably be relegated to the level a "distraction" or a mere "inconvenience" as described in the *Williams* case.

Likewise, in the unpublished *Men of Destiny* decision, denial of a conditional use permit did not substantially burden a drug and alcohol treatment program because the program could alter its methods without working a substantial burden on the program's religious underpinnings. 2006 WL 3219321, *5 (M.D. Fla. Nov. 6, 2006). In contrast, and as described at length in the materials accompanying the Church's variance application, denial of the variance here would impose a substantial burden because a shorter steeple would not convey the religious message the Church intends to convey nor would it adequately identify the building as a house of worship.

Finally, *West Gate Tabernacle, Inc. v. Palm Beach County* bears little resemblance to the current situation because in that case the plaintiff illegally operated a homeless shelter for over one year without bothering to secure the proper permit(s). The shelter refused to pay the $22,000 in fines the county eventually levied against it and sued the county instead, arguing that the requirement of applying for a conditional use permit worked a substantial burden on its

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[2] *See, e.g., Westchester Day Sch. v. Mamaroneck*, 504 F.3d 338, 350-53 (2d Cir. 2007); *Guru Nanak Sikh Soc. v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006); *Midrash Sephardi v. Town of Surfside*, 366 F.3d 121 (11th Cir. 2004); *Adkins v. Kaspar*, 393 F.3d 559 (5th Cir. 2004); *Rocky Mountain Christian Church v. Board of County Com'rs of Boulder County*, 612 F.Supp.2d 1163, 1172 (D. Colo. March 30, 2009); *Grace Church v. City of San Diego*, 2008 U.S. Dist. LEXIS 38227, **31-37 (S. D. Cal. May 9, 2008); *Reaching Hearts Int'l, Inc. v. Prince George's County*, 584 F. Supp. 2d 766, 784 (D. Md. 2008); *Lighthouse Comty. Church of God v. City of Southfield*, 2007 U.S. Dist. LEXIS 28, *24 (E.D. Mich. Jan. 3, 2007); *Mintz v. Roman Catholic Bishop*, 424 F. Supp. 2d 309, 320-21 (D. Mass. 2006); *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1226-27 (C.D. Cal. 2002).

religious exercise, which argument the court rejected. 14 So.3d 1027, 1031-32 (Fla. App. 2009) ("'The mere requirement that one apply for a special exception from an ordinance restricting the use of property is not a substantial burden.' A church must exhaust its administrative remedies and cannot merely predict that it would be denied the permit if it were to apply.") (quoting *Konikov v. Orange County*, 203 F. Supp. 2d 1328, 1342 (M.D. Fla. 2004)).

The Church makes no such argument here. Unlike the homeless shelter in *West Gate*, the Church here has timely complied with all City ordinances and regulations and now, in good faith applies for a variance pursuant to the procedure outlined in City ordinances. In the materials submitted in support of the variance the Church contends, first, that the variance should be granted because the application meets the requirements of the City's "standards for considering variances." Second, and in the alternative, the Church asserts that a denial of the requested variance implicates RLUIPA because it would substantially burden the Church's and its members' religious exercise. The Church nowhere has argued that it is somehow exempt from a reasonable variance process.[3] Its actions bespeak the opposite.

As explained above and in the Church's variance application, the Church doctrinally requires a steeple of appropriate height, and the height restriction imposed by Ordinance 122.238(3) would violate the Church's and its members' religious exercise under RLUIPA, the federal constitution, and Florida law, including FRFRA. The Church therefore seeks a variance to section 122.238(3) pursuant to City law. The Church's variance application meets the requirements of City ordinance(s) and should be approved on that basis, which would also obviate the need to delve into RLUIPA and constitutional issues. Moreover, the Church affirms its willingness to accept reasonable conditions of approval, if needed.

Sincerely yours,

KIRTON & McCONKIE

James E. Ellsworth

Cc: Amy Kimball-Murley, Planning Director, Key West City (via email)
Members of the Planning Review Committee, Planning Dept. c/o Amy Kimball-Murley

[3] It is true that in some instances excessive cost, delay, and uncertainty associated with the land use application process itself (typically where one application has already been denied) can amount to a "substantial burden" under RLUIPA. *See Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005) (Where one application was denied, burden of "search[ing] around for other parcels of land" or "filing [additional] applications with the City" was substantial under RLUIPA because, "in either case there would have been delay, uncertainty, and expense."); *accord Reaching Hearts Int'l, Inc. v. Prince George's County*, 584 F. Supp. 2d 766, 786 (D. Md. 2008) (reapplication process that required "expenditure of substantial funds and resulted in delay and uncertainty" "qualify[ies] as a substantial burden under RLUIPA"); *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978, 990-91 (9th Cir. 2006) (Denial of CUP to build temple on agricultural lands constituted substantial burden because "the County could use its concern with leapfrog development effectively to deny churches access to all such land"; therefore, "any future CUP applications for a temple on land zoned 'agricultural' would be fraught with uncertainty.").

450 F.3d 1295, 19 Fla. L. Weekly Fed. C 603
(Cite as: 450 F.3d 1295)

United States Court of Appeals,
Eleventh Circuit.
PRIMERA IGLESIA BAUTISTA HISPANA OF BOCA RATON, INC., a Florida corporation, Augusto Pratts, David Pratts, Plaintiffs-Counter-Defendants-Appellants Cross-Appellees,
v.
BROWARD COUNTY, a Political Subdivision of the State of Florida, Defendant-Counter-Claimant-Appellee Cross-Appellant.
No. 04-15898.

June 1, 2006.

Background: Incorporated religious organization which had unsuccessfully applied for variance from requirement that any nonagricultural, nonresidential uses of property be separated by at least 1,000 feet from existing agricultural and residential uses, so that it could operate church on property which it acquired after this "separation" requirement went into effect, brought suit against county for allegedly violating its equal protection, due process and free exercise rights, as well as the Equal Terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA). The United States District Court for the Southern District of Florida, No. 01-06530-CV-JEM,Jose E. Martinez, J., dismissed constitutional claims for lack of standing and found that county had not violated Equal Terms provision of the RLUIPA, and religious organization appealed.

Holdings: The Court of Appeals, Marcus, Circuit Judge, held that:
(1) religious organization had standing to pursue constitutional challenge to zoning ordinance;
(2) zoning ordinance did not impermissibly "gerrymander" to place a burden solely on religious, as opposed to nonreligious, assemblies or institutions, in violation of Equal Terms provision of the RLUIPA; and
(3) preparatory school that had obtained relief from zoning ordinance, by successfully applying to have its nearly 70-acre tract of property rezoned was not "similarly situated comparator" to religious organization that had unsuccessfully applied for variance.

Affirmed in part; reversed and remanded in part.

West Headnotes

[1] Federal Courts 170B ⚿776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
Court of Appeals reviews *de novo* the district court's conclusions of law, including its conclusion that corporation did not have standing to pursue § 1983 claim for county's alleged violation of its equal protection, due process and free exercise rights in connection with zoning decision. U.S.C.A. Const.Amends. 1, 14; 42 U.S.C.A. § 1983.

[2] Federal Civil Procedure 170A ⚿103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.2 k. In General; Injury or Interest. Most Cited Cases
In every federal case, party bringing suit must establish standing to prosecute action.

[3] Federal Civil Procedure 170A ⚿103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.2 k. In General; Injury or Interest. Most Cited Cases
In essence, question of whether litigant has stand-

ing to sue is whether litigant is entitled to have court decide merits of dispute or of particular issues.

[4] Federal Civil Procedure 170A ⚖103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.2 k. In General; Injury or Interest. Most Cited Cases
Litigant must have both Article III standing, which enforces the Constitution's case or controversy requirement, and prudential standing, which embodies judicially self-imposed limits on exercise of federal jurisdiction. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[5] Federal Civil Procedure 170A ⚖103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.2 k. In General; Injury or Interest. Most Cited Cases

Federal Civil Procedure 170A ⚖103.3

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.3 k. Causation; Redressability. Most Cited Cases
To demonstrate Article III standing, plaintiff must show: (1) that he has suffered actual or threatened injury, (2) that his injury is fairly traceable to challenged conduct of defendant, and (3) that injury is likely to be redressed by favorable ruling. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[6] Federal Civil Procedure 170A ⚖103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.2 k. In General; Injury or Interest. Most Cited Cases
To establish "injury in fact," of kind required for him to have Article III standing, plaintiff must first demonstrate that defendant has invaded some legally protected interest of his, i.e., that defendant has infringed on an interest protected by statute or otherwise. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[7] Federal Civil Procedure 170A ⚖103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.2 k. In General; Injury or Interest. Most Cited Cases
"Legally protected interest," infringement on which may be sufficient to confer Article III standing, must consist of obtaining compensation for, or preventing, violation of legally protected right. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[8] Constitutional Law 92 ⚖720

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)3 Particular Questions or Grounds of Attack in General
92k720 k. Zoning and Land Use. Most Cited Cases
(Formerly 92k42.2(2), 92k42.2(1))
Incorporated religious organization which had unsuccessfully applied for variance from requirement that any nonagricultural, nonresidential uses of property be separated by at least 1,000 feet from existing agricultural and residential uses, so that it could operate church on property which it acquired after this "separation" requirement went into effect, plainly suffered "injury in fact," in form of ban on its ability to hold religious assemblies on its property, which was traceable to zoning ordinance, and which could be redressed by judgment in its favor

on its equal protection, due process and free exercise claims; thus, religious organization had standing to pursue constitutional challenge to zoning ordinance. U.S.C.A. Const.Amends. 1, 14; 42 U.S.C.A. § 1983.

[9] Civil Rights 78 ⇐1331(6)

78 Civil Rights
78III Federal Remedies in General
78k1328 Persons Protected and Entitled to Sue
78k1331 Persons Aggrieved, and Standing in General
78k1331(6) k. Other Particular Cases and Contexts. Most Cited Cases

Constitutional Law 92 ⇐1328

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1327 Religious Organizations in General
92k1328 k. In General. Most Cited Cases
(Formerly 92k84.5(7.1))

Constitutional Law 92 ⇐2913

92 Constitutional Law
92XXIV Privileges or Immunities; Emoluments
92XXIV(B) Privileges and Immunities of Citizens of the United States (Fourteenth Amendment)
92XXIV(B)1 In General
92k2911 Entities Protected By, or Subject To, Constitutional Provision
92k2913 k. Corporations or Other Business Entities. Most Cited Cases
(Formerly 92k206(7))

Constitutional Law 92 ⇐3012

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)3 Persons or Entities Protec- ted
92k3012 k. Corporations and Other Business Entities. Most Cited Cases
(Formerly 92k210(2))

Constitutional Law 92 ⇐3927

92 Constitutional Law
92XXVII Due Process
92XXVII(C) Persons and Entities Protected
92k3927 k. Business Organizations; Corporations. Most Cited Cases
(Formerly 92k252)

While incorporated religious organization, as corporation, may not have been not a "citizen" entitled to privileges and immunities secured by federal law, and could not obtain redress for denial of such privileges and immunities in cause of action under § 1983, it was nonetheless a "person," within meaning of § 1983, which possessed Fourteenth Amendment rights of equal protection, due process and, through doctrine of incorporation, the free exercise of religion. U.S.C.A. Const.Amends. 1, 14; 42 U.S.C.A. § 1983.

[10] Federal Courts 170B ⇐613

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)1 Issues and Questions in Lower Court
170Bk612 Nature or Subject-Matter of Issues or Questions
170Bk613 k. Constitutional Questions. Most Cited Cases

Whether incorporated religious organization, having failed to establish right to relief from application of local zoning ordinance under the Equal Terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA), could establish right to relief under the Fourteenth Amendment on equal protection, due process or free exercise grounds was question that Court of Appeals would

not address for first time on appeal, as alternate basis for upholding district court's order dismissing these constitutional claims on standing grounds, where district court had made no findings of fact and drawn no conclusions of law on this issue. U.S.C.A. Const.Amends. 1, 14; Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

[11] Constitutional Law 92 ⟹976

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)2 Necessity of Determination
92k976 k. Resolution of Non-Constitutional Questions Before Constitutional Questions. Most Cited Cases
(Formerly 92k47, 92k46(1))
When party raises both statutory and constitutional arguments in support of judgment, court should first consider whether party is entitled to full relief under statute and, if so, should not reach constitutional issue.

[12] Civil Rights 78 ⟹1073

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1073 k. Zoning, Building, and Planning; Land Use. Most Cited Cases
There are four elements of violation of Equal Terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA): (1) plaintiff must be religious assembly or institution, (2) subject to land use regulation which (3) treats religious assembly on less than equal terms with (4) nonreligious assembly or institution. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

[13] Civil Rights 78 ⟹1403

78 Civil Rights
78III Federal Remedies in General
78k1400 Presumptions, Inferences, and Burdens of Proof
78k1403 k. Property and Housing. Most Cited Cases
Religious assembly or institution asserting a claim under Equal Terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA) bears initial burden of producing prima facie evidence to support a claim alleging an Equal Terms violation, whereupon government bears burden of persuasion on any element of claim. Religious Land Use and Institutionalized Persons Act of 2000, §§ 2(b)(1), 4(b), 42 U.S.C.A. §§ 2000cc(b)(1), 2000cc-2(b).

[14] Civil Rights 78 ⟹1073

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1073 k. Zoning, Building, and Planning; Land Use. Most Cited Cases
Violation of Equal Terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA) is not necessarily fatal to land use regulation; rather, such violations are subject to strict scrutiny, under which offending conduct may be upheld if defendant establishes that this conduct employs narrowly tailored means of achieving compelling government interest. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

[15] Federal Courts 170B ⟹776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
Court of Appeals reviews *de novo* the district court's conclusions of law, including its interpretation of statute.

[16] Civil Rights 78 ⇐1073

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1073 k. Zoning, Building, and Planning; Land Use. Most Cited Cases
Land use regulation may violate Equal Terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA) in at least three ways: (1) by facially differentiating between religious and nonreligious assemblies or institutions; (2) by "gerrymandering" to place a burden solely on religious, as opposed to nonreligious, assemblies or institutions, despite being neutral on its face; or (3) or through selective enforcement against religious, as opposed to nonreligious, assemblies or institutions of a truly neutral regulation. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

[17] Civil Rights 78 ⇐1073

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1073 k. Zoning, Building, and Planning; Land Use. Most Cited Cases
Zoning ordinance requiring that any nonagricultural, nonresidential uses of property be separated by at least 1,000 feet from existing agricultural and residential uses, which applied generally to all nonagricultural, non-residential uses without regard to religion, and from which property owner could obtain relief only by requesting a variance or rezoning under standards neutrally and generally applicable, with no special carve-outs or exceptions for nonreligious land uses, did not impermissibly "gerrymander" to place a burden solely on religious, as opposed to nonreligious, assemblies or institutions, in violation of Equal Terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA). Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

[18] Civil Rights 78 ⇐1073

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1073 k. Zoning, Building, and Planning; Land Use. Most Cited Cases
Preparatory school that had obtained relief from zoning ordinance requiring that any nonagricultural, nonresidential uses of property be separated by at least 1,000 feet from existing agricultural and residential uses, by successfully applying to have its nearly 70-acre tract of property rezoned, was not "similarly situated comparator" to religious organization that had unsuccessfully applied for variance to conduct religious services on its property, on which religious organization could rely to satisfy its initial burden of making prima facie showing that zoning ordinance, while neutral on its face, was being selectively enforced against religious assemblies or institutions in manner violating Equal Terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA); preparatory school had applied for different relief, rezoning as opposed to variance, from different decision-making body, that was guided by different standards. Religious Land Use and Institutionalized Persons Act of 2000, §§ 2(b)(1), 4(b), 42 U.S.C.A. §§ 2000cc(b)(1), 2000cc-2(b).

