Exhibit E

69 F.Supp.3d 1299
United States District Court,
M.D. Florida,
Jacksonville Division.

CHURCH OF OUR SAVIOR, formerly known as Resurrection Anglican Church, Inc., a Florida Nonprofit Corporation, Plaintiff,
v.
The CITY OF JACKSONVILLE BEACH, a Florida Municipal Corporation, Defendant.

Case No. 3:13–cv–1346–J–32JBT.
|
Signed Nov. 25, 2014.

Synopsis

Background: Church brought Religious Land Use and Institutionalized Persons Act (RLUIPA) action against city, challenging the city's denial of the request for a conditional use permit to build a church building on property zoned residential. An expedited bench trial was held.

Holdings: The District Court, Timothy J. Corrigan, J., held that:

[1] city's denial of church's request for conditional use permit did not impose substantial burden on the exercise of religion, as would violate RLUIPA;

[2] amendment to city zoning ordinance rendered facial challenge to ordinance moot;

[3] amendment to city zoning ordinance was not bill of attainder;

[4] county school board's application for conditional use permit to make major improvement to existing middle school was not similarly-situated comparator to church's application, and thus, could not support as-applied challenge under RLUIPA's equal terms provision;

[5] private school's application for conditional use permit was similarly-situated comparator to church's application, as required to support as-applied challenge under RLUIPA's equal terms provision;

[6] city's denial of church's application for conditional use permit violated RLUIPA's equal terms provision; and

[7] denial of church's application for conditional use permit did not violate unreasonable limitations provision of RLUIPA.

Judgment in favor of church.

West Headnotes (26)

[1] **Zoning and Planning**
Certiorari

Florida law permits an applicant for a conditional use permit to seek judicial review of a local zoning agency's denial of the application via petition for a writ of certiorari in the appropriate Florida state circuit court.

Cases that cite this headnote

[2] **Constitutional Law**
Proceedings and review

Zoning and Planning
Permits, certificates, and approvals in general

Zoning and Planning
Substantial evidence in general

Under Florida law, a Florida state court is empowered to review a local zoning agency's decision denying a conditional use permit to ensure that due process and the essential requirements of the law were observed and that the administrative findings and judgment are supported by competent substantial evidence. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

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

Under the Religious Land Use and Institutionalized Persons Act (RLUIPA), the

court does not delve into whether the religious exercise implicated by zoning decisions was integral to a believer's faith. Religious Land Use and Institutionalized Persons Act of 2000, § 8(7), 42 U.S.C.A. § 2000cc–5(7).

Cases that cite this headnote

[4] **Civil Rights**

Particular cases and contexts

Under the Religious Land Use and Institutionalized Persons Act (RLUIPA), a "substantial burden" on religion 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. Religious Land Use and Institutionalized Persons Act of 2000, § 4(b), 42 U.S.C.A. § 2000cc–2(b).

Cases that cite this headnote

[5] **Civil Rights**

Particular cases and contexts

A "substantial burden" on religion, as will violate the Religious Land Use and Institutionalized Persons Act (RLUIPA), 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, § 4(b), 42 U.S.C.A. § 2000cc–2(b).

Cases that cite this headnote

[6] **Civil Rights**

Zoning, building, and planning;land use

City's denial of church's request for conditional use permit to build church building on property zoned residential did not impose substantial burden on the exercise of religion, as would violate the Religious Land Use and Institutionalized Persons Act (RLUIPA); the denial of the conditional use permit did not prevent the church from building on property in another area of city, church could continue to hold services in building that it leased, and although church had financial constraints, other properties were available that met church's requirements. Religious Land Use and Institutionalized Persons Act of 2000, § 4(b), 42 U.S.C.A. § 2000cc–2(b).

Cases that cite this headnote

[7] **Civil Rights**

Zoning, building, and planning;land use

The Religious Land Use and Institutionalized Persons Act (RLUIPA) does not relieve religious organizations from the harsh reality of the real estate marketplace that sometimes dictates that certain facilities are not available to those who desire them. Religious Land Use and Institutionalized Persons Act of 2000, § 4(b), 42 U.S.C.A. § 2000cc–2(b).

Cases that cite this headnote

[8] **Civil Rights**

Zoning, building, and planning;land use

A plaintiff may prove any of three distinct kinds of equal terms violations of the Religious Land Use and Institutionalized Persons Act (RLUIPA): (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. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

Cases that cite this headnote

[9] **Federal Courts**

Sua sponte determination

Mootness is a threshold jurisdictional issue that the court must raise even if the parties do not.

Cases that cite this headnote

[10] **Federal Courts**
Nature of dispute;concreteness

Article III extends the authority of federal courts only to actual cases or controversies. U.S.C.A. Const. Art. 3, § 2, cl. 1.

Cases that cite this headnote

[11] **Federal Courts**
Nature of dispute;concreteness

Federal Courts
Inception and duration of dispute; recurrence;"capable of repetition yet evading review"

To comply with the constitutional jurisdictional requirements there must be a live case or controversy throughout the litigation, not only when commenced. U.S.C.A. Const. Art. 3, § 2, cl. 1.

Cases that cite this headnote

[12] **Federal Courts**
Zoning and land use

Amendment to city zoning ordinance, which previously classified religious organizations as conditional uses in a residential zoning district, but classified public and private parks, playgrounds, and recreational facilities as permitted uses, to reclassify parks, playgrounds and recreational facilities as conditional uses in a residential zoning district, rendered church's challenge to the prior ordinance as facially violative of the equal terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA) moot; the amendment equalized the treatment of religious assemblies and non-religious assemblies. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

Cases that cite this headnote

[13] **Federal Courts**
Voluntary cessation of challenged conduct

For a defendant's voluntary cessation to moot any legal questions presented and deprive the court of jurisdiction, it must be absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.

Cases that cite this headnote

[14] **Constitutional Law**
Zoning and land use

Zoning and Planning
Churches and religious uses

Amendment to city zoning ordinance, which previously classified religious organizations as conditional uses in a residential zoning district, but classified public and private parks, playgrounds, and recreational facilities as permitted uses, to reclassify parks, playgrounds and recreational facilities as conditional uses in a residential zoning district, was not a "bill of attainder"; the amendment did not determine that the church was guilty of anything or impose any type of legislative punishment. U.S.C.A. Const. Art. 1, § 9, cl. 3.

Cases that cite this headnote

[15] **Constitutional Law**
Bills of Attainder;Bills of Pains and Penalties

A "bill of attainder" is a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial. U.S.C.A. Const. Art. 1, § 9, cl. 3.

Cases that cite this headnote

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

A plaintiff bringing an as-applied challenge pursuant to the equal terms provision of 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. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

Cases that cite this headnote

[17] **Civil Rights**

Zoning, building, and planning;land use

A showing that two projects were similarly situated, as necessary to support an as-applied challenge under the equal terms clause of the Religious Land Use and Institutionalized Persons Act (RLUIPA), requires some specificity such that the nonreligious comparator is identical for all relevant purposes. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

Cases that cite this headnote

[18] **Civil Rights**

Zoning, building, and planning;land use

If a plaintiff asserting an as-applied challenge under the equal terms clause of the Religious Land Use and Institutionalized Persons Act (RLUIPA) 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. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

Cases that cite this headnote

[19] **Civil Rights**

Zoning, building, and planning;land use

County school board's application for conditional use permit to make major improvement to existing middle school by replacing 60,000 square feet of existing buildings with 90,000 square feet of new construction on school district's 20-acre parcel in residential zoning district was too dissimilar in size, intensity of use, location, and public support to function as a "similarly-situated comparator" to church's application for conditional use permit to build a 9500 square foot church on less than two-acre parcel, and thus, could not support church's as-applied challenge under the 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).

Cases that cite this headnote

[20] **Civil Rights**

Zoning, building, and planning;land use

Private school's application for conditional use permit to build an 18,000 square foot new school building on 1.9 acres in residential zoning district was "similarly-situated comparator" to church's application for conditional use permit to build a 9500 square foot church on less than two-acre parcel, as required to support church's as-applied challenge under the equal terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA); the two parcels were not immediately surrounded by low-density, single family homes, as the area included other public and private facilities nearby, both the school and the church faced objections from neighbors, and proposed buildings and the two parcels were similar in size. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

Cases that cite this headnote

[21] **Civil Rights**

Zoning, building, and planning;land use

City's blanket denial of church's application for conditional use permit to build a church on property zoned residential was not narrowly tailored to further any compelling interest that city had in preserving the character and safety of its residential neighborhoods through enforcement of its zoning regulations, and thus, the denial violated the equal terms provision of the Religious Land Use and

Institutionalized Persons Act (RLUIPA); city planning commission could have imposed range of conditions on the conditional use permit to address city's interests, including limiting the size of the building, requiring certain buffering, landscaping, or lighting, and limiting the hours of operation. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

Cases that cite this headnote

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

The unreasonable limitations provision of the Religious Land Use and Institutionalized Persons Act's (RLUIPA) land use section prevents the government from adopting policies that make it difficult for religious institutions to locate anywhere within the jurisdiction. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(3)(B), 42 U.S.C.A. § 2000cc(b)(3)(B).