[19] Civil Rights 78 ⇐1073

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1073 k. Zoning, Building, and Planning; Land Use. Most Cited Cases
Neutral statute's application may violate Equal Terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA) if it differentially treats similarly situated religious and nonreligious assemblies. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

[20] Civil Rights 78 ⇐1073

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1073 k. Zoning, Building, and Planning; Land Use. Most Cited Cases

Civil Rights 78 ⇐1403

78 Civil Rights
78III Federal Remedies in General
78k1400 Presumptions, Inferences, and Burdens of Proof
78k1403 k. Property and Housing. Most Cited Cases
Plaintiff bringing an as-applied Equal Terms challenge under the Religious Land Use and Institutionalized Persons Act (RLUIPA) must present evidence that a similarly situated nonreligious comparator received differential treatment under the challenged regulation; if plaintiff offers no similarly situated comparator, then there can be no cognizable evidence of less than equal treatment, and plaintiff has failed to satisfy its initial burden of proof. Religious Land Use and Institutionalized Persons Act of 2000, §§ 2(b)(1), 4(b), 42 U.S.C.A. §§ 2000cc(b)(1), 2000cc-2(b).

[21] Civil Rights 78 ⇐1073

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1073 k. Zoning, Building, and Planning; Land Use. Most Cited Cases
Equal Terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA) requires equal treatment for religious assemblies and institutions, not special treatment. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).
***1299** Deborah Lynne Martohue, Martohue Land Use Law Group, P.A., St. Petersburg, FL, for Appellants.

David Jay Glantz, James David Rowlee, Ft. Lauderdale, FL, for Appellee.

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

Before BIRCH and MARCUS, Circuit Judges, and MILLS[FN*], District Judge.

FN* Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

MARCUS, Circuit Judge:

Primera Iglesia Bautista Hispana of Boca Raton, Inc. ("Primera" or "the Church") appeals from the entry of final judgment, after a bench trial, in favor of the defendant, Broward County ("the County"). The district court found that the County did not violate section 2(b)(1) (the "Equal Terms Provision") of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc(b)(1), by denying Primera a zoning***1300** variance. Primera also appeals the district court's conclusion that Primera, as a corporation, lacked standing to bring a section 1983 claim for the violation of its constitutional rights under the Due Process, Equal Protection, and Free Exercise Clauses. After careful review, we reverse the dismissal of Primera's section 1983 claims because Primera, as an incorporated religious organization, both has standing in the case and has stated a claim under the Constitution and laws of the United States. We affirm, however, the district court's final judgment entered for the County on the Church's RLUIPA claims.

I.

The essential facts developed at trial are these. Use and development of land in unincorporated Broward County is regulated by the Broward County Zoning Code ("BCZC"). Article XIV of the BCZC sets forth the regulations applicable to land designated A-1 Agricultural Estate. In July 1997, the County amended Article XIV of the BCZC to

require "a minimum distance of one thousand (1,000) feet" between nonagricultural, nonresidential uses in the A-1 district (the "Separation Requirement"). BCZC § 39-245(9)(a). The stated purpose of these regulations was "to protect, preserve and enhance the rural character and lifestyle of existing low denisity areas and agricultural uses and comply with the [relevant portions of the Comprehensive Plan]." BCZC § 39-246. Places of worship are permitted in the A-1 zoning district, but like all nonagricultural, nonresidential uses, they are subject to the Separation Requirement. BCZC §§ 39-245, 39-249.

Primera is a Hispanic Baptist congregation affiliated with the Southern Baptist Convention and serving Hispanic congregants in northern Broward County, Florida.[FN1] In December of 1997, Primera purchased a residential property located at 7450 Lyons Road in unincorporated northern Broward County ("the Property"). The warranty deed conveying the Property to Primera unambiguously states that the Property is subject to zoning ordinances and other restrictions and prohibitions. The Church was represented by counsel in the purchase. The Property is approximately one acre in size with a single family residence situated thereon. It is located in the A-1 Agricultural Estate zoning district of Broward County.

> FN1. In addition to Primera, the complaint named two individuals, David Pratts and Augusto Pratts, as plaintiffs. Before the trial, the district court dismissed the individual plaintiffs for lack of standing. The individuals do not appeal their dismissal from this lawsuit.

The Property is within 1,000 feet of other nonresidential, nonagricultural uses. Among these properties, several were annexed into the City of Coconut Creek before the County enacted the Separation Requirement. Once annexed, those lands fell outside the A-1 zoning district and were not subject to the Separation Requirement. At trial, Primera presented no evidence that *any* property owner has obtained a variance from the Separation Requirement.

Of particular importance to this appeal is the Broward County Preparatory School ("the School"), which is located within 1000 feet of the Church and comprises some seventy acres of land. Coconut Creek annexed most of the School's land from unincorporated Broward County before the County enacted the Separation Requirement.***1301** But the School later acquired an additional ten-acre parcel of land adjacent to its main grounds, located in unincorporated Broward County and zoned A-1. In 2001, upon the School's application, the County *rezoned* the ten-acre parcel from A-1 to I-1, Institutional and Educational District, which does not impose any distance requirements. There is no evidence that the School used the ten-acre parcel for any nonresidential, nonagricultural use before the rezoning, but afterwards the School built a performing arts center and auditorium on the land.

After Primera purchased the Property, it hired an architect to develop a site plan to renovate the house into a place of worship and submitted those plans to the County. A County official informed Primera that the Separation Requirement prohibited any nonagricultural, nonresidential use of the property, and advised them to seek a zoning variance. Primera applied for a *variance* in March 1998, but at an April 1998 hearing, it withdrew the request after its attorney informed the Church that there was no quorum of the Board of Adjustment ("the Board"), and that it should try instead to work out any opposition from its neighbors. When the Church's pastor, Augusto Pratts, spoke to the neighbors, he learned that some objected to Primera's variance request. And at a hearing in June 1998, neighbors voiced substantial opposition to Primera's renewed request. The Board denied the variance, offering three reasons: (1) the Separation Requirement was necessary to maintain the primary purpose of the agricultural district; (2) Primera created its own hardship by buying an under-zoned property; and (3) Primera's request did not meet the criteria for a variance set forth in the Zoning Code

§ 39-40.[FN2]

> FN2. The BCZC provides that, in determining whether to grant a variance, the Board shall determine whether the applicant has met the following criteria:
>
> > (1) That there are unique and special circumstances or conditions applying to the property in question, or to the intended use of the property, that do not apply generally to other properties in the same district; (2) That any alleged hardship is not self-created by any person having an interest in the property or is the result of mere disregard for, or ignorance of, the provisions of the Code; (3) That strict application of the provisions of the Code would deprive the petitioner of reasonable use of the property for which the variance is sought; (4) That the variance proposed is the minimum variance which makes possible the reasonable use of the property; (5) That the granting of the variance will be in harmony with the general intent and purpose of the Code and that such variance will not be injurious to the area involved or otherwise detrimental to the public welfare; (6) That there exists changed or changing circumstances which make approval of the variance appropriate.
>
> BCZC § 39-40.

In spite of the Board's decision, Primera continued to use the Property for various prayer meetings and church services. In response, in 1999, the County issued Primera a Notice of Violation for "illegally conducting church services (by admission)" in a residential structure in violation of the zoning code, and set a hearing before the Board. At the hearing, on October 28, 1999, the Board found that Primera, by admission, had illegally used the residential structure to conduct church services.

Primera then sued the County in state court under the Florida Land Use and Environmental Dispute Resolution Act, Fla. Stat. § 761.03 (2004), challenging the County's enforcement of the Separation Requirement. However, the parties reached a mediated resolution whereby Primera agreed to submit a new application to the Board to request a variance. ***1302** Primera, with the assistance of the Zoning Code Services Division ("ZCSD") staff, submitted yet another variance application that proposed additional use restrictions to mitigate any possible negative effects. This time, the ZCSD staff recommended approval to the Board on the following grounds: (1) the new site plan mitigated the negative effects of the variance; (2) the hardship was not self-created;[FN3] and (3) the operation of the Church would not negatively affect traffic in the area.

> FN3. The ZCSD staff changed its position on this point because of new information that Primera had relied to its detriment on the seller's representations about the Property's zoning.

The Board held another hearing on Primera's request, at which time Primera's neighbors again voiced opposition and presented photographs and a video of Primera's past use of the Property, depicting, among other things, garage sales and religious services. The Board again voted to deny the variance because "granting the variance would not be in harmony with the community or the general intent or purpose of the Code and ... such variance would be injurious to the area involved and it would be otherwise detrimental to the public welfare by virtue of the traffic created."

Nevertheless, Primera continued to use the Property for worship services, prompting still more complaints to the County, which resulted in the ZCSD issuing still another Notice of Violation on September 12, 2000. Thereafter, Primera stopped using the Property for worship services. Notably, Primera never sought to have the Property *re-zoned* or *annexed* into the nearby municipality of Coconut

Creek.

In April 2001, Primera filed this lawsuit against the County in the United States District Court for the Southern District of Florida, challenging the County's decision denying Primera a variance. Primera's Amended Complaint alleged three counts. Count I sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 for violation of Primera's rights under the First, Fifth and Fourteenth Amendments to the United States Constitution. Count II claimed that the County's zoning decisions violated: RLUIPA section 2(a), 42 U.S.C. § 2000cc(a) (the "Substantial Burden provision"), by imposing a substantial burden on Primera's exercise of its religious freedoms; RLUIPA section 2(b)(1), 42 U.S.C. § 2000cc(b)(1) (the "Equal Terms provision"), by treating Primera on less than equal terms with other nonreligious assemblies; RLUIPA section 2(b)(2), 42 U.S.C. § 2000cc(b)(2) (the "Nondiscrimination provision"), by discriminating against Primera on the basis of religion or religious denomination; and, RLUIPA section 2(b)(3)(B), 42 U.S.C. § 2000cc(b)(3)(B) (the "Unreasonable Limitation provision"), by imposing regulations that unreasonably limit religious assemblies within the A-1 zoning district.[FN4] Finally, count III claimed a violation of a corollary state statute, the ***1303** Florida Religious Freedom Restoration Act of 1998 ("FRFRA").

FN4. The full text of RLUIPA section 2, 42 U.S.C. § 2000cc, reads as follows:

(a) Substantial burdens

(1) General rule

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 governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which-

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) 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.

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose 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.

(2) Nondiscrimination

No government shall impose or imple-

> ment a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.
>
> (3) Exclusions and limits
>
> No 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.

After a three day bench trial the district court ruled in favor of the County on all counts, making extensive findings of fact and conclusions of law. As an initial matter, the district court determined that Primera, as a corporation, lacked standing to pursue a section 1983 action to challenge the County's zoning decisions, and therefore dismissed Primera's section 1983 claim. As for the Religious Land Use and Institutionalized Persons Act claims, the district court held that: (1) Primera failed to establish a violation of RLUIPA's Substantial Burden provision because the Separation Requirement predated Primera's acquisition; RLUIPA does not mandate that municipalities allow residents to operate religious institutions wherever they please; and the County did not prohibit all religious uses, but merely imposed a 1000 foot separation requirement; (2) Primera did not present prima facie evidence that the County violated RLUIPA's Equal Terms provision because the Separation Requirement is facially neutral as between religious and nonreligious assemblies and institutions, and the Separation Requirement is applied equally to nonreligious assemblies and institutions; and, finally, (3) the County's Separation Requirement did not constitute an unreasonable limitation on religious exercise in violation of RLUIPA. The court also concluded that, since the standard for finding a violation of FRFRA and RLUIPA's substantial burden provision are identical, there was no violation of the FRFRA. Primera does not appeal from that determination.

II.

[1] On appeal, Primera first claims that the district court committed reversible error when it dismissed, for lack of standing, Primera's section 1983 claims alleging that the County deprived Primera of its constitutional rights. We review *de novo* the district court's conclusions of law. *Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dept. of Health and Rehab. Servs.*, 225 F.3d 1208, 1216 (11th Cir.2000), and find that the dismissal of the section 1983 claims was erroneous for several reasons and requires reversal.

***1304** [2][3][4] It is by now axiomatic that "[i]n every federal case, the party bringing the suit must establish standing to prosecute the action. 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." *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (internal quotation marks omitted). The Supreme Court's standing jurisprudence "contains two strands: Article III standing, which enforces the Constitution's case or controversy requirement, and prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction." *Id.* at 11-12, 124 S.Ct. 2301 (quotation marks omitted). Only Article III standing is at issue in this case.

[5] To demonstrate Article III standing, a "plaintiff must show that the conduct of which he complains has caused him to suffer an 'injury in fact' that a favorable judgment will redress." *Id.* As we have explained, this requires a plaintiff to show "(1) that he has suffered an actual or threatened injury, (2) that the injury is fairly traceable to the challenged conduct of the defendant, and (3) that the injury is likely to be redressed by a favorable ruling." *Harris v. Evans*, 20 F.3d 1118, 1121 (11th Cir.1994) (en

banc).

[6][7][8] "[T]o establish an injury in fact, [a plaintiff] must first demonstrate that the [defendant] has invaded some 'legally protected interest' of his." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 980-81 (11th Cir.2005). A "legally cognizable injury" requires infringement of "an interest ... protected by statute or otherwise." *Id.* (internal quotation marks omitted) (quoting *Cox Cable Commc'ns, Inc. v. United States*, 992 F.2d 1178, 1182 (11th Cir.1993)). That "interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right." *Id.* (internal quotation marks omitted) (quoting *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000)). We have held that a zoning restriction on property use constitutes an injury in fact. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1224 (11th Cir.2004). Primera plainly has suffered an actual injury: it is barred from assembling for religious worship on the Property.

Moreover, the remaining two standing requirements also are clearly present. The Church's injury is fairly and easily traceable to the zoning ordinance because applying the ordinance to the Church directly and expressly limits Primera's use of the Property for religious worship services. *See id.*; *Fla. Pub. Interest Research Group Citizen Lobby, Inc. v. E.P.A.*, 386 F.3d 1070, 1085 (11th Cir.2004) (holding that the "fairly traceable" element is met where continued injury would result if the challenged conduct persisted). Finally, the injury would be redressed by a ruling in Primera's favor: the church would be free to use the Property for religious services. *See Midrash*, 366 F.3d at 1224. Thus, to the extent the district court grounded its dismissal on Primera's lack of standing, it erred.

[9] The district court's order is sufficiently ambiguous as to suggest that when it employed the doctrine of "standing" it really meant to connote Primera's failure to state a claim under 42 U.S.C. § 1983. If that was the basis of the order, however, this too would be error because Primera stated a claim for the violation of its constitutional rights.

***1305** The district court based its dismissal on language drawn from our opinion in *L.S.T., Inc. v. Crow*, 49 F.3d 679 (11th Cir.1995), where a panel of this Court observed that "[a] corporation is not a 'citizen' entitled to the privileges and immunities secured by federal law for purposes of § 1983." *Id.* at 682-83 n. 6 (citing *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 514, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) ("Natural persons, and they alone, are entitled to the privileges an immunities which section 1 of the Fourteenth Amendment secures for 'citizens of the United States.' "). But Primera's section 1983 claims are not based on the privileges and immunities incident to its citizenship; they are based on its rights as a "person." And this distinction makes all the difference.

By its terms, section 1983 provides a cause of action for "person[s] within the jurisdiction" who have been "depriv[ed] of any rights, privileges, or immunities secured by the Constitution and laws" by a person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State." 42 U.S.C. § 1983. We have clearly and repeatedly held that corporations are "persons" within the meaning of section 1983. *See, e.g., Fla. Right to Life, Inc. v. Lamar*, 273 F.3d 1318, 1323 (11th Cir.2001) (corporation may sue under section 1983 to vindicate its First and Fourteenth Amendment rights); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514, 1526 (11th Cir.1993) (holding that a religious corporation has standing to bring section 1983 claim to vindicate First Amendment rights); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (granting church corporation relief in § 1983 suit to vindicate Free Exercise rights).

Moreover, corporations possess Fourteenth Amendment rights of equal protection, due process, and, through the doctrine of incorporation,[FN5] the free exercise of religion. *See First Nat'l Bank of Boston*

v. Bellotti, 435 U.S. 765, 780 n. 15, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) ("It has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment."); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244, 56 S.Ct. 444, 80 L.Ed. 660 (1936) ("[A] corporation is a 'person' within the meaning of the equal protection and due process of law clauses ...."). Although the rights of corporate persons and natural persons are not entirely coextensive, *see First Nat'l Bank v. Bellotti*, 435 U.S. 765, 778 n. 14, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) ("Certain 'purely personal' guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals."), corporations plainly possess the rights the Church asserted here: due process, equal protection, and the free exercise of religion, *see Grosjean*, 297 U.S. at 244, 56 S.Ct. 444; *Lukumi*, 508 U.S. at 547, 113 S.Ct. 2217; *Church of Scientology*, 2 F.3d at 1526; *cf. Bellotti*, 435 U.S. at 780, 98 S.Ct. 1407 ("Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process ***1306** Clause, and the Court has not identified a separate source for the right when it has been asserted by corporations." (citations omitted)).

> FN5. *See Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) ("The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment.").

Accordingly, we easily conclude that Primera, as an incorporated religious organization, stated a section 1983 claim for the alleged violation of its equal protection, due process, and free exercise rights. The district court, therefore, erred in dismissing Primera's constitutional claims.

[10] The County nevertheless urges us to affirm the dismissal of Primera's § 1983 suit by applying "the well-established rule that where, as here, both constitutional and statutory claims arising from the same set of operative facts are asserted, *only* the statutory issues should be decided." (Appellee's Br. at 15.) The County cites a variety of decisions for the unremarkable proposition that a case should be decided on statutory, rather than constitutional grounds, whenever possible- *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152, 89 L.Ed. 101 (1944); *Konikov v. Orange County*, 410 F.3d 1317, 1319 n. 1 (11th Cir.2005); *Communist Party of Ind. v. Whitcomb*, 414 U.S. 441, 452, 94 S.Ct. 656, 38 L.Ed.2d 635 (1974).

[11] The County is surely correct that the Supreme Court and this Court have long held that where a party raises both statutory and constitutional arguments in support of a judgment, a court should first consider whether the plaintiff is entitled to full relief under a statute, and if so, should not reach the constitutional issue. *See, e.g., McLaughlin*, 323 U.S. at 105, 65 S.Ct. 152 ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable."); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) (explaining that the Court avoids constitutional questions "if a case can be decided [by] a question of statutory construction or general law"); *Konikov*, 410 F.3d at 1319 n. 1. But if a plaintiff is not entitled to statutory relief (as is the case here), then the constitutional claims are unavoidable and the federal court must address their merits. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996) ("We have often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress."); *Metropolitan Life v. Lockette*, 155 F.3d 1339, 1341 (11th Cir.1998) ("Abstention from the exercise of federal jurisdiction is the exception, not the rule. The doctrine of abstention ... is an extraordinary and narrow exception to the

duty of a District Court to adjudicate a controversy properly before it." (internal quotation marks omitted)).

The County, in a corollary argument, invites us to hold that, because RLUIPA's protections equal or exceed the constitutional protections Primera asserts, Primera's failure to prove its constitutional claims necessarily follows from its failure to prove a statutory violation of RLUIPA. We decline the County's invitation to address the merits of this argument, because the district court did not make any findings of fact specifically related to Primera's constitutional claims, and we are unwilling to make such findings in the first instance. As we have observed elsewhere, "[t]he reviewing court oversteps the bounds of its duty ... if it undertakes to duplicate the role of the lower court .... '[A]ppellate courts must constantly have in mind that their function is not to decide ***1307** factual issues *de novo.* ' " *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1351 (11th Cir.2005) (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969)). We are reluctant to reach out to decide an important constitutional question before the district court has made any findings of fact or drawn any conclusions of law on this issue.

Accordingly, we hold that Primera, as an incorporated religious organization, stated a section 1983 claim for violation of its equal protection, due process, and free exercise rights. Because the district court erred in dismissing Primera's constitutional claims, we reverse that order and remand for further proceedings consistent with this opinion.

III.

Primera also argues the district court erred in concluding that the County did not violate RLUIPA's Equal Terms provision. According to Primera, the evidence at trial established that the County treated Primera on less than equal terms with the Broward Preparatory School. Primera assigns three basic errors: first, the district court improperly held that the School and Primera are not similarly situated; second, the district court failed to recognize that "the County's differing treatment toward [Primera and the School is] simply inexplicable," from which one must infer a hostility to religion; and finally, the district court failed to consider that the County applied to Primera a separation requirement that "was never intended to apply to that area," as evidenced by the County's differential treatment of the School. Although Primera styles these as separate arguments, in fact each is based on the premise that by comparing Primera's treatment with the School's, the district court necessarily should have found unequal treatment in violation of the Equal Terms provision of the statute. We are unper- suaded.

RLUIPA's Equal Terms provision states that "[n]o government shall impose 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). This statutory command "requir[es] equal treatment of secular and religious assemblies [and] 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.* " *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir.2004) (emphasis added).

[12][13][14] There are four elements of an Equal Terms violation: (1) the plaintiff must be a religious assembly or institution, (2) subject to a land use regulation, that (3) treats the religious assembly on less than equal terms, with (4) a nonreligious assembly or institution.[FN6] ***1308**42 U.S.C. § 2000cc(b)(1); *see Midrash*, 366 F.3d at 1232. Under the statute, the plaintiff bears the initial burden of "produc[ing] prima facie evidence to support a claim alleging a[n Equal Terms] violation." 42 U.S.C. § 2000cc-2(b). If the plaintiff meets its initial burden, "the government ... bear[s] the burden of persuasion on any element of the claim." *Id.*[FN7]

We have also held that a violation of the Equal Terms provision is not necessarily fatal to the land use regulation, *Midrash*, 366 F.3d at 1231-35, but "a violation of § (b)'s equal treatment provision ... must undergo strict scrutiny." *Id.* at 1232. Under that rubric, the offending conduct may be upheld if the defendant establishes that the conduct employs a *narrowly* tailored means of achieving a *compelling* government interest. *Id.* (citing *Lukumi*, 508 U.S. at 546, 113 S.Ct. 2217).

> FN6. We have defined an "assembly" as "a company of persons collected together in one place and usually for some common purpose (as deliberation and legislation, worship, or social entertainment)," and an "institution" as "an established society or corporation: an establishment or foundation especially of a public character." *Konikov v. Orange County, Fla.*, 410 F.3d 1317, 1325 (11th Cir.2005) (internal quotation marks omitted). Although the statute does not define the term "religious," we give this common term it its natural meaning: "relating to that which is acknowledged as ultimate reality: manifesting devotion to and reflecting the nature of the divine or that which one holds to be of ultimate importance." *Webster's Third New International Dictionary* (2002); *see also Nat'l Coal Ass'n v. Chater*, 81 F.3d 1077, 1081 (11th Cir.1996) ("Terms that are not defined in the statute ... are given their ordinary or natural meaning."). The statute defines a "land use regulation" 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[ ] ... property interest in the regulated land." 42 U.S.C. § 2000cc-5(5).

> FN7. The statute's burden shifting provision states:
>
> (b) Burden of persuasion
>
> If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.
>
> 42 U.S.C. § 2000cc-2(b).

[15] The parties agree (and the record is undisputed) that Primera is a religious assembly subject to a land use regulation, so the first two elements are readily satisfied. The dispute on appeal thus concerns whether Primera met its initial burden to produce evidence supporting the last two elements of the claim: that the land use regulation treats the religious assembly on less than equal terms with a nonreligious assembly or institution. We review *de novo* the district court's conclusions of law, including its interpretation of a statute. *Dysert v. U.S. Sec'y of Labor*, 105 F.3d 607, 609 (11th Cir.1997).

[16] Based on a review of our case law construing the Equal Terms provision and reviewing closely related Supreme Court precedent arising under the Free Exercise Clause of the First Amendment, we can discern at least three distinct kinds of Equal Terms statutory violations: (1) a statute that facially differentiates between religious and nonreligious assemblies or institutions; (2) a facially neutral statute that is nevertheless "gerrymandered" to place a burden solely on religious, as opposed to nonreligious, assemblies or institutions; or (3) a truly neutral statute that is selectively enforced against religious, as opposed to nonreligious assemblies or institutions. We discuss each in turn and conclude that on this record none have been established.

In *Midrash*, we confronted the first kind of statutory Equal Terms violation-facial discrimination. There, the zoning ordinance under consideration created a zoning district in which certain non-religious assemblies and institutions were permitted, but religious assemblies were prohibited. *Midrash*, 366 F.3d at 1230-31. A ***1309** panel of this Court held that the ordinance facially violated RLUIPA's Equal Terms provision, and struck the ordinance down after determining that it failed strict scrutiny review. *Midrash*, 366 F.3d at 1231-35. Here, Primera concedes, and we agree, that the zoning provisions in question-the Separation Requirement, BCZC § 39-246(9)(a), variance provisions, *id.* at §§ 39-35-39-44, and rezoning provisions, *id.* at §§ 39-24-39-32-are facially neutral and therefore do not constitute a facial Equal Terms statutory violation.

[17] The second manner in which a law could violate the Equal Terms provision's "requirements of neutrality and general applicability," *Midrash*, 366 F.3d at 1232, may be exemplified by the Supreme Court's decision in *Lukumi*, which examined the constitutionality of a facially neutral law that nevertheless targeted religion through a "religious gerrymander." [FN8] 508 U.S. at 535, 113 S.Ct. 2217. The City of Hialeah ordinances at issue in *Lukumi* had the effect of proscribing ritualistic animal sacrifice by adherents of the Santeria religion, while at the same time permitting animal slaughter for other religious or secular purposes. The Supreme Court looked to the text of the challenged ordinances and concluded that they were "drafted in tandem to achieve [the] result" that "almost the only conduct subject to [the challenged ordinances was] the religious exercise of Santeria church members." *Id.* This careful drafting of otherwise facially neutral classifications essentially constituted a religious "gerrymander" that departed from principles of neutrality because it revealed that the ordinances "had as their object the suppression of religion." *Id.* at 542, 113 S.Ct. 2217. The Supreme Court also held that the ordinances were not generally applicable because they pursued the city's interests *only* against conduct motivated by religious belief. *Id.* at 544-45, 113 S.Ct. 2217. Accordingly, the Court employed strict scrutiny review to strike down the ordinances as violating the Free Exercise Clause of the First Amendment, determining that they were not narrowly tailored to accomplish a compelling government interest.[FN9] *Id.* at 546, 113 S.Ct. 2217.

> FN8. To "gerrymander" is "[t]o divide (an area) into political units in an unnatural and unfair way with the purpose of giving special advantages to one group." *Webster's Third New International Dictionary* 952 (2002). In 1812, "the notoriously outrageous political districting in Massachusetts ... gave the gerrymander its name-an amalgam of the names of Massachusetts Governor Elbridge Gerry and the creature ('salamander') which the outline of an election district he was credited with forming was thought to resemble." *Vieth v. Jubelirer*, 541 U.S. 267, 274, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (citing *Webster's New International Dictionary* 1052 (2d ed.1945)).

> FN9. Although in *Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 877-90, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), the Supreme Court, interpreting the Free Exercise Clause, held that a neutral law of general applicability is not subject to strict scrutiny even if the law has the incidental effect of burdening religious exercise, the *Lukumi* court applied strict scrutiny precisely because it found the statute covertly departed from principles of neutrality and general applicability, thereby placing it outside the ambit of the *Smith* rule. *Lukumi*, 508 U.S. at 546, 113 S.Ct. 2217.

Thus, a religious "gerrymander" that departs from basic principles of neutrality may also support a RLUIPA Equal Terms violation. To prove this kind of statutory violation, Primera would have to show

that the challenged zoning regulation separates permissible from impermissible assemblies or institutions in a way that burdens "almost only" religious uses. But Primera ***1310** presented no such evidence here, and our review of the local zoning ordinances at issue reveals that they were not in the slightest degree "gerrymandered" to burden only religious uses. Indeed, the County's 1000-foot Separation Requirement applies generally to *all* non-agricultural, non-residential uses without regard to religion. *See* BCZC § 39-246(9)(a). Owners may avoid the separation requirement *only* by requesting a variance or rezoning; there are no special carve-outs or exceptions made for non-religious land uses. *Id.* at §§ 39-35-39-44, and §§ 39-24-39-32. The zoning code provisions setting forth criteria for variances and rezoning are likewise neutral and generally applicable. *Id.* Moreover, all of the zoning ordinances at issue were enacted before Primera purchased the Property, further undermining any suggestion that the zoning code "target[ed] Primera's lesser known religious sect." Accordingly, the record is abundantly clear that Primera failed to produce any evidence that the County violated RLUIPA's Equal Terms provision by engaging in a religious "gerrymander."

[18] A third kind of statutory Equal Terms violation would arise in the case of *discriminatory application* of a facially neutral, generally applicable statute. *See Konikov*, 410 F.3d at 1327-29 (holding that discriminatory application of a facially neutral statute violates RLUIPA's Equal Terms provision); *cf. Lukumi*, 508 U.S. at 532, 113 S.Ct. 2217 ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue ... regulates or prohibits conduct because it is undertaken for religious reasons."). Primera essentially claims this kind of as-applied Equal Terms violation is evident because the County rezoned the Broward County Preparatory School's property, while, at the same time, it denied Primera's request for a variance. The Church further claims that under our decision in *Midrash*, "RLUIPA's equal terms provision does not require a finding that the alleged disparate treatment be between two uses similarly situated in all relevant respects." The County responds, and we agree, that the School is simply not a valid comparator here because the "rezoning" process is an entirely different form of relief from obtaining a "variance."