2 Cases that cite this headnote

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

The purpose of the unreasonable limitations provision of the Religious Land Use and Institutionalized Persons Act's (RLUIPA) land use section is not to examine restrictions placed on individual landowners, but to prevent municipalities from broadly limiting where religious entities can locate. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(3)(B), 42 U.S.C.A. § 2000cc(b)(3)(B).

2 Cases that cite this headnote

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

City's denial of church's request for conditional use permit to build church building on property zoned residential did not unreasonably limit religious entities' ability to locate within the city, and thus, did not violate the unreasonable limitations provision of the Religious Land Use and Institutionalized Persons Act's (RLUIPA) land use section, where at least 19 churches operated within the city limits, and the great majority of land in the city was open for use by religious organizations. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(3)(B), 42 U.S.C.A. § 2000cc(b)(3)(B).

2 Cases that cite this headnote

[25] **Civil Rights**
Injunction

Declaratory Judgment
Criminal laws

Declaratory Judgment
Zoning ordinances

Appropriate relief for a Religious Land Use and Institutionalized Persons Act (RLUIPA) violation may include injunctive and declaratory relief. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

Cases that cite this headnote

[26] **Civil Rights**
Judgment and relief in general

If a religious assembly or institution such as church proves its case under the Religious Land Use and Institutionalized Persons Act (RLUIPA), the RLUIPA provides an appropriate federal remedy. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

Cases that cite this headnote

Attorneys and Law Firms

***1303** Charles L. Stambaugh, Stambaugh & Associates, PA, Jacksonville, FL, Daniel P. Dalton, Dalton & Tomich, PLC, Katharine Elizabeth Brink, Dalton & Tomich, PLC, Detroit, MI, for Plaintiff.

Dale A. Scott, Michael J. Roper, Bell & Roper, PA, Orlando, FL, for Defendant.

Opinion

FINDINGS OF FACT AND CONCLUSIONS OF LAW

TIMOTHY J. CORRIGAN, District Judge.

This dispute lies at the intersection of a church's right to practice its religion and a local government's power to regulate land use. Plaintiff Church of Our Savior challenges Defendant City of Jacksonville Beach's denial of the Church's request for a conditional use permit to build a church on property zoned residential. This case is brought under three provisions of the federal Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc.

At the Church's request and with good cause, the Court expedited the case for trial before the Court on September 17 and 18, 2014.[1] (Docs. 99, 100.) Following trial, the parties submitted proposed findings of fact and conclusions of law. (Docs. 107, 110.) The Court heard final argument on November 10, 2014. (Doc. 115.) The case is now ready for decision. Fed.R.Civ.P. 52(a).[2]

1 Before trial, the City filed a combined motion for summary judgment and trial brief (Doc. 59) and later a combined supplemental motion for summary judgment and trial brief (Doc. 95). The Church filed a response to the initial motion and trial brief. (Doc. 66.) The Court advised the parties it would carry the filings with the case and view them as the parties' trial briefs. (*See* Doc. 104 at 6–7.)

2 The Court conditionally admitted certain evidence at trial subject to further consideration in reaching its findings of fact and conclusions of law. The findings and conclusions set forth herein do not include any evidence the Court has rejected as irrelevant, unreliable, or otherwise inadmissible. Moreover, while the Court has adopted portions of each party's submission, the Court's findings of fact and conclusions of law are the result of its own independent review.

I. FACTS

A. The Church of Our Savior

The Church of Our Savior began its existence in 2006 as Resurrection Anglican Church, which itself formed from a Bible study at St. Paul's by-the-Sea Episcopal Church in Jacksonville Beach, Florida. ***1304** (Trial Tr. vol. 1, 19, Sept. 17, 2014, Doc. 104.) In 2013, Resurrection Anglican Church came together with Calvary Anglican Church to form one congregation known as the Church of Our Savior. (Doc. 104 at 19–21; Trial Tr. vol. 2, 11–12, Sept. 18, 2014, Doc. 105.) The Church is the only Anglican church in Jacksonville Beach and the surrounding seaside communities of Atlantic Beach, Neptune Beach, and Ponte Vedra Beach. (Doc. 104 at 35.)

Since its founding, the Church has worshipped at six separate facilities. (*Id.* at 19–20.) The Church currently holds services at the Beaches Museum Chapel in Jacksonville Beach. (*Id.* at 20, 23.) The Beaches Museum Chapel is a historic chapel owned by the Beaches Area Historical Society. (*Id.* at 24; *see* Pl.'s Ex. 5.) After unsuccessfully attempting to reach a longer term agreement with the Historical Society in 2011 and having to use a different location, the Church eventually signed a three-month lease for the Chapel. (Doc. 104 at 25–27; Pl.'s Exs. 4–6.) The lease has no automatic renewal provision. It allows the Church to use the Chapel for worship and two adjacent buildings for nursery and children's Sunday school for four hours on Sunday mornings and gives the Church priority for major religious holidays, like Ash Wednesday, Easter week, and Christmas Eve. (Pl.'s Ex. 6; *see* Doc. 104 at 27–28.) The Chapel may also be rented for other church events not traditionally performed on Sundays, like weddings, baptisms, and Bible studies, but the Church first needs to check with the Historical Society to make sure it is available (Doc. 104 at 28–29; Pl.'s Ex. 6.) Presently, no other church regularly uses the Chapel. (Doc. 104 at 51.)

The Church views the Chapel building as less than ideal due to its limited storage space and signage and its maximum capacity of 140 people. (Doc. 104 at 29–31; Doc. 105 at 17; Pl.'s Ex. 5.) The Church suggests the *comfortable* capacity of the Chapel is actually no more than 100 people. (Doc. 105 at 51–52.) On top of that, Church experience suggests that occupying more than 80% of a facility's capacity during services inhibits further membership growth. (*Id.* at 15.) With an average Sunday attendance of approximately 100 people, the Church moved to two Sunday services in 2013. (*Id.* at 14–15, 51; Pl.'s Ex. 3.[3]) The Church contends without dispute that

these time and space limitations constrain its ability to grow and to fully exercise its religion by performing its sacraments and worshipping together in one service. (Doc. 105 at 15–16; *see* Doc. 104 at 31–32.)

3 The parties' exhibit lists contained many of the same exhibits; as a result, many exhibits were admitted at trial twice. (*Compare* Doc. 101 *with* Doc. 102.) Where the exhibits are substantially identical, and unless otherwise necessary, the Court refers to only the number on the Church's exhibit list.

B. The Property

Even before it became the Church of Our Savior, the Church had hoped to own its building on its own property. (Doc. 104 at 33–34.) The Church identified three main search criteria drawn from circumstances and its religious beliefs and traditions: affordability, visibility (or "identifiability"), and accessibility. (Doc. 104 at 34–36; Doc. 105 at 22–24.) On affordability—the "number one" criteria—the Church's budget was $300,000 to $500,000, though it would need seller financing for that amount. (Doc. 104 at 34, 36.) As to visibility, the Church wanted an "attractive" church on a main thoroughfare that a passerby would recognize as a church. (*Id.* at 37–38, 109–10). The Church was open to refurbishing a building, as well as building ***1305** new. (Doc. 105 at 52.) As for accessibility, the building itself needed to be physically accessible, but also centrally located in the Jacksonville Beach, Neptune Beach, Atlantic Beach, and Ponte Vedra Beach area, and on the east side of the intracoastal waterway. (Doc. 104 at 88–89; Doc. 105 at 24–25, 43–44.) The Church did not hire a professional real estate broker, but relied on one of its leaders, a retired real estate agent, and the rest of its members to be on the lookout for suitable property. (Doc. 104 at 38–40; Doc. 105 at 22–23.)

During this informal but persistent search, the Church's pastor, Reverend David Ball, identified vacant land for sale along Beach Boulevard (the "Property"), just east of the intracoastal waterway, that might meet the Church's three criteria. (Doc. 104 at 42–43; Doc. 105 at 30–31.) As depicted on the satellite image below, the Property actually consists of three parcels currently owned by two different owners[4] and separated by a City-owned sewer lift station. (Doc. 105 at 130–31; Pl.'s Exs. 7, 11.)

4 The county appraiser's office lists the parcel in yellow in the image above as Real Estate Number 177295–0000, owned by the Duval County Land Trust, and lists the parcels in red together as Real Estate Number 177279–0005, owned by George M. Goodloe. (Pl.'s Exs. 7, 11, 45.)