In *Konikov*, the plaintiff brought an as-applied Equal Terms challenge to zoning regulations that prohibited a rabbi from conducting thrice-weekly "Chabad" meetings in his residence.[FN10] The plaintiff contended that the municipality discriminatorily applied a zoning regulation requiring a special exception for religious and social organizations located in a certain district. The plaintiff presented evidence that the municipality required religious assemblies meeting thrice-weekly in a rabbi's home to apply for a special permit, but did not require a permit to conduct similarly frequent in-home secular assembly meetings. *Id.* at 1327. The *Konikov* Court framed its as-applied Equal Terms analysis this way:

> FN10. Chabad "refers ... to a particular movement/philosophy/denomination within Orthodox Judaism that emphasized certain mystical teachings, as well as outreach and education in the Jewish world." *Konikov*, 410 F.3d at 1320 n. 2.

> Even though the Code, on its face, treats all of the relevant comparable groups the same ... If, as here, the [municipality] deems a group that meets three times per week a religious organization, but does not consider a group having *comparable* community impact a "social organization," that is a violation.
> ***1311** *Id.* (emphasis added).

The Court went on to compare the government's treatment of religious and nonreligious organizations, and concluded that it violated the Equal Terms provision because "[g]roups that meet with *similar frequency* are in violation of the Code only if the purpose of their assembly is religious." *Id.* at 1329 (emphasis added). Accordingly, we reversed the district court's grant of summary judg-

ment and held that the plaintiff presented sufficient evidence to prove an as-applied Equal Terms violation.

[19][20] Thus *Konikov* stands for the proposition that a neutral statute's *application* may violate the Equal Terms provision if it differentially treats *similarly situated* religious and nonreligious assemblies. [FN11] 410 F.3d at 1327-29; *cf. Campbell*, 434 F.3d at 1314 ("[D]ifferent treatment of dissimilarly situated persons does not violate the equal protection clause." (internal quotation marks omitted)). A plaintiff bringing an as-applied Equal Terms challenge must present evidence that a *similarly situated* nonreligious comparator received differential treatment under the challenged regulation. If a plaintiff offers no similarly situated comparator, then there can be no cognizable evidence of less than equal treatment, and the plaintiff has failed to meet its initial burden of proof. *See* 42 U.S.C. § 2000cc-2(b).

> FN11. Although Primera relies on our decision in *Midrash* for the proposition that, for Equal Terms purposes, non-religious comparators need not be similarly situated to the religious plaintiff, its reliance is misplaced. *Midrash* involved a *facial* Equal Terms challenge, 366 F.3d at 1230, while *Konikov*, decided an *as-applied* Equal Terms challenge by engaging in a similarly situated analysis. 410 F.3d at 1326-28. In deciding the as-applied Equal Terms claim before us, we are therefore guided more by *Konikov* than by *Midrash*.

With this in mind, we turn to the question of whether Primera presented a similarly situated comparator. Primera says that it was similarly situated with the School, but we disagree. Primera and the School are not similarly situated because, notably, they sought markedly different forms of zoning relief, from different decision-making bodies, under sharply different provisions of local law.

To begin with, rezoning and variance plainly have different purposes. As Primera's own expert testified at trial, a variance is

> a legal procedure whereby [the Board of Adjustment] gives relief ... to individual property owners where it becomes impractical or there is a hardship that surrounds the particular use of property. Zoning codes can't be designed to meet every particular piece of property that they zone, so, therefore, the variance procedure is a commonly acceptable form of giving *individual relief* to a *specific property owner* based on specific set of conditions and standards applicable only to that location.

(emphasis added). Since a variance is meant to alleviate a particular owner's hardship, it does not alter the property's zoning classification; it merely grants the present owner a right to deviate from the general rule.

By contrast, rezoning is not meant to alleviate a particular landowner's hardship; rather, it is a general adjustment of the zoning scheme that affects the rights of all future landowners. As Primera's expert explained, rezoning "chang[es] ... the map portion of the property rights .... The rights to the property." And because rezoning is a general adjustment of the zoning scheme, the County takes "substantially***1312** more time to review the details of what the impact would be and if it would be appropriate for this location."

Moreover, different decision-making bodies within the County government decide whether to grant rezonings or variances: a party seeking to rezone its property petitions the *Zoning Board*, BCZC § 39-26, while a party seeking a variance applies to the *Board of Adjustment*, BCZC § 39-35. These wholly different decision-making bodies are guided by different standards as well, and there is a different application and approval process for rezoning versus a variance.

For example, the Zoning Board conducts a public hearing on a request for rezoning after providing

due notice. BCZC § 39-27. The Zoning Board then formulates a recommendation, taking into consideration the criteria discussed below and comments received during the public hearing. The Zoning Board may defer the matter, recommend a less intensive zoning classification than requested, recommend approval, or recommend denial. BCZC § 39-29. The Zoning Board's recommendation then goes to the County Commission for final approval or denial. BCZC § 39-30. In sharp contrast, a party seeking a variance applies to the Board of Adjustment. BCZC § 39-35. The County zoning staff review any variance application, and present a recommendation to the Board of Adjustment, which must then conduct a public hearing. After the public hearing the Board of Adjustment decides whether to grant the variance.

While there is some overlap in the criteria that govern the decision to rezone or grant a variance-in both instances, the decision-maker will consider whether the relief is consistent with the general intent and purpose of the zoning code, and whether there exists changed or changing conditions which make approval of the request appropriate, BCZC §§ 39-28, 39-40-these similarities are slight in comparison to the pronounced differences in the criteria governing variance and rezoning decisions. Thus, for example, when deciding whether to rezone a property, the Zoning Board considers the following factors, which the Board of Adjustment does *not* consider when deciding on a variance: (1) whether there exists an error or ambiguity which must be corrected; (2) whether the request is consistent with the densities, intensities, and general uses set forth in the Broward County Comprehensive Plan and Land Use Element Map; (3) whether the request will protect, conserve, or preserve environmentally critical areas and natural resources; (4) whether the request will place an undue burden on existing infrastructure and whether capacity exists for any projected increase that may be generated; and (5) whether the permitted uses in a requested rezoning are compatible with existing and proposed uses in the general vicinity; except, however, nonconforming uses of neighboring lands, structures, or buildings shall not be considered as support for approval of any request. BCZC § 39-28.

Conversely, the Board of Adjustment must consider the following criteria in deciding whether to grant a variance, which the Zoning Board does *not* consider at all in deciding whether to rezone property: (1) whether there are unique and special circumstances or conditions applying to the property in question, or to the intended use of the property, that do not apply generally to other properties in the same district; (2) whether any alleged hardship is not self-created by any person having an interest in the property or is the result of mere disregard for, or ignorance of, the ***1313** provisions of the Code; (3) whether strict application of the provisions of the Code would deprive the petitioner of reasonable use of the property for which the variance is sought; and (4) whether the variance proposed is the minimum variance which makes possible the reasonable use of the property. BCZC § 39-40.

In addition to the differences apparent from the BCZC's terms, Primera itself acknowledges important differences between a variance and rezoning, and between Primera and the School: "Whether a property owner seeks a variance versus a rezoning is primarily dependent upon the size of the parcel and the future anticipated uses of the site. Primera's property is less than one acre in size in contrast to the Prep School's current size of nearly 70 acres." This neatly describes one of the powerful reasons the School is an inapt comparator: its property is seventy times as large as Primera's. Nor, tellingly, does Primera allege that any other small property owner would be granted the same zoning relief as a property owner with seventy times as much land. *Cf. Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir.2003) ("Whatever specific difficulties [plaintiff church] claims to have encountered, they are the same ones that face all [land users]. The harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them."

(alterations in original) (quoting *Love Church v. City of Evanston*, 896 F.2d 1082, 1086 (7th Cir.1990)).

Viewed in this light, it is abundantly clear, as the district court found, that Primera failed to establish a prima facie Equal Terms violation because it introduced no evidence that the County applied the BCZC in a manner that "subtly or covertly depart[ed] from requirements of neutrality and general applicability." *Midrash*, 366 F.3d at 1232. The evidence Primera adduced regarding its treatment and the School's treatment is consistent with the County's neutral application of different zoning regulations. Primera's evidence establishes only that the School received *different* treatment, not *unequal* treatment.

This conclusion is consonant with our recent holding in the Equal Protection context that "projects which seek different types of variances are not similarly situated." *Campbell*, 434 F.3d at 1314. *Cf. E & T Realty v. Strickland*, 830 F.2d 1107, 1109 (11th Cir.1987) ("Different treatment of dissimilarly situated persons does not violate the equal protection clause."); *Lighthouse Inst. for Evangelism Inc. v. City of Long Branch*, 100 Fed.Appx. 70, 77 (3d Cir.2004) (holding that the plaintiff failed as a matter of law to establish a prima facie violation of RLUIPA's Equal Terms provision because "the Mission ... failed to produce evidence to support its contention that the secular assemblies it identified were actually similarly situated such that a meaningful comparison could be made.").

[21] The bottom line, fatal for Primera's statutory claim, is that RLUIPA's Equal Terms provision requires equal treatment, not special treatment. *Midrash*, 366 F.3d at 1231-32; *Civil Liberties for Urban Believers*, 342 F.3d at 762 ("[N]o ... free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise."); *cf. Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217; *Smith*, 494 U.S. at 886, 110 S.Ct. 1595. And without identifying a similarly situated nonreligious comparator that received favorable treatment, Primera ***1314** failed to establish a prima facie Equal Terms violation.[FN12] The result in this case might be different if the Church had been denied a request for rezoning-at the very least it would have afforded a reasonable basis for comparison-but on these facts, the Church's Equal Terms claim plainly fails.[FN13]

FN12. Although Primera argues that the district court made certain erroneous factual findings related to the timing of the School's rezoning requests, we need not reach that issue because Primera concedes it did not seek the same zoning relief as the School.

FN13. The County also contends that Primera failed to offer evidence supporting the fourth element of an Equal Terms violation: the secularity of its comparator assembly. Although such proof is unquestionably required to support an Equal Terms claim, 42 U.S.C. § 2000cc(b)(1), we need not consider the sufficiency of Primera's evidence on this element because we have already decided that Primera failed to support the "less than equal terms" element of its prima facie case. 42 U.S.C. §§ 2000cc(b)(1), 2000cc-2(b).

Accordingly, we reverse the district court's dismissal of Primera's section 1983 claims and remand for further proceedings consistent with this opinion, but we affirm the district court's entry of final judgment, after trial, on Primera's Equal Terms RLUIPA claim.[FN14]

FN14. The County filed a Notice of Cross-Appeal challenging the constitutionality of RLUIPA and FRFRA's "substantial burden" provisions, but expressly abandoned its cross-appeal in its Answer Brief. Accordingly, the County's cross-appeal is DISMISSED.

AFFIRMED IN PART; REVERSED AND RE-

450 F.3d 1295, 19 Fla. L. Weekly Fed. C 603
(Cite as: 450 F.3d 1295)

MANDED IN PART.

C.A.11 (Fla.),2006.
Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County
450 F.3d 1295, 19 Fla. L. Weekly Fed. C 603

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358 F.Supp.2d 1207, 18 Fla. L. Weekly Fed. D 495
(Cite as: 358 F.Supp.2d 1207)

United States District Court,
S.D. Florida.
THE WILLIAMS ISLAND SYNAGOGUE, INC.,
Plaintiff,
v.
CITY OF AVENTURA, Defendant.
No. 0420257CIV.

Feb. 24, 2005.

Background: Synagogue challenged city's denial of conditional use permit, alleging violation of both Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) and Florida Religious Freedom Restoration Act of 1998. City moved for summary judgment.

Holdings: The District Court, Ungaro-Benages, J., held that:
(1) denial of synagogue's conditional use application did not substantially burden members' ability to worship according to their beliefs, and
(2) application of conditional use permit requirement was not discriminatory.

Motion granted.

See also 2005 WL 121783.

West Headnotes

[1] Civil Rights 78 ⇐1073

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1073 k. Zoning, Building, and Planning; Land Use. Most Cited Cases
City's denial of Orthodox Jewish synagogue's conditional use application to operate in new location did not substantially burden synagogue members' ability to worship according to their beliefs, and thus did not, under Religious Land Use and Institutionalized Persons Act (RLUIPA) or Florida Religious Freedom Restoration Act (FRFRA), have to be justified by compelling governmental interest; worship distractions caused by physical limitations of synagogue's current location, i.e., lack of separate space for movement of late-arriving congregants or for kiddush preparation and necessity for congregants to turn in order to face Jerusalem, did not amount to substantial burdens. Religious Land Use and Institutionalized Persons Act of 2000, § 2(a)(1), 42 U.S.C.A. § 2000cc(a)(1); West's F.S.A. § 761.03(1).

[2] Civil Rights 78 ⇐1032

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1030 Acts or Conduct Causing Deprivation
78k1032 k. Particular Cases and Contexts. Most Cited Cases
Religious Land Use and Institutionalized Persons Act (RLUIPA) and Florida Religious Freedom Restoration Act (FRFRA) do not protect religious assemblies from being distracted while observing their religious beliefs; rather, they protect religious assemblies from "substantial burdens," i.e. pressures that force assemblies to forego their religious beliefs. Religious Land Use and Institutionalized Persons Act of 2000, § 2(a)(1), 42 U.S.C.A. § 2000cc(a)(1); West's F.S.A. § 761.03(1).

[3] Civil Rights 78 ⇐1073

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1073 k. Zoning, Building, and Planning; Land Use. Most Cited Cases
Requirement that synagogue obtain conditional use permit before moving into residential zoning district, while condominium building's accessory party room was allowed to operate without permit, did

not constitute type of less favorable treatment proscribed by Religious Land Use and Institutionalized Persons Act (RLUIPA); statute did not compels municipal government to treat religious institutions in same manner as residential uses. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b), 42 U.S.C.A. § 2000cc(b).

***1208** Lawrence R. Metsch, of Metsch & Metsch, P.A., Miami, FL, for plaintiff.

Harriet R. Lewis, of Weiss Serota Helfman Pastoriza Guedes Cole & Boniske, P.A., Ft. Lauderdale, FL, for defendant.

ORDER GRANTING DEFENDANT'S CORRECTED MOTION FOR SUMMARY JUDGMENT

UNGARO-BENAGES, District Judge.

THIS CAUSE is before the Court upon Defendant's Corrected Motion for Summary Judgment, filed December 29, 2005.

THE COURT has considered the motion and the pertinent portions of the record and is otherwise fully advised in the premises.

FACTS

The following facts are derived from the facts to which the parties have stipulated, Defendant's statement of undisputed material facts and the deposition transcripts contained in the record. Plaintiff's statement of facts filed in support of its response to Defendant's motion for summary judgment does not contain a recitation of the facts in this case or dispute those facts put forth by Defendant; rather, Plaintiff only lists questions that it claims prevent the entry of summary judgment in Defendant's favor. Under Rule 7.5.D of the Local Rules of the United States District ***1209** Court for the Southern District of Florida, the Court deems Plaintiff to have admitted those material facts set-forth by Defendant that are supported by citation to the record.

Plaintiff Williams Island Synagogue, Inc. (Plaintiff or the synagogue) is a nonprofit Florida corporation whose congregation adheres to the principles and traditions of Orthodox Judaism. Rabbi Jonathan Horowitz has served as a pulpit rabbi, i.e. a rabbi chosen to perform certain pastoral and educational duties, to the synagogue since July 2000. Deposition of Jonathan Horowitz, at 9. Between thirty and fifty people on average would regularly attend religious services at the congregation in mid-2000, whereas now between thirty and fifty people on average attend weeknight services and between eighty and, on several occasions during winter months, up to two hundred people on average attend Saturday morning services. *Id.* at 27-28.

I. ***Facts relating to Plaintiff's substantial burden claim***

The Synagogue has operated in its present location at 2000 Island Boulevard since sometime in the mid-1990s. *Id.* at 22. This space, to which the Court shall refer to as the current location, has been partitioned to separate male and female congregants in a manner that conforms with the tenets of Orthodox Judaism and has existed in its present configuration for the past ten years. *Id.* at 49-50, Deposition of Julius Trump, at 23, 49.

Plaintiff, in its words, claims that "[three] problem[s] under Jewish law [are] presented" by the current location, Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, at 5, but has never retained an interior designer or other professional to assess how the current location may be reconfigured to alleviate or eliminate these problems, Horowitz Depo., at 48, 50. First, Plaintiff claims that female congregants who arrive late to prayer services must pass through the section reserved for men in order to get to the section reserved for female worshipers, creating a disturbance that distracts from prayer and the services. Plaintiff's Memo., at 5; Horowitz Depo., at 51-52. Second, the kiddush, or ceremonial blessing of wine and meal that follows Sabbath services, is

prepared in the prayer area while services are ending, creating a distraction. Plaintiff's Memo., at 5; Horowitz Depo., at 53-54. Finally, Plaintiff claims that the north by northeast orientation of the current location prevents congregants from worshiping while facing toward Jerusalem in the east as required by Orthodox Judaism. Plaintiff's Memo., at 5; Horowitz Depo., at 55-57.

While being deposed regarding these problems with the current location, Rabbi Horowitz stated that tardy female worshippers now have the choice of walking through or around the men's prayer area and that it is equally distracting when either men or women arrive late to services. Horowitz Depo., at 68-69. Next, he explained that the distraction caused by the kiddush is the result of the female volunteers moving food and talking to one another as well as the need to relocate to the front of the room male congregants who have become accustomed to using particular seats near the kitchen. *Id.* at 65-67. Finally, he stated that Jewish law requires worshippers themselves, rather than the building in which they worship, to face toward Jerusalem during prayer. As the existing location has always faced north by northeast, this problem is now solved by allowing individuals to rotate their bodies or chairs to face toward the east while praying. *Id.* at 56-58. Rabbi Horowitz, however, testified that this rotation***1210** creates an inconvenient distraction. *Id.* at 58.

Plaintiff claims that these three problems would be solved by allowing it to relocate to a 6,000 square foot space, to which the Court shall refer to as the proposed location, located in the ground floor level of a parking garage adjacent to the residential building housing the 2600 Island Boulevard Condominium, to which the Court shall refer to as the 2600 Building. Joint Pretrial Stipulation, at 16. The proposed location is accessible only through a twenty-foot wide service driveway now used for deliveries to the 2600 Building and by Williams Island residents as a walking and jogging path. *Id.*

II. ***Facts relating to Plaintiff's disparate treatment claim***

The 2600 Building includes a party room available exclusively to building residents and their guests for, among other uses, holiday and birthday celebrations and religious celebrations. Joint Pretrial Stip., at 16-17. This room can accommodate between eighty and one hundred people at a time. *Id.* at 17. The party room was designated as an accessory use to the 2600 Building under the appropriate zoning requirements at the time of the building's construction in September 1997. Affidavit of Joanne Carr, at 12.

The proposed location, the 2600 Building and the party room are located within a zoning district designated by Defendant as a Multifamily High Density Residential District ("RMF4"). Joint Pretrial Stip., at 17. Sections 31-143(f)(2) and (2a) of the City of Aventura Municipal Code provide that buildings, structures or land located within an RMF4 district may only be used for those uses approved within Multifamily Medium Density Residential Districts ("RMF3s"), high-rise apartments, publicly owned recreation facilities, assisted living facilities, uses accessory to these uses, and, if first approved as a conditional use, "all uses permitted in the [Community Facilities] District." Section 31-147 governs the use of land within Community Facilities, or CF, districts. Sections 31-147(a)(1) and (a)(2) govern, respectively, those uses which are permitted as of right and those uses which require prior conditional approval; subsection (a)(1)(d) provides specifically that "[c]hurches or synagogues and other houses of worship" are among those uses permitted within CF districts, while subsection (a)(2)(d) lists, among other categories, "[p]rivate fraternal, civic, charitable, professional or educational non-profit organizations" as requiring conditional approval for operation within CF districts. Section 31-73 of the municipal code governs the procedures and requirements for conditional use applications. Section 31-73(d) provides that the Community Development Depart-

ment of the City of Aventura shall prepare a report summarizing the Department's assessment of whether a particular conditional use application satisfies the general criteria established by § 31-73(c).

As a result of the interaction of these statutory provisions, specifically § 31-143(f)(2a), while churches, synagogues and other religious institutions are entitled to operate within CF districts as of right, they require conditional approval before being allowed to operate within RMF4 districts. By comparison, activities and spaces that are accessory to permitted uses, such as the party room, are allowed as of right in RMF4 districts.

III. *Plaintiff's conditional use application and procedural history*

On April 8, 2002, Defendant issued a Certificate of Use which authorized Plaintiff to use the proposed location for religious exercises. Joint Pretrial Stip., at 17. This certificate was subsequently revoked ***1211** by Defendant. *Id.* On December 20, 2002, Plaintiff applied for conditional use approval pursuant to § 31-73 to use the proposed location for religious exercises. *Id.* On November 6, 2003, the Community Development Department delivered a report to the City of Aventura City Commission recommending that Plaintiff's conditional use application be denied because the proposal did not make adequate provisions for parking and because the walkway to and from the proposed location would not provide safe pedestrian access. *Id.* On November 12, 2003, the City Commission conducted a hearing on Plaintiff's conditional use application and then denied the application on a five to two vote. *Id.*

On February 3, 2004, Plaintiff filed the pending two-count complaint, seeking injunctive relief and damages against Defendant pursuant to both the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc et seq., and the Florida Religious Freedom Restoration Act of 1998 ("RFRA"), Fla. Stat. § 761.

Count I of Plaintiff's complaint contains two claims under RLUIPA. Plaintiff's first claim, to which the Court will refer as the "substantial burden claim," argues that the City's decision to deny the conditional use application violates Plaintiff's rights under § 2000cc(a)(1).[FN1] Plaintiff's second claim, to which the Court will refer as the "disparate treatment claim," alleges that § 31-143(f)(2a) of Defendant's municipal code, to the extent it requires conditional approval by the City Commission before religious organizations such as Plaintiff may locate within certain zoning districts, violates §§ 2000cc(b)(1) and (b)(2) of RLUIPA,[FN2] because the groups which use the party room located in the condominium at 2600 Island Boulevard are comparable nonreligious assemblies which have been treated on more favorable terms than Plaintiff. Count II of the complaint claims that Defendant's denial of Plaintiff's conditional use application violates Florida Statute § 761.03(1) by imposing a substantial burden on Plaintiff's religious beliefs for the same reasons explained in its claim under RLUIPA.[FN3]

FN1. Section 2000cc(a)(1) 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 governmental interest; and
>
> (B) is the least restrictive means of further that compelling governmental interest.

FN2. Section 2000cc(b) provides in pertinent part:

> (1) **Equal Terms**

> No government shall impose 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.
>
> (2) **Nondiscrimination**
>
> No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

FN3. Section 761.03(1) provides:

> 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.

On March 10, 2004, Defendant filed a motion to dismiss Plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that Plaintiff lacked ***1212** standing to bring this action, that Plaintiff's complaint failed to state a claim for which relief could be granted and that RLUIPA and RFRA were unconstitutional to the extent that they operate to invalidate zoning regulations of general, nondiscriminatory applicability. On May 6, 2004, the Court entered an order denying Defendant's motion to dismiss. The Court found first that Plaintiff has standing to maintain this action because the complaint alleges that the November 12, 2003 denial of the conditional use permit resulted in an actionable violation of Plaintiff's rights under RLUIPA. The Court then concluded that Plaintiff's substantial burden claim stated a cognizable claim after finding persuasive authority for the proposition that the denial of a zoning variance may under certain circumstances force religious institutions, as a result of increased membership, to forego their religious precepts in violation of RLUIPA. *Accord Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792 (W.D.Tex. Mar.17, 2004), *Westchester Day School v. Village of Mamaroneck*, 280 F.Supp.2d 230, 241-42 (S.D.N.Y.2003). The Court also concluded that Plaintiff's disparate treatment claim survived Defendant's Rule 12(b)(6) motion because Plaintiff stated a cognizable claim that it was required to submit to a certification process which did not apply to comparable private organizations, such as the 2600 Building's condominium association. Finally, the Court rejected Defendant's challenges to RLUIPA and RFRA based on the Eleventh Circuit's holding in *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1243 (11th Cir.2004),[FN4] that RLUIPA does not exceed Congress's authority under § 5 of the Fourteenth Amendment, does not violate the Establishment Clause of the First Amendment and does not abridge state sovereignty in violation of the Tenth Amendment.

> FN4. To the extent that Plaintiff's substantial burden claim can be understood as arguing that the synagogue's need to submit to the conditional use application process per se violates RLUIPA, the Court in her order denying Defendant's motion to dismiss observed that *Midrash Sephardi* rejects this argument. 366 F.3d at 1227 n. 11 ("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.").

On June 8, 2004, Plaintiff filed a motion for partial summary judgment, asking the Court to find as a matter of law that Defendant's denial of Plaintiff's conditional use permit application has imposed a "substantial burden" on Plaintiff's exercise of its religious beliefs, as that term is used in 42 U.S.C. § 2000cc(a)(1); that Defendant has treated Plaintiff and non-party the 2600 Island Boulevard Condominium Association on less than equal terms in violation of § 2000cc(b)(1); and that RLUIPA and RFRA are constitutional. Plaintiff's evidentiary submissions in support of that motion for partial summary judgment consisted entirely of copies of its complaint, Defendant's answer and affirmative defenses, the Eleventh Circuit's decision in *Midrash Sephardi*, the Court's order denying Defendant's motion to dismiss and the affidavits of Julius Trump, Plaintiff's Director, and Rabbi Jonathan Horowitz. Rabbi Horowitz stated in his affidavit that Plaintiff's members were unable to worship in conformance with the tenets of Orthodox Judaism in their current location.

On July 6, 2004, Defendant filed a motion to strike the affidavit of Rabbi Horowitz pursuant to Federal Rule of Civil Procedure 56(e), which requires that affidavits filed in support of a motion for summary judgment "shall be made on personal***1213** knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated herein."

On August 3, 2004, the Court entered an order denying Plaintiff's motion for partial summary judgment and denying Defendant's motion to strike. In denying the former, the Court held in part that summary judgment could not be entered in Plaintiff's favor based on the factual dispute created by the expert affidavit testimony introduced by Defendant to the effect that Plaintiff's members could worship in the current location in full conformance with the tenets of Orthodox Judaism. In denying the latter, the Court concluded that Rabbi Horowitz was an expert on the subject of Jewish law based on his education and experience and the fact that at least two circuit courts of appeal have relied on rabbinical testimony to determine the requirements of Orthodox Judaism.

Following the close of discovery, Defendant filed the pending motion for summary judgment as to all claims contained in Plaintiff's complaint.

LEGAL STANDARD

Summary judgment is authorized only when the moving party meets its burden of demonstrating that "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. The Supreme Court explained in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), that when assessing whether the movant has met this burden, the court should view the evidence and all factual inferences in the light most favorable to the party opposing the motion.

The party opposing the motion may not simply rest upon mere allegations or denials of the pleadings; after the moving party has met its burden of coming forward with proof of the absence of any genuine issue of material fact, the non-moving party must make a sufficient showing to establish the existence of an essential element 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, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 (11th Cir.1997); *Barfield v. Brierton*, 883 F.2d 923, 933 (11th Cir.1989).

If the record presents factual issues, the court must not decide them, it must deny the motion and proceed to trial. *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir.1981).[FN5] Summary judgment may be inappropriate even where

the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *Lighting Fixture & Electric Supply Co. v. Continental Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir.1969). If reasonable minds might differ on the inferences arising from undisputed facts then the court should deny summary judgment. *Impossible Electronic Techniques, Inc. v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1031 (5th Cir.1982); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) ("[T]he dispute about a material fact is 'genuine.' ... if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.").

> FN5. Decisions of the United States Court of Appeals for the Fifth Circuit entered before October 1, 1981, are binding precedent in the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981).

Moreover, the party opposing a motion for summary judgment need not respond ***1214** to it with evidence unless and until the movant has properly supported the motion with sufficient evidence. *Adickes*, 398 U.S. at 160, 90 S.Ct. 1598. The moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied notwithstanding that the non-moving party has introduced no evidence whatsoever. *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 611-12 (5th Cir.1967). The Court must resolve all ambiguities and draw all justifiable inferences in favor of the non-moving party. *Liberty Lobby, Inc.*, 477 U.S. at 255, 106 S.Ct. 2505.

ANALYSIS

I. *Plaintiff's substantial burden claim*

[1] Section 2000cc(a)(1) of RLUIPA prohibits zoning decisions that substantially burden a religious assembly's ability to adhere to its beliefs unless such a decision is supported by a compelling governmental interest. In order to determine whether Defendant is entitled to summary judgment on Plaintiff's substantial burden claim, the Court must proceed in two steps: (1) based on the undisputed facts established by the record, has Defendant's denial of Plaintiff's conditional use application to operate in the proposed location substantially burdened Plaintiff's members' ability to worship according to their beliefs; and (2) if so, was Defendant's decision in furtherance of a compelling governmental interest. Because the Court concludes as a matter of law that the answer to the first question is no, there is no need to reach the second.

A. *No reasonable trier of fact could find that a substantial burden is imposed on Plaintiff's members' religious beliefs in their current location*

The Eleventh Circuit, with emphasis added, has explained clearly that a substantial burden, as that term is used in RLUIPA, "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." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir.2004). (In *Warner v. City of Boca Raton*, 887 So.2d 1023, 1033 (Fla.2004), the Florida Supreme Court adopted this definition of substantial burden for purposes of RFRA.) Further, it may be appropriate upon a motion for summary judgment to determine as a matter of law whether a zoning decision has substantially burdened a religious assembly's religious beliefs where no genuine, material factual disputes exist. In *Midrash Sephardi*, for example, the Eleventh Circuit considered an Orthodox Jewish synagogue's appeal from the magistrate judge's entry of summary judgment in favor of the defendant municipality and the appellate court found, as a matter of law, that the

record viewed in the synagogue's favor established that the synagogue's members' religious beliefs had not been substantially burdened by the city's actions. 366 F.3d at 1228-29. In this case, there is no factual dispute regarding the requirements imposed on Plaintiff's congregation by Jewish law and the ways in which Plaintiff's congregants are now required to enter, worship in and exit from the current location. Defendant and the Court now credit Rabbi Horowitz's testimony on these points. As in *Midrash Sephardi*, the undersigned concludes as a matter of law that Defendant's denial of Plaintiff's conditional use permit has not coerced Plaintiff's congregants into foregoing their religious beliefs.