(Def.'s Ex. 32.[5]) The total acreage of the Property is unclear in the record, with some support for a total of 1.34 acres, 1.62 acres, or 1.7 acres. (Pl.'s Ex. 10; Pl.'s Ex. 11 at 6; Pl.'s Ex. 18 at 2.) To the north of the Property is Beach Boulevard, a six-lane highway with commercial property on its north side. (Doc. 104 at 46.) The ***1306** Property is accessed from the north via a frontage road along Beach Boulevard. (Doc. 105 at 72–73.) Immediately to the east of the Property is a drainage ditch and a grass and gravel overflow parking lot for Adventure Landing amusement park, which is on the other side of the parking lot and is the nearest structure to the east of the Property.[6] (Doc. 104 at 46–47.) To the west and south of the Property is a small neighborhood of houses along Hopson Road, which curves south, southeast off of the frontage road.[7] (*Id.* at 47.)

5 The Court uses this exhibit for illustrative purposes only.

6 Reverend Ball actually first thought the overflow parking lot was the property available for sale, until the Church inquired and learned that the parcels next to it were the ones for sale. (Doc. 105 at 31.)

7 With the parties' approval and attendance, the Court visited and walked around on the site on August 26, 2014. (Doc. 104 at 9–10, 15–16.)

C. The Jacksonville Beach Land Development Code

The Property is currently zoned "Residential, single family (RS–1)" under the Jacksonville Beach Land

Development Code ("LDC"). (Pretrial Statement 9, Doc. 72.) RS–1 is one of thirteen zoning districts established in the LDC "to ensure that each permitted and conditional use is compatible with surrounding land uses, served by adequate public facilities, and sensitive to natural and coastal resources." LDC Secs. 34–321, –322.[8] The City's Comprehensive Plan calls for its land use regulations to include a classification for "Low Density Residential" of "[n]ot more than six (6) units per acre." (Pl.'s Ex. 21 at COJB 00000266.) The RS–1 zoning district "implement[s] the low density residential land use district in the comprehensive plan" and "is intended to classify areas suitable for low density single-family residential development." LDC Sec. 34–336. The Comprehensive Plan further provides that "future institutional uses (schools, churches, government buildings, fraternal groups, cemeteries, and health and public safety facilities) ... shall be located outside of areas proposed for low-density residential use...." (Pl.'s Ex. 21 at COJB 00000266.)

8 Each party included a copy of the LDC as it existed before September 15, 2014 with its exhibits. (Docs. 101, 102.) For ease of reference, the Court will cite to the LDC by code section rather than exhibit number and page.

Each zoning district in the LDC, including RS–1, has certain "permitted uses" and "uses accessory to permitted uses" that are allowed in the district as of right and certain "conditional uses" that may be allowed upon submission of an application for a Conditional Use Permit ("CUP") and the review and approval of the Planning and Development Director and the Planning Commission. LDC Secs. 34–41, –221 to –236, –321. For most of the relevant period, until September 15, 2014, "[s]ingle family dwellings," "[p]ublic and private parks, playgrounds and recreational facilities," and "Type I home occupation"[9] uses were permitted as of right on property zoned RS–1. LDC Sec. 34–336(b). Permitted private parks, playgrounds and recreational facilities could not be for commercial use, however, and were restricted to "the sole use of residents living in the area where such facilities are located ...." *Id.* at (b)(2). Conditional uses on property zoned RS–1 included, among other things, "[r]eligious organizations" and "[p]ublic and private elementary and secondary schools and technical institutes, excluding trades schools and vocational schools." *Id.* at (d).

9 "Type I home occupation" generally means a home office. LDC Sec. 34–41.

***1307** "*Religious organization* means a structure or place in which worship, ceremonies, rituals, and education pertaining to a particular system of beliefs are held." LDC Sec. 34–41. Out of the City's thirteen zoning districts, religious organizations are conditional uses in all five residential zones (RS–1, RS–2, RS–3, RM–1, and RM–2) and three of the five commercial zones (CPO, CS, CBD), are permitted as of right in the other two commercial zones (C–1, C–2), and are not permitted at all in the City's industrial zone (I–1), redevelopment district (RD), or planned unit development district (PUD). LDC Secs. 34–336 to –348. There are presently nineteen properties within Jacksonville Beach city limits that are identified as churches in the Duval County Property Appraiser's data and the City's geographic information system. (Doc. 105 at 168.) Most of the churches are in zones where they are permitted as of right, while others are in zones where they would require a CUP, though they were likely established before the LDC required a CUP. (*Id.* at 165, 167.)

Uses listed as conditional in a particular zoning district are eligible for a CUP, but are not guaranteed to receive one. LDC Sec. 34–223. Instead, the Planning and Development Director and the Planning Commission are supposed to evaluate each application for CUP based on a set of eleven general standards and the standards of the particular zone in which the CUP is requested. *Id.; see* LDC Sec. 34–231. To receive a CUP, the property owner or someone else with an interest in the property (or their agent) submits an application with certain required information to the Planning and Development Director. LDC Secs. 34–225, 226. The Director (or his staff) reviews the application for initial sufficiency, prepares a report on the application, and schedules the application for a public hearing before the Planning Commission. LDC Secs. 34–227 to –229. At the hearing, the Planning Commission reviews the application and the Director's report as well as any public testimony, and then issues an order approving the application, approving it with conditions, or denying it. LDC Sec. 34–230. The LDC does not include any review mechanism where the applicant can appeal the Commission's ruling to the full City Council or some other city body.[10]

10 A disappointed applicant can seek *certiorari* review of the Planning Commission decision in state court. The

Church chose not to do so here, instead filing suit in federal court under RLUIPA.

D. The First CUP Application

Because it would need a CUP to operate on the Property, the Church retained Fred Atwill, a consultant with municipal land use, zoning, and planning experience, to serve as its liaison with the City and assist the Church in preparing and presenting its CUP request. (Doc. 104 at 174, 178–79, 186–94.) The Church also retained architect Michael Bruce to prepare a site plan for use in the CUP application. (Doc. 104 at 122–23). Bruce developed a site plan based on the Church's needs and the site's compatibility. (*See* Pl.'s Exs. 23–25.) For instance, Reverend Ball informed Bruce that the Church wanted the building to have a sanctuary with a 250–person capacity to comfortably accommodate 200 attendees, various administrative offices, a fellowship hall, nursery space, and classrooms. (Pl.'s Ex. 23.) Bruce's preliminary work determined the project would require a 9,500 square-foot building, but that the site, with the required parking and setback, would fit only a 7,440 square-foot building. (Pl.'s Ex. 25.) Bruce expressed concern about the Property's size, limited room for growth, ***1308** and other potential site issues (Doc. 104 at 128–29; Pl.'s Exs. 25, 27), but the Church's goal was to limit its membership to 200 at this site and, as necessary, expand by "planting" new churches on other sites. (Doc. 105 at 18–19; Pl.'s Ex. 28.) Bruce then prepared a few preliminary site plans (Pl.'s Ex. 26), ultimately arriving at the preliminary plan below:

(Def.'s Ex. 4 at 7.) Bruce placed the building on the easternmost portion of the Property to achieve visibility from Beach Boulevard and to provide the maximum buffer from the Hopson Road neighborhood. (Doc. 104 at 132, 196.) The Church next moved to obtaining City approval to build a church on the property. (*See id.* at 128–30.)

On March 8, 2013, the Church submitted a CUP application to the City's Planning and Development Department. (Pl.'s Ex. 29). William Mann, city planner for the City, prepared a report recommending the application be approved. (Pl.'s Ex. 35; Doc. 105 at 69.) Mann detailed in the report the Church's proposal and its interaction with the Department. (Pl.'s Ex. 35) He also noted that the Property is divided by the City-owned sewer lift station and that the Public Works Department was aware of the Church's plans and indicated that the plans would not interfere with maintenance of the lift station. (*Id.*) The report noted the current owner of one of the parcels making up the Property had approached the Department several times to develop the parcel for commercial use, but had been advised that would not be supported as it was not consistent with the Comprehensive Plan. (*Id.*) Mann concluded in the report that, by contrast, the Church's proposal "is contemplated in RS–1 zoning," "is not inconsistent" with the designation of the Property as "Residential—Low Density" in the Comprehensive ***1309** Plan, "represents a reasonable low intensity use of the undeveloped parcels surrounding the City's lift station, and would serve as transition between the soon to be developed commercial parking facilities to the east, and the Hopson Road neighborhood to the west and south." (*Id.* at 2.) At trial, Mann stood by his recommendation and agreed that the Church's proposal met the City's parking requirements and did not cause him concerns about traffic or noise. (Doc. 105 at 70, 74.) As the Church understood at the time of its application, however, the Planning Commission would make the final decision. (Doc. 104 at 93); *see* LDC Sec. 34–230.