***1215** Plaintiff's response to Defendant's motion for summary judgment identifies, but does not discuss at length, three "problems" that would be solved by approval of the conditional use application and relocation to the proposed location: (1) late-arriving women will no longer be forced to walk through the men's prayer area; (2) the kiddush will be prepared in a dining area separate from the prayer area; and (3) the congregants will no longer have to rotate their bodies in order to pray facing toward Jerusalem. These problems may or may not be solved in the proposed location but the Court need not decide that question in order to reject Plaintiff's substantial burden claim. There is no dispute that these problems either can be or already have been solved in the current location or that the distractions caused by these problems do not amount to substantial burdens.

Rabbi Horowitz has testified that late-arriving women now have the option of walking around the men's prayer area to arrive at their own. (And, the Court notes, tardy congregants will be equally disruptive in either location and Plaintiff cannot plausibly argue that the proposed location will cause all congregants to arrive on time for all religious services.) Next, Rabbi Horowitz has testified that the disruption caused by preparation of the kiddush is amplified by the decision of certain congregants to sit in the back of the prayer area; these individuals are now free to move forward before services begin, leaving the back of the prayer area empty for the preparation of the meal. Finally, the congregation is now able to adhere to its religious beliefs regarding the need to pray facing toward Jerusalem by rotating toward the east during prayer services.

To the extent that these problems cannot be solved in the current location, Plaintiff does not claim that they violate Jewish law but rather, using Rabbi Horowitz's characterization, claims that these problems distract congregants from prayer or religious services. Plaintiff, however, has made no argument explaining how distractions are actionable under RLUIPA. The only legal authority submitted by Plaintiff is neither relevant nor persuasive. Plaintiff argues, briefly, that the decision of the Seventh Circuit Court of Appeals in *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 2005 WL 221964 (7th Cir. Feb.1, 2005), supports its position. Plaintiff, however, ignores the fact that the Eleventh Circuit has rejected the Seventh Circuit's construction of the term substantial burden. *Midrash Sephardi*, 366 F.3d at 1227 ("[W]e decline to adopt the Seventh Circuit's definition [of the term.]"). Furthermore, the religious assembly applying for a conditional use permit in *Sts. Constantine and Helen* suffered a substantial burden by being forced to sell land in its possession or "be subjected to unreasonable delay by having to restart the permit process to satisfy the [municiaplity] about a contingency for which the Church has already provided complete satisfaction." 396 F.3d 895, 2005 WL 221964. Plaintiff in this case does not claim that Defendant's have comparably deprived the synagogue of the use of land in its possession. Instead, Plaintiff claims that it will have to continue to deal with certain distractions during prayer services unless allowed to relocate to land that it does not now own.

[2] RLUIPA does not protect religious assemblies from being distracted while observing their religious beliefs; by its terms, the statute protects religious assemblies such as Plaintiff from *substantial*

burdens, i.e. pressures that force assemblies to forego their religious beliefs. No reasonable trier of fact could conclude from the present record that Plaintiff's congregants are forced to forego the tenets***1216** of Orthodox Judaism in the current location. Men and women now sit separately as required by Jewish law, the kiddush is prepared-distractions notwithstanding-in a manner consistent with Jewish law and Plaintiff's members are able to rotate toward Jerusalem while praying. Accordingly, summary judgment in favor of Defendant is appropriate. [FN6]

> FN6. Plaintiff also argues without explanation that two unpublished opinions of the Sixth Circuit Court of Appeals support the conclusion that Defendant's zoning decision has imposed a substantial burden on Plaintiff's religious beliefs. *Dilaura v. Ann Arbor Charter Township*, 2002 WL 273774 (6th Cir. Feb.25, 2002); *DiLaura v. Township of Ann Arbor*, 2004 WL 2297869 (6th Cir. Oct.6, 2004). Plaintiff, however, has not explained the significance of these cases and the Court, after reviewing the holdings in each, concludes that they do not compel a result different than that reached here today.

B. *No genuine issues of material fact exist*

Next, Plaintiff argues that a genuine issue of material fact prevents the entry of summary judgment in Defendant's favor. Specifically, Plaintiff argues that the same genuine issue of material fact that prevented the Court from granting Plaintiff's motion for partial summary judgment now prevents the Court from granting Defendant's motion. This argument, however, is meritless. Plaintiff's motion asked the Court to find as a matter of law, and prior to the completion of discovery in this cause, that the three problems identified above imposed a substantial burden on Plaintiff's congregation as that term is used in RLUIPA; in response, Defendant introduced the testimony of an expert on Jewish law to the effect that these problems did not violate the tenets of Orthodox Judaism. The Court found that a conflict between the two submissions rendered summary judgment in Plaintiff's favor inappropriate. Now, upon Defendant's motion for summary judgment, the city, with the benefit of having deposed Rabbi Horowitz, does not dispute Plaintiff's characterization of the requirements of Jewish Law or the facts surrounding Plaintiff's members' worship in the current location. Instead, Defendant argues, and the Court agrees, that no reasonable trier of fact could find that the three problems identified by Plaintiff amount to substantial burdens under RLUIPA.

For these reasons, the Court concludes that no reasonable trier of fact could find that Defendant's zoning decision has imposed a substantial burden on Plaintiff's members' exercise of their religious beliefs in violation of RLUIPA. Because the same analysis applies to Plaintiff's claims under RFRA, the Court enters summary judgment in Defendant's favor on the substantial burden claims contained in Count I as well as Count II of Plaintiff's complaint. Because the Court finds that no substantial burden has been imposed, there is no need to reach the question of whether Defendant's decision was supported by a compelling governmental interest.

II. *Plaintiff's disparate treatment claim*

[3] Plaintiff claims that Defendant has "treated and continues to threat the Synagogue on less than equal terms with a nonreligious assembly or institution, to wit: the 'party room' in the 2600 Island Boulevard building." Defendant argues that Plaintiff is not being treated on unequal terms vis-a-vis the 2600 Building in violation of RLUIPA because the two entities are materially different under the zoning scheme adopted by Defendant. On this point, Plaintiff does not dispute that the party room located in the 2600 Building has been zoned as an accessory use to the ***1217** residential building located at that address and may operate within an RMF4 zoning district without need for a condition-

al use permit, nor does Plaintiff dispute that churches are one of several types of organizations that must first apply for leave of the zoning board to operate in an RMF4 zoning district. Instead, Plaintiff argues, without citation to the case or further explanation, that,

> as the decision in *Midrash Sephardi* makes clear, the issue which this Court must address is *not* whether the "party room" qualifies as an "accessory use" under the City's land development regulations. Rather, the factual questions which this Court must answer are whether (a) the "party room" is a "nonreligious assembly or institution" within the meaning of 42 U.S.C. § 2000cc(b)(1), *supra*, and (b) if so, by virtue of the denial of the Synagogue's application for a conditional use permit, it received from the City better treatment than did the Synagogue.
>
> ... [T]he 'party room' operated by the [2600 Building] is the quintessential 'social club' (hence ... a 'nonreligious assembly or institution' within the meaning of 42 U.S.C. § 2000cc(b)(1)) because it is reserved for the exclusive use of the residents of the 2600 Building and their invited guests.

Comparing this case to *Midrash Sephardi* and considering the relevant, undisputed facts makes clear that, as a matter of law, Plaintiff has not been treated on unequal terms vis-a-vis the 2600 Building in violation of RLUIPA because the party room of the 2600 Building is an accessory to a residential use rather than a separate nonreligious assembly.

In *Midrash Sephardi*, the court of appeals considered a zoning ordinance that prohibited religious assemblies from being located within a business district where "private clubs" and secular assemblies were permitted to operate. The ordinance at issue in that case defined private clubs as 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.' " 366 F.3d at 1233 (quoting Town of Surfside Zoning Ordinance § 90-2(20)). The defendant municipality explained that it affirmatively excluded churches, synagogues and other religious assemblies from these business districts because, in the city's judgment, they did not further the city's goal of increasing commerce within business districts. *Id.* Adopting the strict scrutiny test announced by the United States Supreme Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542, 545-46, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), the court of appeals found that this ordinance by its terms was not neutral between private clubs and religious entities, was not of general applicability and was not narrowly tailored to the city's goals. *Id.* at 1232-35.

In this case, the pertinent portions of the municipal code do not distinguish between religious and nonreligious assemblies in the same manner as the regulation struck down in *Midrash Sephardi*. Rather, §§ 31-143(f)(2) and (2a) of the City of Aventura Municipal Code distinguish between *residential* uses, and accessories thereto, and "all uses permitted in [CF] District[s]." Section 31-147, which governs CF districts, in turn provides that "[c]hurches or synagogues and other houses of worship" are among those uses permitted as of right within CF districts while "[p]rivate fraternal, civic, charitable, professional or educational non-profit organizations," i.e. the private clubs treated more favorably in *Midrash Sephardi*, require conditional approval before operating within CF districts. In other words, while residential uses, such as the party room, ***1218** are allowed as of right in RMF4 districts, such as the one in which the proposed location, the 2600 Building and the party room are located, both religious assemblies such as Plaintiff and private clubs such as those in *Midrash Sephardi* are required to apply for a variance before being allowed to operate in these districts. Rephrasing these distinctions in terms of RLUIPA, Plaintiff is treated less favorably than residential uses and accessories thereto because the synagogue must apply for a conditional use permit before moving into an

RMF4 district, but is treated on equal terms with the nonreligious institutions listed in § 31-147, which must also submit conditional use permit applications before operating in an RMF4 district.

Plaintiff has introduced no legal authority to support the proposition that RLUIPA compels municipal governments to treat religious institutions in the same manner as *residential* uses. Furthermore, Plaintiff has made no argument and introduced no evidence that would allow a reasonable trier of fact to conclude that Defendant's treatment of the 2600 Building and the synagogue was not neutral or was not conducted according to rules of general applicability. Rather, Plaintiffs asserts only that the party room is operated by the 2600 Building as a social club for its residents and their guests without explaining further how this residential use constitutes a nonreligious assembly or institution. The Court finds no basis in either the text of RLUIPA, the case law of other circuit courts of appeal or the Eleventh Circuit's analysis of RLUIPA for the conclusion that the term nonreligious assembly encompasses residential uses such as the 2600 Building; rather, this term's ordinary meaning encompasses organizations such as the private clubs and businesses such as those at issue in *Midrash Sephardi*- organizations that must submit to the same conditional use permit application process as Plaintiff before operating in RMF4 districts.

Plaintiff does not dispute Joanne Carr's testimony that the party room is zoned as an accessory use to the 2600 Building.[FN7] As a residential use, it is not a nonreligious assembly or institution for purposes of comparison under RLUIPA and Plaintiff's disparate treatment claims therefore fails as a matter of law.

> FN7. It is the undisputed testimony of Carr to the effect that the party room is an accessory to a residential use that now allows the Court to find as a matter of law that the 2600 Building and its party room are not a nonreligious assembly under RLUIPA.

For the reasons discussed above, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment is GRANTED.

S.D.Fla.,2005.
Williams Island Synagogue, Inc. v. City of Aventura
358 F.Supp.2d 1207, 18 Fla. L. Weekly Fed. D 495

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Not Reported in F.Supp.2d, 2006 WL 3219321 (M.D.Fla.), 20 Fla. L. Weekly Fed. D 314
(Cite as: 2006 WL 3219321 (M.D.Fla.))

United States District Court, M.D. Florida,
Orlando Division.
MEN OF DESTINY MINISTRIES, INC., Plaintiff,
v.
OSCEOLA COUNTY, Florida, Defendant.
No. 6:06-cv-624-Orl-31DAB.

Nov. 6, 2006.

Anita L. Staver, Mathew D. Staver, Liberty Counsel, Maitland, FL, Erik W. Stanley, Rena M. Lindevaldsen, David Michael Corry, Liberty Counsel, Lynchburg, VA, for Plaintiff.

Rebecca J. Martel, Albert F. Tellechea, David A. Jones, Holland & Knight, LLP, Orlando, FL, for Defendant.

MEMORANDUM OPINION

GREGORY A. PRESNELL, District Judge.

***1** The Plaintiff, Men of Destiny Ministries, Inc. ("MDM"), provides a rehabilitation program for men addicted to drugs or alcohol. The Defendant, Osceola County, Florida (the "County"), attempted to evict MDM from a group home near St. Cloud, Florida for failing to comply with the Osceola County Land Development Code (the "Code"). In response, MDM filed the instant suit, contending that the County's actions violated the Religious Land Use and Institutionalized Person Act of 2000, 42 U.S.C. § 2000cc *et seq.*, ("RLUIPA") (Count I); the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101-12213 ("ADA") (Count II); the Rehabilitation Act, 29 U.S.C. § 701 *et seq.* (Count III); the Fair Housing Act, 42 U.S.C. § 3601, *et seq.* *("FHA")* (Count IV); the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (Count V); the right to free speech contained in the First Amendment to the United States Constitution (Count VI); the right to peaceable assembly contained in the First Amendment to the United States Constitution (Count VII); the right to free exercise of religion contained in the First Amendment to the United States Constitution (Count VIII); and Florida's Religious Freedom Restoration Act of 1988, Fla. Stat. § 761.01 (the "FRFRA") (Count IX). A bench trial was held before the undersigned on July 26-28, 2006. Having thoroughly considered the evidence and argument of counsel, the Court enters its findings of fact and conclusions of law.

I. Jurisdiction and Venue

Subject matter jurisdiction is proper pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367. The parties do not contest personal jurisdiction or venue.

I. The Facts

MDM is a Florida not for profit corporation that operates a residential drug and alcohol rehabilitation program in Osceola County, Florida. MDM's president, George Shafter ("Shafter"), serves as the pastor of the program, which he refers to as a "Christian discipleship program." (Doc. 82 at 43-44). Much of the program is religious in nature, with participants required to, among other things, attend Bible study classes and worship services. (Doc. 1 at 8). The program also imposes strict discipline on the participants by way of mandatory curfews and requirements that overseers know of the participants' whereabouts at all times when they are outside the residence. (Doc. 1 at 8). Shafter describes the program as one of "regeneration" rather than "rehabilitation" (Doc. 82 at 45-46), but the distinction is not material for purposes of this case. [FN1]

FN1. In its verified complaint, MDM described itself as operating "a residential drug and alcohol rehabilitation program." (Doc. 1 at 4).

MDM relocated its program to a house at 3575 Michigan Avenue in Osceola County in July 2005. (Doc. 1 at 4). Shafter and his wife own the house and the two acres on which it sits, leasing the property to MDM. (Doc. 82 at 58). The house is located in an E-2A zoning district. (Doc. 1 at 4) "E-2A" is a residential classification-one of five "Estate Development" classifications in the Code-with two-acre minimum lots. (Code at 14-18). Single-family homes and certain ancillary uses-such as servant's quarters or stables-are permitted as of right in E-2A. (Code at 14-16). More intense uses, such as houses of worship and nursing homes, may be permitted if approved as a "conditional use". (Code at 14-17).

***2** What is referred to as a "Community Residential Home A" is also permitted as of right in the E-2A district (Code at 14-16), while a "Community Residential Home B" may be permitted if approved as a conditional use (Code at 14-17). The Code defines a community residential home as a "dwelling unit licensed to serve clients of the Department of Children & Families". (Code at 14-83). A Community Residential Home A can have no more than six residents, while a Community Residential Home B can have between seven and 14 residents. (Code at 14-83). The parties agreed that districts exist in Osceola County where a Community Residential Home B may exist as of right. So far as the record shows, during the period relevant to this suit, MDM had more than seven residents in the Michigan Avenue house. (Doc 82 at 71; Doc. 79 at 114). At least some (if not all) of those residents were recovering drug addicts or alcoholics, and many (if not all) had criminal records. (Doc. 79 at 40-47). It is undisputed that MDM is not licensed to serve clients of the Department of Children & Families, although MDM contends it was notified that the religious nature of its program made it exempt from the licensing requirement.

Prior to MDM moving in, the house on Michigan Avenue had suffered hurricane damage. (Doc. 82 at 51). MDM repaired that damage and began making alterations to the house, including such things as converting the garage and a carport into additional living space. (Doc. 82 at 60). MDM did not obtain the necessary permits for at least some of the renovations. (Doc. 82 at 61).

The renovations came to the attention of Osceola County Zoning/Code Enforcement ("Code Enforcement"), which inspected the house on September 20, 2005. (Doc. 82 at 64). Code Enforcement cited MDM for improperly allowing the property to be used for multi-tenant occupancy, for making alterations without permits, and for allowing the house to be used for a purpose for which it was not zoned-specifically, the residential rehabilitation program. (Plaintiff's Exh. 1 at 1). By letter dated October 26, 2005, Code Enforcement gave MDM two weeks to remedy the violations. (Plaintiff's Exh. 1 at 2). MDM halted the construction, acquired the proper building permits, and began the process of applying for a conditional use permit ("CUP") that would permit operation of the rehabilitation program on the property. (Doc. 82 at 65-71). MDM also moved the administrative and classroom aspects of the program to another site. (Doc 82 at 71). However, at a November 16, 2005 hearing, the Osceola County Code Enforcement Board found that violations continued at the property. (Plaintiff's Exh. 2 at 1). The board notified MDM that failure to remedy the problems by 8 a.m. the next day would result in a $200 per day fine. (Plaintiff's Exh. 2 at 2).

MDM continued working with the County to try to get a CUP to operate as a Community Residential Home B or as a "men's discipleship program" on the property. (Doc. 79 at 13-19). MDM representatives met with members of the Osceola County Planning Commission (the "Planning Commission"), which makes investigates and makes recommendations to the Board of County Commissioners regarding such things as CUP applications. (Doc. 1 at 14). Members of the Planning Commission staff recommended approval of MDM's CUP, subject to certain conditions.

***3** Some of MDM's neighbors, however, vigorously

opposed granting of the CUP. A dozen spoke against the measure at a March 2, 2006 meeting of the Planning Commission itself. (Doc. 1 at 15). Some said the facility was not compatible with the residential neighborhood, while others stated (or implied) that the alcoholics, drug addicts and criminals who resided in the house would pose a threat to the health and safety of neighborhood residents. (Doc. 1 at 15-16). The Planning Commission voted 6-2 to recommend denial of MDM's CUP application. (Doc. 1 at 16).

MDM met with members of the County Commission who would make the final decision on the CUP application, and numerous neighbors e-mailed commissioners to express their opposition. Again, many of the unhappy neighbors expressed their beliefs that a residential drug and alcohol rehabilitation facility was incompatible with the residential character of the neighborhood or that the facility's residents posed a threat to the health and safety of the people living or going to school in the neighborhood. (Doc. 1 at 17-22). By a vote of four to zero, the commissioners voted to deny the CUP and give MDM 45 days to relocate to a new location. (Doc. 1 at 23). The commissioners primarily cited compatibility concerns, rather than health and safety concerns, in explaining their decisions. (Doc. 1 at 22-23). The commissioners subsequently testified before this Court regarding the decision to deny the CUP application, and all denied that they made their decision based on the residents' status as recovering alcoholics and drug addicts, or based on the religious character of the MDM program. (Doc. 80 at 308-65).

At trial, MDM abandoned its facial challenge to the Code. (Doc. 82 at 32).

III. Legal Analysis

The burden of proof in civil cases is the same regardless of whether the finder of fact is a judge in a bench trial or a jury. *Cabrera v. Jakabovitz*, 24 F.3d 372, 380 (2d Cir.1994). That is, a plaintiff bears the burden of satisfying the finder of fact that he has proven every element of his claim by a preponderance of the evidence. A preponderance of the evidence means such evidence as, when considered with that opposed to it, has more convincing force, and demonstrates that what is sought to be proved "is more likely true than not true." *See* Pattern Jury Instructions (Civil Cases) of the Eleventh Circuit, Basic Instruction No. 6.1 (2000). In bench trials, the judge serves as the sole fact-finder and, thus, assumes the role of the jury. In this capacity, the judge's function includes weighing the evidence, evaluating the credibility of witnesses, and deciding questions of fact, as well as issues of law. *See generally Childrey v. Bennett*, 997 F.2d 830, 834 (11th Cir.1993).

Because the court acts as both the judge and the jury, it may resolve conflicts in the evidence, as well as make credibility assessments. *Stearns v. Beckman Instruments, Inc.*, 737 F.2d 1565, 1568 (Fed.Cir.1984). Finally, the court must set forth "findings of fact and conclusions of law," subject to reversal only if clearly erroneous. Fed.R.Civ.P. 52(c); *Holmes v. Bevilacqua*, 794 F.2d 142, 147 (4th Cir.1986); *see also Martinez v. U.S. Sugar Corp.*, 880 F.Supp. 773, 775 (M.D.Fla.1995).[FN2]

FN2. Decisions of the former Fifth Circuit filed prior to October 1, 1981 constitute binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

A. The Religious Land Use and Institutionalized Persons Act (Count I)

***4** 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 in-

stitution-

(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) is generally referred to as RLUIPA's "Substantial Burdens" provision. MDM contends that the Osceola Development Code violates the RLUIPA by imposing a substantial burden on its religious exercise without furthering a compelling government purpose. (Doc. 1 at 25).

Under RLUIPA, "religious exercise" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C.A § 2000cc-5(7)(A). It also includes the "use, building, or conversion of real property for the purpose of religious exercise." 42 U.S.C. § 2000cc5(7)(B).

Prior to the passage of RLUIPA, courts considering whether government activity imposed a substantial burden on religious exercise-such as, for example, in cases under the Religious Freedom Restoration Act-generally considered whether the religious exercise implicated by zoning decisions was integral to a believer's faith. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226 (11th Cir.2004) (citing cases). RLUIPA's definition of religious exercise rejects any such requirement. *Id.* The Court finds that MDM's ministry to men with drug and alcohol problems, which is clearly motivated by the religious beliefs of Shafter (among others) and utilizes religious teaching as part of its methods, constitutes a religious exercise for purposes of the RLUIPA. As such, use of the Michigan Avenue property for that purpose would also constitute a religious exercise.

RLUIPA does not define "substantial burden," and thus the term is to be given its ordinary or natural meaning. *Midrash Sephardi* at 1226. The United States Court of Appeals for the Eleventh Circuit has held that an individual's exercise of religion is substantially burdened if a regulation completely prevents an individual from engaging in religiously mandated activity, or if the regulation requires participation in an activity prohibited by religion. *Id.* at 1227. Short of such extremes, however, the Eleventh Circuit has held that a "substantial burden" for purposes of RLUIPA "requires something more than an incidental effect on religious exercise."

> [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.

***5** *Midrash Sephardi* at 1227 (finding that zoning regulations requiring location of synagogues farther away from congregants than preferred location, thus requiring congregants to walk farther and possibly significantly decreasing attendance, was not a substantial burden).[FN3]

> FN3. The *Midrash Sephardi* court also held that commercial unavailability of suitable sites for the synagogues in the properly zoned area could not constitute a substantial burden in that "[t]he harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them." *Id.* at 1227 n. 11.

Under these facts, the Court finds that the County refusal of the CUP did not impose a substantial burden on MDM's religious exercise. MDM remains free to relocate its program to another location in the County where it can operate as of right, or to operate its ministry by other methods-such as a non-residential facility, for example-that do not run afoul of the requirements of the Code. There is no argument that Shafter or MDM can exercise their religion *only* at the Michigan Avenue location or

only by way of the seven-to-fourteen person residential program currently operating there. MDM and Shafter may believe that other locations or other methods would be less convenient or less effective, but so long as other locations and methods are reasonably available, Osceola County has not imposed a substantial burden on MDM's religious exercise.

MDM also argues that the County has violated Section (b)(1) of RLUIPA, the so-called "Equal Terms" provision, which provides in pertinent part

> Equal terms. No government shall impose 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.
>
> (2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.
>
> (3) Exclusions and limits. No 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.

MDM contends that it suffered discriminatory treatment for purposes of RLUIPA. Specifically, MDM points out that the Code permits 14 unrelated individuals to reside in a house and have religious study (even when provided by another), but those same 14 individuals could not do so if involved in a religious discipleship program. (Doc. 82 at 31). But MDM is comparing apples and oranges. A group of people living together and engaging in religious study is simply not the same as a residential drug and alcohol rehabilitation facility, even if they share some characteristics. To demonstrate a violation of RLUIPA's Equal Terms provision, MDM would need to show that a secular rehabilitation facility or the like had been (or would be) treated better than its own religious-based facility. MDM made no such showing.

B. The Americans with Disabilities Act (Count II)

MDM complained at trial that certain prejudicial statements expressed by its neighbors were adopted by the Osceola County Commissioners and motivated them to deny the CUP, thus resulting in a violation of the ADA. Section 12132 of the ADA provides, in pertinent part, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Courts have found that the ADA, Rehabilitation Act, and FHA all apply to municipal zoning decisions. *See, e.g., Forest City Daly Housing, Inc. v. Town of North Hempstead*, 175 F.3d 144 (2nd Cir.1999).

***6** The ADA's definition of "disability" is drawn almost verbatim from the definition of "handicapped individual" contained in the Rehabilitation Act and the definition of "handicap" contained in the FHA. *Bragdon v. Abbot*, 524 U.S. 624 (1998). The ADA defines disability for an individual as a "physical or mental impairment that substantially limits one or more of the major life activities of such individual [or] a record of such impairment [or] being regarded as having such an impairment." 42 U.S.C. § 12102(2). At trial, MDM demonstrated that most if not all of its residents were handicapped for purposes of the ADA, in that they were at least regarded as having an impairment that substantially limited one or more major life activities.

However, MDM did not demonstrate that the Commission voted to deny the CUP because of its residents' handicaps. Commissioner William Lane testified that he opposed granting the CUP because of the facility's incompatibility with the surrounding residential neighborhood and because MDM had

initially refused to get the required construction permits. (Doc. 80 at 312, 319). He denied that the e-mails and public comments about the health and safety "threats" posed by the program's residents influenced his decision. (Doc. 82 at 321). In his testimony, Commissioner Ken Shipley denied that the drug or alcohol problems of the program's residents affected his vote. (Doc. 82 at 343). Commissioner Atley Mercer testified that he was influenced by MDM's initial failure to get the necessary building permits, by the Planning Commission's negative recommendation, and by incompatibility issues. (Doc. 82 at 363-65). The Commissioners were credible, and the Court finds that MDM's residents were not denied participation or benefits because of their disability.

C. The Rehabilitation Act (Count III)

The Rehabilitation Act provides, in pertinent part, that no otherwise qualified individual with a disability in the United States shall "solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance". 29 U.S.C. § 794(a). As noted above, MDM failed to show that its residents' disabilities were the motivating factor behind the Commissioners' decision to deny the CUP application, and thus its Rehabilitation Act claim fails.

C. The Fair Housing Act (Count IV)

The Fair Housing Act ("FHA") makes it unlawful "to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of ... a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available". 42 U.S.C. § 3604(f)(1)(B). Like the ADA, the FHA defines "handicap" as a physical or mental impairment that substantially limits one or more major life activities, or a record of such impairment, or being regarded as having such an impairment. 42 U.S.C. § 3602(h). Numerous courts have held that recovering drug addicts and alcoholics can be entitled to protection under the FHA. *See, e.g., U.S. v. Southern Management Corp.*, 955 F.2d 914, 922-23 (4th Cir.1992) (holding that FHA's definition of "handicap" should be construed consistently with definition from Rehabilitation Act, which included individuals participating in a supervised rehabilitation program and no longer using drugs, and people erroneously regarded as using drugs) *and Tinch v. Walters*, 765 F .2d 599, 603 (6th Cir.1985) (finding that recovered alcoholic was a handicapped individual within meaning of Rehabilitation Act). Again, however, this Court's finding that the Commissioners did not deny the CUP because of concerns over the residents' possible drug or alcohol use is fatal to MDM's FHA claim.

E. Equal Protection (Count V)

***7** To prevail on an equal protection claim that a defendant unequally applied a facially neutral statute, a plaintiff must show intentional discrimination. *E & T Realty v. Strickland*, 830 F.2d 1107, 1112 (11th Cir.1987). Mere error or mistake in judgment when applying a facially neutral statute does not violate the Equal Protection clause. *Id.*

As described above, MDM did not demonstrate that the Osceola County Commission intentionally discriminated against MDM's residents on the basis of their religion or their disability. Further, MDM did not even attempt to demonstrate that the County had intentionally discriminated against its residents on the basis of their "content, viewpoint, identity and expression," or any of the other impermissible bases asserted in Count V of the Complaint. (Doc. 1 at 31). Thus, MDM's equal protection claim fails.

F. Free Speech and Peaceful Assembly (Counts VI and VII)

Although not explicitly abandoned by MDM, the Free Speech and Peaceful Assembly claims were

not mentioned in MDM's trial brief or pursued at trial by MDM's counsel. Indeed, in his opening argument, MDM's counsel listed seven claims that he would prove up but failed to mention the free speech and peaceful assembly claims. To the extent MDM may have wished to pursue these claims at trial, it failed to produce any evidence that it was entitled to prevail, and these claims must fail.

G. The Florida Religious Freedom Restoration Act and the Free Exercise clause (Counts VIII and IX)

Florida's Religious Freedom Restoration Act of 1998, Fla. Stat. § 761.01 *et seq* ("FRFRA") provides that government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless the government demonstrates that the burden is in furtherance of a compelling governmental interest and is the least restrictive means for furthering that interest. Fla. Stat. § 761.03. In addition, FRFRA defines "exercise of religion" as "an act or refusal 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." Fla. Stat. § 761.02. As is the case under the RLUIPA, the Florida Supreme Court has held for purposes of the FRFRA 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. *Warner v. City of Boca Raton*, 887 So.2d 1023, 1035 (Fla.2004).

Based on Shafter's testimony, MDM's efforts to rehabilitate drug addicts and alcoholics are undoubtedly motivated by a religious belief and therefore constitute a religious exercise under the FRFRA. However, the County has not placed a substantial burden on that religious exercise, either through the Code itself or through their denial of the CUP. 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. *See, e.g., Warner*, 887 So.2d at 1035 (concluding that city's prohibition on vertical grave markers, but not horizontal ones, merely inconvenienced plaintiffs' religious exercise and therefore did not constitute a substantial burden under the FRFRA).