On April 8, 2013, the Commission considered the application at a public hearing. (Pl.'s Exs. 36, 37.) Mann read the department report into the hearing record, and Atwill spoke on behalf of the Church and submitted a letter of support from one of the homeowners in the Hopson Road neighborhood. (Pl.'s Ex. 37 at 2–7.) Reverend Ball also spoke about the Church's goals for the Property and answered some questions, as did Bruce. (*Id.* at 8–10.) Five residents from the Hopson Road neighborhood spoke against the application, objecting primarily over the traffic impact, parking for the building, and the project's density of use. (*Id.* at 10–15.) Among other things, Commissioner Terry DeLoach expressed

concerns over the "Children's Play Area" on the south parcel, the plan for main structure, the close proximity of the project to the surrounding homes, the project's potential impact on property values, and its consistency with the neighborhood. (*Id.* at 19–21, 23, 28.) Ball, Bruce, and Atwill responded to the concerns expressed by the neighbors and the Commission (*id.* at 15–24), and Mann answered some questions about access to the City's sewer lift station and the RS–1 zoning district (*id.* at 24–28). No concerns were expressed regarding the religious aspects of the proposed use in particular. At the close of the hearing, Commissioner DeLoach reiterated his concern about the consistency of the Church's proposal with the character of the neighborhood and the effect on property values and moved to deny the application. (*Id.* at 28.) The Commission unanimously voted in favor of denial. (*Id.* at 28–29.)

E. The Second CUP Application

Following the denial, the Church conferred with Planning and Development Department staff and, on August 7, 2013, submitted a second application. (Pl.'s Ex. 39.) The second application re-designated the play area on the south parcel as a public park so as to constitute a "material difference" to allow the matter to be brought back before the Planning Commission sooner than ordinarily allowed under the LDC. (Pl.'s Ex. 45 at 2; Def.'s Ex. 4 at 2); *see* LDC Sec. 34–158. In between the two applications, the Church had also mailed letters to residents of the Hopson Road neighborhood seeking support for the proposal. (Pl.'s Ex. 47 at 7; *see, e.g.,* Pl.'s Ex. 41.) The Planning and Development Department prepared a report on the new application, noting that the reduction in lot size due to the reclassification of the south parcel would likely require the Church to obtain a variance to exceed the maximum lot coverage. (Pl.'s Ex. 45.) But the Department again recommended approval without condition, repeating the conclusion from its report on the first application verbatim. (*Id.*)

On September 9, 2013, the Commission considered the second application at a public hearing. (Pl.'s Exs. 46, 47.) Mann read the second department report into the record. (Pl.'s Ex. 47 at 2–6.) A representative of the Church made a presentation, highlighting the change to the designation of the southern parcel and the ***1310** Church's intention to stay small and be respectful of the community, and answered questions from the Commission. (*Id.* at 6–11.) Atwill then spoke in favor of the Church. (*Id.* at 11–12.) This time, thirteen Hopson Road residents spoke against the application, expressing largely the same concerns. (*Id.* at 13–32.) Mann answered some questions about the Property's zoning and egress from the Property. (*Id.* at 16–18, 22–23, 32–33.) The Church representative provided rebuttal to some of comments of the residents and answered other questions from the commissioners. (*Id.* at 34–41.) Commissioner DeLoach again expressed concerns about the Church fitting into the area, its potential growth beyond the current site plan, and its effect on property values. (*Id.* at 38–39.) The owner of one of the parcels making up the Property also spoke in favor of the proposal as the best use for the land as it is currently zoned. (*Id.* at 41–42.) At the conclusion of the hearing, Commissioner Georgette Dumont moved for approval of the application with the condition that the Church must follow the site plan submitted with the application. (*Id.* at 43.) The Commission, including the movant, Commissioner Dumont, unanimously voted against the motion and denied the second application. [11] (*Id.; see* Pl.'s Ex. 46 at 8.)

11 Planning and Development Director Steven Lindorff testified at trial that, during his nearly thirty years with the Planning and Development Department, the Planning Commission had perhaps only once denied a CUP application twice where the Department had twice recommended approval. (Doc. 105 at 145–46.)

After the hearing, Mann drafted Findings of Fact identifying three reasons for denial: (1) "[b]ased on public testimony from the Hopson Road neighborhood residents, the proposal "is not consistent with the character of the immediate vicinity;" (2) the proposal is "inconsistent" with the City's Comprehensive Plan, which requires future institutional uses, like churches, to be located outside of low-density residential areas; and (3) changing the designation of the children's play area to a public park meant the proposed building would exceed the maximum of 35% lot coverage for property zoned RS–1. [12] (Pl.'s Ex. 49; *see* Doc. 105 at 83.) On September 23, 2013, the Commission approved the Findings of Fact. (Def.'s Ex. 8 at 16–17.) The Planning and Development Department does not usually prepare findings of fact for each CUP application, but only when an application has been denied and particularly when there is a likelihood of litigation. (Doc. 105 at 83, 144.)

12 At trial, Mann reconciled the Findings of Fact supporting denial with the two Department reports he had authored recommending approval by noting that, even though churches in general are conditional uses in RS–1 and so not necessarily inconsistent with the Comprehensive Plan, the Planning Commission's decision effectively ruled that the Church's proposal is inconsistent in this instance. (*Id.* at 120.)

The Church did not file any petition in Florida state court to review the Commission's determinations. The Church did, however, enter into option agreements for the parcels making up the Property on October 25, 2013 to establish standing to file this lawsuit. (Doc. 104 at 54.) If timely closed, the total purchase price for all the parcels would be $450,000, most of it seller-financed. (Pl.'s Exs. 7, 11.)

F. The 2014 Amendment

Two days before trial began on September 17, 2014, the City amended the LDC. On September 15, 2014, after having held a first public reading on September 2, 2014, the City Council passed Ordinance No.2014–8060, an amendment to the LDC that "would require parks in residential ***1311** zones to make application to the Planning Commission for approval as a conditional use." (Pl.'s Ex. 59.) Under the ordinance (the "2014 Amendment"), section 34–336 of the LDC now includes only "[s]ingle-family dwellings" and "Type I home occupation" as permitted uses on RS–1, with "public and private parks, playgrounds and recreational facilities" moved from permitted uses to conditional uses. (Def.'s Ex. 33.[13])

13 The City used Defendant's Exhibit 33, a certified copy of the ordinance, during its examination of Planning and Development Director Lindorff, but never moved to admit the exhibit into evidence. The Court nevertheless takes judicial notice of Defendant's Exhibit 33 pursuant to Federal Rule of Evidence 201. The Church objected to the timing of the ordinance, but has not disputed that the City's Exhibit 33 accurately reflects the ordinance.

The minutes from the September 2, 2014 City Council meeting reflect comments from the City Attorney that the 2014 Amendment was designed to "ensure compliance with" RLUIPA by "equaliz[ing] the treatment of religious organizations, and public and private parks, playgrounds, and recreational facilities...." (Pl.'s Ex. 59.) Director Lindorff also explained at trial that Jacksonville Beach no longer has open green fields for development where the developer might want to include a park, playground, or recreation center, so there was little need for the LDC to continue to designate parks, playgrounds, and recreation centers as permitted uses as of right in residential zones. (Doc. 105 at 181.) But Lindorff could not recall another time when the LDC had been amended to address a pending lawsuit. (*Id.* at 186.)

II. THE COURT'S DECISION

The Church contends that the City's denial of a CUP and the language of the LDC both violate RLUIPA. (Doc. 107.) The City disputes that and argues, moreover, that the very recent amendment to the LDC moots the Church's challenge to the language of the LDC. (Doc. 110.)

On July 18, 2014, in an order denying the City's motion to dismiss the Church's amended complaint, the Court closely reviewed the language of RLUIPA and the authority interpreting it in an effort to provide guidance to the parties as they prepared for trial. (July 18, 2014 Order, Doc. 56.) The parties generally agree on the broad strokes of the applicable law. (*See* Doc. 72 at 9–11, 19.) Still, the number of issues that remain in dispute and the dictates of Federal Rule of Civil Procedure 52(a)(1) compel the Court to fully set forth the controlling law as it endeavors to apply it to the facts of this case.

[1] **[2]** A key prerequisite is recognizing what law the Court is *not* being asked to apply. Florida law permits a CUP applicant to seek judicial review of a local agency's denial of the application via petition for a writ of *certiorari* in the appropriate Florida state circuit court. *Broward Cnty. v. G.B.V. Int'l Ltd.*, 787 So.2d 838, 842–43 (Fla.2001). The state court in that instance would be empowered to review the local agency's actions to ensure that due process and the essential requirements of the law were observed and that "the administrative findings and judgment are supported by competent substantial evidence." *Florida Power & Light Co. v. City of Dania*, 761 So.2d 1089, 1092 (Fla.2000) (quotation omitted). By contrast, the Court's license to question the judgment of the Planning Commission here is cabined by the elements of RLUIPA.

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

RLUIPA supplies the operative limitations on how government land use regulations may intersect with religious exercise:

> ***1312 (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
>
> ....
>
> **(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.
>
> ....
>
> **(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.

42 U.S.C. § 2000cc.[14] As a "rule of construction," RLUIPA itself provides that it "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." *Id.* § 2000cc–3(g).

14 RLUIPA also includes a provision that "No government shall impose or implement a land use regulation that discriminates against any assembly on the basis of religion or religious denomination." *Id.* § (b)(2). The Church dismissed its claim alleging a violation of this provision. (Docs. 57, 58.)

RLUIPA's prohibitions apply to "a State, county, municipality or other governmental entity created under the authority of the State," their branches, departments, agencies, instrumentalities, and officials, and to "any other person acting under color of State law." *Id.* § 2000cc–5(4). Section 2000cc–2 permits a litigant to assert a RLUIPA violation in a judicial proceeding, as long as it has standing under "the general rules of standing under article III of the Constitution." *Id.* § 2000cc–2(a).[15]

15 RLUIPA claims brought under at least § 2000cc(a), the Substantial Burden provision, must meet one of three additional jurisdictional requirements dealing with whether the land use restriction in question (A) is part of a federally-funded program, (B) affects interstate commerce, or (C) involves "individualized assessments of the proposed uses for the property involved." *Id.* § 2000cc(a)(2). The City does not dispute, and the Court previously held, that subpart (C) is met here.

For claims other than those brought under the Substantial Burden provision, the plaintiff bears the initial burden of producing "prima facie evidence to support a claim alleging ... a violation of section 2000cc of this title," after which, "the government shall bear the burden of persuasion on any element of the claim...." *Id.* at (b). For a Substantial Burden claim, "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 plaintiffs exercise of religion." *Id.*

The Church alleges that the City violated the Substantial Burden, Equal Terms, ***1313** and Unreasonable Limitations provisions of RLUIPA by denying both of the Church's CUP applications and that, on its face, the LDC violates the Equal Terms provision by allowing certain secular assemblies as of right on property zoned RS–1, but classifying religious assemblies as conditional uses that require a permit. (Doc. 107.) The Church urges the Court to order the City to issue a CUP consistent with the Church's first application and to award attorney's fees and costs. (*Id.* at 30.) The City disputes that RLUIPA is even the right vehicle for the Church's challenge to the City's

actions, but says that, in any event, the City did not violate RLUIPA. (Doc. 110.)

1. *The Substantial Burden Provision*

[3] The Church's first claim challenges the City's denial of its CUP application under section (a) of RLUIPA, the Substantial Burden provision, which provides that a land use restriction may not substantially burden "religious exercise" unless it is "the least restrictive means of furthering a compelling governmental interest." *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1225 (11th Cir.2004). "The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief," as well as "[t]he use, building, or conversion of real property for the purpose of religious exercise...." 42 U.S.C. § 2000cc–5(7). Under RLUIPA, the court does not delve into "whether the religious exercise implicated by zoning decisions was integral to a believer's faith." *Men of Destiny Ministries, Inc. v. Osceola Cnty.,* 624–Orl–31DAB, 2006 WL 3219321, at *4 (M.D.Fla. Nov. 6, 2006); *see Burwell v. Hobby Lobby Stores, Inc.,* —— U.S. ——, 134 S.Ct. 2751, 2778, 189 L.Ed.2d 675 (2014).

[4] **[5]** RLUIPA does not define "substantial burden," but the Eleventh Circuit has held that:

> a "substantial burden" must place more than an inconvenience on religious exercise; a "substantial burden" is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.

Midrash, 366 F.3d at 1227 (11th Cir.2004). "To invoke the protection of § (a) of RLUIPA, plaintiffs bear the burden of first demonstrating that the regulation substantially burdens religious exercise." *Id.* at 1225 (citing 42 U.S.C. § 2000cc–2(b)). If a plaintiff meets this burden, the government must then demonstrate "that the imposition of the burden ... is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1).

[6] The Church believes that the evidence at trial showed that the denial of a CUP has left the Church unable to use the Property for any religious purpose, leaving the Church at the Beaches Museum Chapel where its ability to fully practice its religion is restricted. (Doc. 107 at 12–14.) The Church feels called by its religion to this particular Property, with no other property in Jacksonville Beach meeting its affordability, visibility, and accessibility criteria. (*Id.* at 15–17.) The Church argues that the City has not identified, let alone argued, any compelling interest in denying the CUP application without employing less restrictive means such as imposing conditions on the permit that might ***1314** address the concerns of the residents of Hopson Road.[16] (*Id.* at 14, 18–19.)

16 The Church also argues that the Planning Commission violated the Substantial Burden provision by acting unreasonably on the Church's CUP application in light of its long track record of following the recommendations of the Planning and Development Department. (Doc. 107 at 17.) Though a government could conceivably impose a substantial burden by subjecting the CUP applications of religious organizations to greater or different scrutiny than other applications, the Court will address this argument to the extent necessary with respect to the Church's Equal Terms and Unreasonable Limitations claims. *See Midrash,* 366 F.3d at 1229 (indicating that the Substantial Burden provision is "operatively independent" of the other provisions of RLUIPA).

In the City's view, its actions have not forced the Church to forego its religious precepts, just the ability to develop land of its choosing, a consideration not protected by the Substantial Burden provision. (Doc. 110 at 15.) According to the City, other properties are available that meet the Church's religious needs, but just not its budget. (*Id.* at 16–17.) The Church is also free to continue its services at the Beaches Museum Chapel. (*Id.* at 17–18.) The City says the Chapel's limitations are not due to any actions of the City. (*Id.* at 17–18.)

[7] The Eleventh Circuit has stated that " 'run of the mill' zoning considerations" like "[r]equiring churches and synagogues to apply for CUPs" do not amount to a substantial burden. *Midrash,* 366 F.3d at 1227 n. 11; *see*

Konikov v. Orange Cnty., Fla., 410 F.3d 1317, 1323–24 (11th Cir.2005). "That the [religious organization] may be unable to find suitable alternative space does not create a substantial burden within the meaning of RLUIPA." *Midrash*, 366 F.3d at 1227 n. 11. RLUIPA does not relieve religious organizations from " 'the harsh reality of the marketplace [that] sometimes dictates that certain facilities are not available to those who desire them.' " *Id.* (quoting *Love Church v. City of Evanston*, 896 F.2d 1082, 1086 (7th Cir.1990)).

A logical corollary of the principle that requiring a church to apply for a CUP does not impose a substantial burden is that the denial of a CUP does not operate *per se* as a substantial burden. *See Men of Destiny Ministries, Inc. v. Osceola Cnty.*, No. 6:06–cv–624–Orl–31DAB, 2006 WL 3219321, at *4–5 (M.D.Fla. Nov. 6, 2006) (finding denial of CUP did not impose substantial burden); *Williams Island Synagogue, Inc. v. City Aventura*, 358 F.Supp.2d 1207, 1215–16 (S.D.Fla.2005) (same). Allowing the plaintiff in a RLUIPA case to meet its burden simply by showing that its CUP application had been denied would be to effectively hold that the CUP requirement is always a substantial burden and that religious institutions are exempt from the requirement, propositions the Eleventh Circuit has rejected. *Midrash*, 366 F.3d at 1227 n. 11; *see Living Water Church of God v. Charter Twp. of Meridian*, 258 Fed.Appx. 729, 736 (6th Cir.2007) ("If the term 'substantial burden' is not to be read out of the statute, RLUIPA cannot stand for the proposition that a construction plan is immune from a town's zoning ordinance simply because the institution undertaking the construction pursues a religious mission.").

That is not to say that the denial of a CUP could never impose a substantial burden in violation of RLUIPA. But courts must evaluate the alleged burden and be mindful of whether it is the result of the land use regulation in question or "the harsh reality of the marketplace" faced by all those who seek to own or rent land. *See Midrash*, 366 F.3d at 1227 n. 11.

In its order denying the City's motion to dismiss the amended complaint, the Court ***1315** reviewed in some detail Judge Presnell's ruling in *Men of Destiny Ministries, Inc. v. Osceola County*, No. 6:06–cv–624–Orl–31DAB, 2006 WL 3219321 (M.D.Fla. Nov. 6, 2006) and suggested that the Court would likely revisit the ruling after trial. (Doc. 56 at 14–16.) The Court does so now with the benefit of a complete record.