***8** The First Amendment, made applicable to the states through the Fourteenth Amendment, provides in pertinent part that the government shall make no law prohibiting the free exercise of religion. U.S.C.A. Const. Amend. 1. The FRFRA expands the scope of religious protection beyond the conduct considered protected by cases from the United States Supreme Court. *Warner*, 887 So.2d at 1035. Because the County's actions do not violate the FRFRA, and because the Code is a neutral law of general applicability, MDM's Free Exercise claim must also fail. *Warner v. City of Boca Raton*, 420 F.3d 1308, 1310 (11th Cir.2005).

IV. Conclusion

The Court does not doubt that Pastor Shafter and the other individuals leading the MDM are sincere in their efforts to minister to men suffering from addiction to drugs or alcohol. But that sincerity does not shield them from having to comply with the same zoning requirements as secular organizations and organizations not working with the disabled. MDM has not shown that its statutory or constitutional rights have been violated. Accordingly, it is hereby

ORDERED that the Clerk enter judgment in favor of the Defendant and close the case.

DONE and ORDERED in Chambers, Orlando, Florida on November 6, 2006.

M.D.Fla.,2006.
Men of Destiny Ministries, Inc. v. Osceola County
Not Reported in F.Supp.2d, 2006 WL 3219321 (M.D.Fla.), 20 Fla. L. Weekly Fed. D 314

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Westlaw

14 So.3d 1027, 34 Fla. L. Weekly D997
(Cite as: 14 So.3d 1027)

District Court of Appeal of Florida,
Fourth District.
WESTGATE TABERNACLE, INC., Reverend Avis Hill, Reverend Sherry McGee-Hill, and Maria Todd, Appellant,
v.
PALM BEACH COUNTY, Appellee.
No. 4D07-3792.

May 20, 2009.
Rehearing Denied Aug. 13, 2009.

Background: Church brought action against county to challenge the application of land development code to its operation of homeless shelter, which the county found to be prohibited without a conditional use permit, as violative of the Florida Religious Freedom Restoration Act (FRFRA) or the federal Religious Land Use and Institutionalized Persons Act (RLUIPA). After a jury trial, the Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, David Crow, J., entered judgment in favor of county. Church appealed.

Holding: The District Court of Appeal, Warner, J., held that evidence was sufficient to support jury finding that application of county land development code to church's operation of homeless shelter did not violate FRFRA or RLUIPA.

Affirmed.

West Headnotes

[1] Civil Rights 78 ⇐1406

78 Civil Rights
78III Federal Remedies in General
78k1400 Presumptions, Inferences, and Burdens of Proof
78k1406 k. Other Particular Cases and Contexts. Most Cited Cases

Civil Rights 78 ⇐1743

78 Civil Rights
78V State and Local Remedies
78k1742 Evidence
78k1743 k. In General. Most Cited Cases
The party claiming that a government action constitutes a violation of the Florida Religious Freedom Restoration Act (FRFRA) or the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) bears the initial burden of showing that a regulation constitutes a substantial burden on his or her exercise of religion. Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.; West's F.S.A. § 761.03 et seq.

[2] Civil Rights 78 ⇐1032

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1030 Acts or Conduct Causing Deprivation
78k1032 k. Particular Cases and Contexts. Most Cited Cases
Under the Religious Land Use and Institutionalized Persons Act (RLUIPA), a government's "substantial burden" on religion must place more than an inconvenience on religious exercise; it is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly, and thus, it can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct. Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

[3] Civil Rights 78 ⇐1073

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1073 k. Zoning, Building, and Planning; Land Use. Most Cited Cases
Evidence was sufficient to support jury finding that

application of county land development code, which required conditional use permit (CUP) for church's operation of homeless shelter housing more than six people, did not "substantially burden" the exercise of religion by the church so as to violate the Florida Religious Freedom Restoration Act (FRFRA) or the federal Religious Land Use and Institutionalized Persons Act (RLUIPA); the church had not applied for a CUP and could obtain one with renovations to the shelter, church did not show that running a homeless shelter at its specific location was fundamental to its religious exercise, and a suitable alternative location for the shelter was also possible. Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.; West's F.S.A. § 761.03 et seq.

[4] Civil Rights 78 ⟹1073

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1073 k. Zoning, Building, and Planning; Land Use. Most Cited Cases

Civil Rights 78 ⟹1318

78 Civil Rights
78III Federal Remedies in General
78k1314 Adequacy, Availability, and Exhaustion of State or Local Remedies
78k1318 k. Property and Housing. Most Cited Cases

Civil Rights 78 ⟹1716

78 Civil Rights
78V State and Local Remedies
78k1713 Exhaustion of Administrative Remedies Before Resort to Courts
78k1716 k. Other Particular Cases and Contexts. Most Cited Cases
The mere requirement that one apply for a special exception from an ordinance restricting the use of property is not a "substantial burden" on the exercise of religion under Florida Religious Freedom Restoration Act (FRFRA) or the federal Religious Land Use and Institutionalized Persons Act (RLUIPA); a church must exhaust its administrative remedies and cannot merely predict that it would be denied the permit if it were to apply. Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.; West's F.S.A. § 761.03 et seq.

[5] Civil Rights 78 ⟹1073

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1073 k. Zoning, Building, and Planning; Land Use. Most Cited Cases
Neither the Florida Religious Freedom Restoration Act (FRFRA) nor the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) prohibits the application of valid, neutral zoning provisions to church property to curtail uses not permitted in the area. Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.; West's F.S.A. § 761.03 et seq.

***1028** Barry M. Silver, Boca Raton, for appellants.

Robert P. Banks and Leonard Berger, Assistant County Attorneys of Palm Beach County Attorney's Office, West Palm Beach, for appellee.

WARNER, J.

Westgate Tabernacle appeals a final judgment entered after a jury verdict finding that the imposition of Palm Beach ***1029** County's Unified Land Development Code ("ULDC" or "code") requirements on Westgate's activities as a homeless shelter did not violate the Florida Religious Freedom Restoration Act ("FRFRA") or the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA"). Because the code requirements did not constitute a substantial burden on its religious beliefs, we affirm the final judgment.

Westgate Tabernacle, Inc. is a not-for-profit corpor-

ation which operates a church located in West Palm Beach. The church and its pastors, the Reverends Avis Hill and Sherry McGee-Hill, opened the church property as a shelter for the homeless in Palm Beach County as a part of its Christian mission.

Westgate's church is situated in a Multi-Family Residential High Density (RH) Zoning District under the ULDC. The ULDC constitutes the County's official zoning code and has been approved by the Board of County Commissioners. The code lists all permitted uses, special uses, and conditional uses (class A and B) within a given district. A permitted use is by right and requires no prior approval. ULDC § 6.4.C.1 (1995). Class B conditional uses are permitted "if they are approved by the Zoning Commission in accordance with the procedures and standards of Sec. 5.4.F." ULDC § 6.4.C.4. Class A conditional uses require approval "by the Board of County Commissioners in accordance with the procedures and standards of Sec. 5.4.E." ULDC § 6.4.C.5. The ULDC includes a detailed procedure involved when applying for a conditional use permit ("CUP"). *See* ULDC § 5.4.

The code uses the term "congregate living facility" and not "homeless shelter" to regulate group living facilities. Congregate living facilities are permitted in the RH zoning district. ULDC § 6.2.D.8. The code identifies three types of facilities: Type 1 can house up to six people and is a permitted use in the RH district. ULDC §§ 6.4.D.24.b.(1), 6.2.D.8. Type 2 can house up to fourteen and is a class B conditional use. ULDC §§ 6.4.D.24.b.(2), 6.2.D.8. Type 3 determines the number of residents based on land density and requires Board approval as a class A conditional use. ULDC §§ 6.4.D.24.b.(3), 6.2.D.8.

"Prohibited uses" are those not listed in the use regulation schedule "as permitted by right, as a Conditional use, or a Special use," and "are not allowed in such district unless otherwise expressly permitted under this Code." ULDC § 6.4.C.6. In other words, any use not expressly listed under the district's definition or in the use regulation schedule is prohibited.

Because Westgate was operating a shelter for more than six people without a CUP, the County issued a May 4, 1998, notice of violation entitled, "Operating a Homeless Shelter is Prohibited in this Zoning District." The notice gave Westgate two months to comply or attend a hearing before the Code Enforcement Board for the imposition of fines.

Westgate failed to correct the violations, and the Board conducted a hearing, which Reverend Hill and Westgate's attorney attended. At the hearing Westgate's counsel conceded that the shelter currently housed around twenty people, admitting that the use was not legal in the district without a conditional use permit. Westgate requested time to obtain the necessary permit, and the Board agreed to give Westgate 180 days, during which time it requested that the church attempt to keep the number of residents at fourteen. The Board's written order found Westgate in violation of section 6.4.C.6 and gave Westgate until April 5, 1999, to either file an application for a Type 2 congregate living facility or to cease operations as a homeless shelter. If Westgate did not exercise ***1030** one of these options within the allotted time, the County would impose a $100 fine for each day the violation continued. Westgate did not appeal the Board's order, as permitted under article 14 of the ULDC. Westgate submitted but then withdrew a permit application during the 180-day period.

A code enforcement officer inspected the property in April 1999, concluding that Westgate had not complied with the Board's order. Based upon his affidavit of non-compliance, the Board imposed a fine as set forth in its order. Westgate did not appeal the fine order. In October 1999, Westgate shut the shelter. Nevertheless, the County imposed a $22,700 fine against Westgate for its period of non-compliance. Westgate did not satisfy the debt, and the County imposed a lien on the property.

Westgate filed two multi-count complaints against

the County based on a variety of state and federal constitutional doctrines claiming that the County had violated Florida's Religious Freedom Restoration Act, chapter 761, Florida Statutes, and the federal Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, et seq. Throughout a lengthy trial, Westgate presented evidence to show that the operation of a shelter was mandated by religious beliefs. It also presented some evidence that the ULDC imposed an outright ban of homeless shelters on RH-zoned property. Much of the evidence produced explained the mission of Westgate and that its sheltering activities have substantially improved many lives. Westgate stressed that County agencies routinely sent homeless people to Westgate, as no other shelters existed in Palm Beach County.

The County presented witnesses who explained that the ULDC exists to ensure public health and safety. Homeless shelters, identified as congregate living facilities, are permitted in Westgate's district upon obtaining a CUP, and Westgate was aware of this fact at the time of the 1998 violation. In fact, Westgate admitted that it was required to obtain a conditional use permit. The County also elicited testimony that the code enforcement department tried in vain, by repeatedly meeting with church officials and their lawyers, to help the church obtain a CUP.

After presentation of the case, the jury found that the application of the ULDC to the church did not substantially burden its religious activities in violation of either FRFRA or RLUIPA. It also found that the ULDC constituted the least restrictive means of furthering a compelling interest. It thus found in favor of the County, and the court entered judgment accordingly, from which this appeal is taken.

FRFRA and RLUIPA each include a provision meant to protect the free exercise of religion. Section 761.03 of the FRFRA provides:

> (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.

(emphasis supplied). The parallel statute in 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 ***1031** 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) (emphasis supplied).

In light of the above 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); *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).

[1] 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); *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."). Section 761.02(3), Florida Statutes, defines "exercise of religion" as "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." RLUIPA has two definitions of "religious exercise." First, "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" and, second, "[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)(A), (B).

[2] Neither statutory scheme expressly defines "substantial burden." 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. Under RLUIPA,

> a "substantial burden" must place more than an inconvenience on religious exercise; [it] 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."

Midrash, 366 F.3d at 1227 (citation omitted). We have held that "the 'substantial burden' standard is the same under both" FRFRA and RLUIPA. *Christian Romany*, 980 So.2d at 1167.

[3] Westgate argues on appeal that the trial court erred in denying its motion for directed verdict by failing to conclude as a matter of law that the application of the ULDC to Westgate's sheltering activities caused a substantial burden on the church. The County does not dispute that the plaintiffs house the homeless based on deeply cherished religious beliefs. However, the County presented sufficient evidence to support the jury's conclusion that the ULDC did not substantially burden Westgate in accordance with relevant case law.

[4] The ULDC required a permit for the conditional use as a homeless shelter in the church's zoning district. "The mere ***1032** requirement that one apply for a special exception from an ordinance restricting the use of property is not a substantial burden." *See Konikov*, 302 F.Supp.2d at 1342. A church must exhaust its administrative remedies and cannot merely predict that it would be denied the permit if it were to apply. *Id.* The County informed Westgate in the notice of violation and at the Code Enforcement Board hearing that a CUP was necessary to house more than six individuals. Although Westgate applied for a permit, it withdrew its application. Based on this evidence alone, the jury could conclude that the County did not substantially burden Westgate's religious exercise.

Even assuming the ULDC prohibited homeless shelters outright on RH-zoned property, Westgate would still fail to prove a substantial burden, because it did not show that running a homeless shelter at its specific location was fundamental to its religious exercise. *See Christian Romany*, 980 So.2d at 1168. In fact, church witnesses testified that Westgate officials had found a suitable alternative location for the shelter shortly after receiving the notice of violation, but were unable to purchase the property. In a similar context, where a church resisted condemnation of its church property without showing how the specific property was unique to the conduct of its religious exercise, this court stated, "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" under FRFRA. *Id.* at 1166; *see also Hollywood Cmty. Synagogue, Inc. v. City of Hollywood*, 430 F.Supp.2d 1296, 1319 (S.D.Fla.2006) (finding no substantial burden under RLUIPA as "[t]he Synagogue has not shown that its property carries

unique religious significance or that other properties are not available that could accommodate its practices").

[5] Neither FRFRA nor RLUIPA prohibits the application of valid, neutral zoning provisions to church property to curtail uses not permitted in the area. As explained in *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 762-63 (7th Cir.2003), regarding RLUIPA:

> [W]e find that these conditions [the costs of applying for and complying with special land use permitting requirements] do not amount to a substantial burden on religious exercise. While they 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 ... for religious exercise, much less discourage churches from locating or attempting to locate in Chicago. Significantly, each of the five individual plaintiff churches has successfully located within Chicago's city limits. That they expended considerable time and money so to do does not entitle them to relief under RLUIPA's substantial burden provision. Otherwise, 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 legitimate protections RLUIPA affords to religious exercise.

(citations omitted).

Although its shelter has grown beyond a Type 2 facility to a Type 3 facility because it now houses nearly 100 persons at a time, Westgate has not applied for the required permits or received the approval of the Board of County Commissioners. Admittedly,***1033** to obtain such a permit would require substantial renovations, because the church does not have sufficient space to house that many people or even provide restrooms for such a number. Nevertheless, it has not proved that the ULDC poses a substantial burden to its religious exercise. The court correctly denied Westgate's motion for directed verdict.

Because we hold that Westgate did not show that the County's imposition of its permitting requirements constituted a substantial burden on its exercise of religion, the County did not violate FRFRA or RLUIPA. We affirm as to all other issues raised.

HAZOURI, J., and SHAHOOD, GEORGE A., Senior Judge, concur.
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