In *Men of Destiny Ministries*, the plaintiff had begun renovations to property in Osceola County to operate a Christian drug and alcohol rehabilitation program. 2006 WL 3219321 at *1–2. The property was zoned, however, such that plaintiff would need a CUP to operate the seven-to-fourteen-person residential facility it had planned. *Id.* at *2. When the renovations came to the county's attention, it cited plaintiff for a number of building permit violations and for not having a CUP. *Id.* Plaintiff addressed the building permit violations and then applied for a CUP. *Id.* Staff members of the planning commission recommended the application be approved with conditions. *Id.* But when the planning commission itself convened to vote on the application, plaintiffs neighbors spoke against the application, and the planning commission voted 6–2 to deny it. *Id.* at *3. The application then went to the full county commission for a final decision, where the vote was 4–0 to deny the CUP and give the plaintiff forty-five days to relocate. *Id.* The plaintiff filed suit against the county on a number of grounds, including alleged violation of the Substantial Burden provision. *Id.* at *1, *4.

Judge Presnell found that the county's denial of the plaintiff's CUP did not impose a substantial burden, relying largely on the Eleventh Circuit's opinion in *Midrash*. *Id.* at *5. Judge Presnell noted that there was no allegation that the plaintiff could exercise its religion only on the property in question or only through its planned residential facility, so it was free to alter its facility or to relocate where it might operate as of right. *Id.* "[Plaintiff] 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 [plaintiff's] religious exercise." *Id.*

The Church contends that this case differs from *Men of Destiny Ministries* because "the Property is the *only* location in the City that allows the Church to fully exercise its religious beliefs." (Doc. 107 at 17.) However, the evidence neither supports such a broad statement nor implicates the City in causing that supposed limitation.

Reverend Ball testified that the Church feels a divine calling and religious necessity to own the Property and

build a stand-alone church on it. (Doc. 105 at 34, 40.) Accepting these beliefs as sincerely held, the City's refusal to issue a CUP, even one with conditions, does impact the Church's ability to use the Property for its religious purposes. (*See id.* at 40–41.) But just as in *Men of Destiny Ministries,* the City's denial of the Church's CUP application does not prevent the Church from relocating to property in any of the zones where it might operate as of right or where its application for CUP might meet with more success. (*See* Pl.'s Ex. 19); LDC Secs. 34–336 to –348. Churches are permitted as of right along nearly all of Beach Boulevard and much of Third Street (A1A), the main thoroughfares in Jacksonville Beach. (Pl.'s Ex. 19.) Reverend Ball acknowledged that the Church's search did find properties that met its needs for accessibility and visibility, but were disqualified by their price. [17] (Doc. 105 at 49.)

17 The Court conditionally admitted the testimony of Kate Clifford, a local real estate broker, who testified for the City regarding other potentially suitable properties for sale at the time the Church found the Property. (Doc. 105 at 208–225.) The specifics of this testimony, to which the Church objects, are largely unhelpful and have not been considered in reaching the findings and conclusions here. *See* Fed.R.Evid. 702. The Court does credit, however, Clifford's uncontroversial testimony that other property is available in Jacksonville Beach, but that it would be difficult to find property that the Church could afford. (Doc. 105 at 243.)

***1316** The overwhelming balance of the evidence shows that affordability was the primary reason the Church has locked onto the Property as its desired location. However, that other suitable land is not available in Jacksonville Beach at a price the Church can afford is a burden imposed by the market, not one the City created by denying the Church a CUP. *Midrash,* 366 F.3d at 1227 n. 11 ("[W]hatever specific difficulties the plaintiff church claims to have encountered, they are the same ones that face all land users, not merely churches." (quotation omitted).) RLUIPA does not authorize the Court to relieve the Church of such an impediment.

Moreover, the Court cannot find from the evidence that the City's refusal to grant a CUP imposed a substantial burden on the Church by forcing it to continue holding its services at the Beaches Museum Chapel. Reverend Ball did testify as to the limitations of the Chapel building and their impact on the Church's ability to hold its traditional Sunday services and other events. (*See, e.g.,* Doc. 105 at 14–18.) But he also agreed that the Church can use the Chapel for its special functions as long as it is available and the rate is affordable, and acknowledged other accommodations to which the Church and the Historical Society have agreed. (*See, e.g., id.* at 16–17, 50–51.) Undoubtedly, the Beaches Museum Chapel is less convenient and less effective than the Church's proposal for the Property would be. But "a 'substantial burden' must place more than an inconvenience on religious exercise;" instead, it must exert the kind of "pressure that tends to force adherents to forego religious precepts ... or mandates religious conduct." *Midrash,* 366 F.3d at 1227. To the extent the City's denials can be said to have prevented the Church from alleviating the deficiencies of its current arrangement, these impediments do not rise to the level of a "substantial burden" prohibited by RLUIPA. *See Williams Island Synagogue, Inc. v. City Aventura,* 358 F.Supp.2d 1207, 1215–16 (S.D.Fla.2005).

Finding that the Church has not proven its Substantial Burden challenge by a preponderance of the evidence, 42 U.S.C. § 2000cc–2(b), the Court does not reach whether denying the Church's request for a CUP constituted "the least restrictive means of furthering [a] compelling governmental interest," *id.* § 2000cc(a)(1). The Court finds instead that the City is entitled to judgment on Count I of the Amended Complaint.

2. *The Equal Terms Provision*

The Church also contends it is entitled to judgment in its favor on its facial and as-applied challenges under § (b)(1) of RLUIPA, the Equal Terms provision, which 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). To establish an Equal Terms violation, the plaintiff must make a *prima facie* showing that it is (a) a religious assembly or institution; (b) subject to a land use regulation; (c) that treats it on less than equal terms; (d) with a nonreligious assembly or institution. ***1317** *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.,* 450 F.3d 1295, 1307–08 (11th Cir.2006); *see* 42 U.S.C. § 2000cc(b)(1); 42 U.S.C. § 2000cc–2. Importantly, as acknowledged by the City at

final argument, if the Church makes the required *prima facie* showing of unequal treatment, it need not further show that the City was motivated by discriminatory animus or intent. Put another way, if the City treated the Church unequally to a similarly situated, non-religious assembly or institution, the Church need not prove *why* the City did so.

[8] If the Church makes its *prima facie* showing, the City then bears the burden of attacking an element of the claim or establishing that the conduct at issue "employs a *narrowly* tailored means of achieving a *compelling* government interest." *Primera,* 450 F.3d at 1308 (citations omitted). A plaintiff may prove any of three distinct kinds of Equal Terms 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.

Id.

The Eleventh Circuit has explained that, in evaluating unequal treatment, courts do not look for "similarly situated" secular land uses of any kind, but only at "assemblies and institutions." *Midrash,* 366 F.3d at 1230. Though RLUIPA does not define "assembly" or "institution," the Eleventh Circuit gives the terms their natural (read: dictionary) meaning. *Id.* So, "[a]n 'assembly' is a company of persons collected together in one place [usually] and usually for some common purpose (as deliberation and legislation, worship, or social entertainment)." *Id.* (second alteration in original) (quotation omitted). An "institution" is more formal, "an established society or corporation: an establishment or foundation [especially] of a public character." *Id.* at 1230–31 (quotation omitted).

Here, the Church contends both that the LDC facially treats religious assemblies and institutions differently than secular ones—specifically parks, playgrounds, and recreation centers—and that the City has enforced even the neutral aspects of the LDC selectively by denying the Church a CUP when it has granted CUPs to secular groups in similar circumstances.

a. *Facial Challenge and Mootness*

[9] **[10]** **[11]** The Court turns first to the Church's facial challenge, specifically, to the impact of the City's recent amendment on its continued viability. Mootness is a threshold jurisdictional issue that the Court must raise even if the parties do not.[18] *Seay Outdoor Adver., Inc. v. City of Mary Esther, Fla.,* 397 F.3d 943, 946 (11th Cir.2005). Article III of the U.S. Constitution extends the authority of federal courts only to actual cases or controversies. *Covenant Christian Ministries, Inc. v. City of Marietta, Ga.,* 654 F.3d 1231, 1239 (11th Cir.2011); *Seay Outdoor Adver., Inc.,* 397 F.3d at 946. There must be a live case or controversy throughout the litigation, not only when commenced. *Tanner Adver. Grp., LLC v. Fayette Cnty., Ga.,* 451 F.3d 777, 785 (11th Cir.2006).

18 With this in mind, the Court determines that only the Church's facial Equal Terms challenge is potentially mooted by the 2014 Amendment, as its other claims do not rely on the classification of parks, playgrounds, and recreational centers as permitted uses in the LDC.

***1318** **[12]** At the time the Church twice applied for a CUP and was twice denied, the Jacksonville Beach LDC classified "religious organizations" as conditional uses in the RS–1 zoning district, but classified "Public and private parks, playgrounds and recreational facilities ... for the sole use of residents living in the area where such facilities are located, and ... not ... used for commercial purposes" as permitted uses. LDC Sec. 34–336(b)(2). Relying on this allegedly unequal treatment and the Eleventh Circuit's opinion in *Covenant,* the Court denied the City's motion to dismiss the Church's facial Equal Terms challenge and ordered that it proceed to trial. (Doc. 56 at 18–20.) In direct response to the Court's ruling, on September 15, 2014, two days before trial began, the City amended the LDC to reclassify parks, playgrounds, and recreational facilities as conditional uses on all residential property, including property zoned RS–1. (Def.'s Ex. 33; Pl.'s Ex. 59.)

The City contends that the 2014 Amendment moots the Church's facial challenge. (Doc. 110 at 18–21.) The Church believes the 2014 Amendment is actually an admission by the City that judgment should be entered in favor of the Church, or is potentially an unconstitutional bill of attainder. (Pl.'s Supplement to its Trial Brief, Doc. 93; Doc. 107 at 21–23.) The Court determines that, though the passage of the 2014 Amendment smacks of strategy, it renders the Church's facial challenge moot.

The Eleventh Circuit's opinion in *Covenant* is controlling here and its remarkably similar circumstances are worth close review. In an effort to address an earlier RLUIPA lawsuit, the City of Marietta, Georgia passed an amendment to its zoning ordinance in 2004 that prohibited religious organizations in a number of residential zoning districts. 654 F.3d at 1236. Just two weeks prior to the passage of the amendment, a non-denominational Christian church had entered into a purchase contract on property zoned residential. *Id.* The church, unaware of the amendment, eventually closed on the property only to learn later that it could no longer build its church without seeking rezoning. *Id.* at 1237. The church filed suit against the city, challenging the validity of the 2004 ordinance under the Equal Terms provision of RLUIPA and on other grounds. *Id.* at 1236–37. The district court eventually granted summary judgment for the city on most of the church's claims, except that it found that the ordinance did facially violate the Equal Terms provision by treating religious assemblies differently than secular assemblies by permitting parks, playgrounds, and neighborhood recreation centers in residential zones, but not religious assemblies. *Id.* at 1237–38. To remedy this violation, the district court struck parks, playgrounds, and neighborhood recreation centers from the list of permitted uses, effectively prohibiting all assemblies in residential zones. *Id.* at 1238. Based on the district court's finding of unequal treatment, though, the church then applied in 2008 for permits to start building its facility. *Id.* At the same time, however, the city again amended its zoning ordinance, this time to classify all places of assembly as "special uses" requiring approval by the city council. *Id.*

The Eleventh Circuit eventually faced the question of the whether the 2008 ordinance rendered the church's challenges to the 2004 ordinance moot. *Id.* at 1238–39. The court started by noting that "[w]hen a party challenges an ordinance and seeks injunctive relief, a superseding ordinance moots the claim for injunctive relief," *Id.* at 1239, but " 'only to the extent it removes challenged features of the prior law,' " fundamentally altering the statutory framework, *id.* at 1243 (quoting ***1319** *Naturist Soc., Inc. v. Fillyaw*, 958 F.2d 1515, 1520 (11th Cir.1992)). The court found that the City of Marietta's new ordinance did moot the church's request for injunctive relief:

> We conclude that the 2008 Ordinance has fundamentally changed the City's zoning regulations and mooted Covenant's claims for injunctive relief. The 2008 Ordinance makes places of assembly (including religious institutions), private parks, playgrounds, and neighborhood recreation centers special uses permitted upon approval by the City Council. Under the 2004 Ordinance, churches were completely prohibited in residential zones while all of these other uses were permitted. One of the central allegations of Covenant's First Amended Complaint is that the 2004 Ordinance treats religious institutions differently from other similar uses. Under the 2008 Ordinance, religious institutions in R–2 residential zoning classifications are no longer treated differently than the uses that Covenant identifies as similar in the First Amended Complaint. Therefore, we agree with the district court that the 2008 Ordinance fundamentally altered the statutory framework, and thus the claims for injunctive relief concerning the 2004 Ordinance are now moot.

Id. at 1243 (quotation omitted). Because the church had requested damages in addition to injunctive relief, the court did address the 2004 ordinance substantively and found it invalid. *Id.* at 1244–46. Though the zoning ordinances in *Covenant* and in this case started at different places, the respective amendments are similar in that they both equalize the treatment of religious assemblies and other, non-religious assemblies.

The Church contends the 2014 Amendment is an admission that the LDC originally did treat religious organizations unequally. (Doc. 93 at 3; Doc. 107 at 21.) Indeed, it is hard for the Court to see the amendment and the City Attorney's statement in support of it in any other light. But that admission does not give the Court jurisdiction to issue an injunction to fix a problem that no longer exists. [19]

19 To the extent the Church might be heard to argue that its facial challenge is not moot because it requested a different kind of injunction, one that directed the City to grant a CUP rather than to change the LDC, the Court disagrees that a facial challenge to the LDC would entitle the Church to such a remedy. True, a CUP would solve the Church's problems, but would leave the offending ordinance in place. Instead, a proper remedy would be to sever and modify the ordinance itself. *See Covenant,* 654 F.3d at 1240.

In its supplemental trial brief, the Church points to the Fifth Circuit's opinion in *Opulent Life Church v. City of Holly Springs. Miss.,* 697 F.3d 279, 285–86 (5th Cir.2012) as support for the proposition that voluntary cessation of offending conduct does not necessarily moot a controversy. [20] (Doc. 93 at 3–5.) In that RLUIPA case, the defendant city amended its zoning ordinance the night before oral argument before the Fifth Circuit. *Id.* The court rejected the city's mootness argument because there was nothing preventing the city from reenacting the objectionable ordinance and, in fact, every indication the city would repeat its allegedly wrongful conduct. [21] *Id.* at 286.

20 The Church actually raises this issue while arguing that its as-applied Equal Terms challenge is not moot. But the City does not argue that the as-applied challenge is moot, and the Court does not find it moot either.

21 The Church also misquotes *Opulent Life* as holding that a request for attorney's fees " 'alone is enough' " to keep a controversy alive. (Doc. 93 at 5.) The opinion actually says that, even where an injunction is no longer necessary, a request for *actual damages* and attorney's fees is enough for the court to decide the case. *Opulent Life,* 697 F.3d at 286. Here, the Church has never sought damages and cites to no authority holding that a request for attorney's fees is enough on its own to avoid a case being moot.

***1320 [13]** The evidence in this case, however, provides no similar indication that the City will simply reclassify parks, playgrounds, and recreational centers as permitted uses on residential property upon the conclusion of this case. " 'For a defendant's voluntary cessation to moot any legal questions presented and deprive the court of jurisdiction, it must be absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' " *Covenant,* 654 F.3d at 1244 (quoting *Nat'l Adver. Co. v. City of Miami,* 402 F.3d 1329, 1333 (11th Cir.2005)). " '[G]overnmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities.' " *Id.* (quoting *Nat'l Adver. Co.,* 402 F.3d at 1333). "The City's purpose in amending the statute is not the central focus of our inquiry nor is it dispositive of our decision. Rather, the most important inquiry is whether we believe the City would re-enact the prior ordinance." *Nat'l Adver. Co.,* 402 F.3d at 1334. "Mere speculation that the City may return to its previous ways is no substitute for concrete evidence of secret intentions." *Id.*

Director Lindorff testified that the designation of parks, playgrounds, and recreation centers as permitted uses in residential zones in the LDC was likely a vestige of some model zoning code. (Doc. 105 at 181.) There was little need, therefore, to retain that designation since, "[a]s a practical matter as a build-out [sic] community, Jacksonville Beach doesn't have the kinds of green fields that could be developed for—for residential development that they might desire to include a recreational center." (*Id.*) With no practical reason for the City to retain the designation in the first place, the Church has supplied no other reason to expect the City to reenact it after this case is closed.

[14] [15] As a final attempt to avoid the effect of the 2014 Amendment, the Church contends it amounts to an unconstitutional "bill of attainder," keying off a discussion the Court had with counsel for the City at the close of trial. (Doc. 107 at 22–23.) This argument merits only brief discussion. The U.S. Constitution prohibits Congress and the States from passing any bill of attainder. U.S. Const. art. 1, §§ 9, 10. "A bill of attainder is 'a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.' " *Houston v. Williams,* 547 F.3d 1357, 1364 (11th Cir.2008) (quoting *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 468, 97 S.Ct. 2777, 53 L.Ed.2d

867 (1977)). Though the 2014 Amendment has a targeted effect on the Church's lawsuit, its language applies broadly to the entire class of property in the City zoned residential. (*See* Def.'s Ex. 33.) Moreover, the amendment does not determine the Church guilty of anything or impose the type of legislative punishment prohibited by the Bill of Attainder Clause. *Selective Serv. Sys. v. Minn. Public Interest Research Grp.*, 468 U.S. 841, 852–56, 104 S.Ct. 3348, 82 L.Ed.2d 632 (1984); *see Nixon,* 433 U.S. at 472, 97 S.Ct. 2777 ("Forbidden legislative punishment is not involved merely because the [amendment] imposes burdensome consequences."); *cf. Covenant,* 654 F.3d at 1240 (finding no error in striking parks, playgrounds, and neighborhood recreation centers from the list of permitted uses rather than including religious organizations). The Court thus declines to find the 2014 Amendment to be an unlawful bill of attainder.

***1321** The Court finds the Church's facial Equal Terms challenge moot and will therefore dismiss Count II of the Amended Complaint for lack of jurisdiction.

b. *As–Applied Challenge*

[16] **[17]** **[18]** The Church's as-applied Equal Terms challenge, Count III, still remains for adjudication. "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." *Primera,* 450 F.3d at 1311; *Konikov v. Orange Cnty., Fla.,* 410 F.3d 1317, 1325 (11th Cir.2005). "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." *Primera,* 450 F.3d at 1311. Neither party proposes a rubric under RLUIPA for how to decide whether a potential comparator is "similarly situated" for purposes of an as-applied challenge (and neither the statute nor case law specifically defines the phrase), but the Court gleans from authority, including Equal Protection jurisprudence, that "[a] showing that two projects were similarly situated requires some specificity" such that the comparator is identical for all *relevant* purposes. *See Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1314 (11th Cir.2006). The decision requires a close review of the circumstances of both projects. *See Church of Scientology of Ga., Inc. v. City of Sandy Springs, Ga.,* 843 F.Supp.2d 1328, 1362–70 (N.D.Ga.2012) (reviewing comparators for a discrimination claim under RLUIPA). Applying these legal principles to the facts found by the Court, the Court must determine whether the Church has proven by a preponderance of the evidence that the proposed comparator is similarly situated to the Property in the relevant aspects.

The Church initially pointed to four comparators—two churches, one private school, and one public school —where the City granted CUPs to operate on RS–1 property. (Doc. 32 at ¶¶ 37, 87.) For trial, though, the Church appropriately limited itself to the secular comparators: the Duval County School Board and Discovery Montessori School. (Doc. 72 at 18.) The Church alleges that by denying its application but granting these, the City has, in practice, treated the Church on less than equal terms with nonreligious assemblies. The Court addresses each comparator in turn.

i. The Duval County School Board

[19] In 1995, the Duval County School Board sought and received permission to make major improvements to an existing middle school that was non-conforming on an approximately twenty-acre lot zoned RS–1. (Pl.'s Ex. 55 at 1; Doc. 105 at 101.) The improvements included replacing 60,000 square feet of existing buildings with 90,000 square feet of new construction, but not increasing school enrollment. (Pl.'s Ex. 55 at 20.) Significantly, the twenty-acre middle school property was located next to another school. (Doc. 105 at 101.) When the School Board's CUP application was brought before the Planning Commission for public hearing, the commissioners asked some questions of the School Board representative, but no one spoke against the application. (Pl.'s Ex. 55 at 21.) The Commission approved the School Board's CUP application. (*Id.*)

The Church contends that the School Board's application was similar to its own because the School Board intended to use its property for some of the same things the Church intends to use the Property, such as educational activities and assembling together. (Doc. 107 at 25.) While true, these similarities only establish that both uses qualify as an "assembly" and/or ***1322** "institution" under RLUIPA, a point which the City concedes. From its review of the evidence, the Court finds the Duval County School

Board's CUP application too dissimilar in size, intensity of use, location, fit with the surrounding neighborhood, and public support to function as a comparator in the Church's as-applied Equal Terms challenge.

ii. Discovery Montessori School

[20] Discovery Montessori School's initial CUP application is a better comparator. In 1994, Discovery Montessori School sought and received a CUP to build a private school on a 1.9–acre parcel in Jacksonville Beach that was zoned RS–1. (Pl.'s Ex. 53 at 1.) The school intended to operate out of a temporary facility until permanent construction was called for. (Def. Ex. 22 at 1.) The temporary facility would house a maximum of twenty students, but the school's site plan called for a permanent facility for seventy-five to eighty students. (*Id.*) Across the street from the property to the east was the City's public works facilities, to the north and northeast were mobile home parks, to the west was multi-family retirement housing, and to the south were single family homes. (*Id.*) At the public hearing on the school's application, representatives of the school and four members of the public spoke in favor of the application. (*Id.* at 1–2.) Six residents of the area around the property spoke against the application, raising concerns about traffic, fit with the neighborhood and the Comprehensive Plan, and the impact on property values. (*Id.* at 2–3.) The commissioners asked a number of questions about the school's proposal and the potential traffic impact. (*Id.* at 3–5.) At the close of the hearing, the Commission voted unanimously in favor of approving the school's application to construct the temporary structure on the site with the condition that the school re-appear before the Planning Commission for approval of a permanent structure.[22] (*Id.* at 5.)

22 The permanent structure was apparently built, though the record does not contain any materials relating to subsequent approval proceedings for the structure.

In 2014, while this case was pending, the Discovery Montessori School applied for a CUP to expand the school to two residential lots adjacent to its current property and build a two-story, 18,000 square-foot building that would support up to 175 additional students. (Pl.'s Ex. 54; Def.'s Ex. 29.) The school met and worked with the Planning and Development Department to address potential traffic issues caused by student drop-off/pick-up times. (Pl.'s Ex. 54 at 3.) The Department found the school's desire to expand to these lots "logical," the school to be a "good steward of the existing property through its incremental expansions since it was established," and the school's site plan to be "a deliberate effort at minimizing any potential off-site impacts due to traffic." (*Id.* at 3–4.) The Department recommended that the permit be approved with the conditions that the school develop the properties in accordance with the submitted site plan, enforce a staggered drop-off/pick-up time schedule, and provide a crosswalk guard during drop-off/pick-up times. (*Id.* at 4.) At the March 24, 2014 public hearing on the expansion, one resident of the area raised concerns about parking in the area, while another concurred and expressed concern about traffic. (Pl.'s Ex. 54 at 5.) The Planning Commission unanimously approved the application with the conditions recommended by the Department. (*Id.*)

The Court finds the Discovery Montessori School's CUP to be a similarly situated comparator for purposes of the Church's as-applied challenge. The school proposed a similarly small, relatively low- ***1323** impact use of property zoned RS–1. The school's property totaled 1.9 acres; the Church has options on between 1.34 and 1.7 acres. Much like the Property at issue here, the area immediately surrounding the school's property was not strictly low-density, single family homes, but included a public works facility across the street, a mobile home park to the north, and a multi-family retirement home to the west. The Property here is bordered by a busy six-lane highway on the north, with overflow parking for an amusement park immediately to the east, the amusement park itself as the very next structure to the east, and a sewage lift station bisecting the main north parcels of the Property from the south parcel. Like the Church, Discovery Montessori faced objections by the neighbors and questions from the commissioners about traffic, fit with the neighborhood, and the impact on property values. Though it is not clear, it appears that the Planning and Development Department generally recommended approval of the school's application, just as it approved the Church's. An even closer review of the Department files for Discovery Montessori's applications (Pl.'s Exs. 53, 54; Def.'s Exs. 21, 22, 29, 30) impresses further with the substantial similarities between the school and the Church

with respect to circumstances and the considerations at play in both situations.

But unlike with the Church's application, the Commission did grant the school a CUP with the condition that the Commission approve the final site plan. Here, the Commission voted against a motion to approve the Church's second application with the same condition that the Church must follow its proposed site plan, but gave no indication why or that it had considered any of the other conditions proposed during the hearing.

Without explanation or citation to authority, the City argues that Discovery Montessori School's CUP application cannot be a similarly situated comparator due to its "remoteness in time." (Doc. 110 at 26.) Remoteness might be an important distinction in some cases, considering the potential for the sensibilities of the community and the policies of the local government to change. However, the Court cannot find the relative remoteness in time significant here. Instead, the City's very recent approval with conditions of Discovery Montessori's application to expand its footprint further into the residential neighborhood adds currency to the City's treatment of the school as compared to the Church. Approval of the School's 2014 expansion affirms that the Planning Commission continues to allow the secular school to operate as a conditional use on RS–1 property, but has now twice denied the Church's similar application. [23]

23 When asked at oral argument to distinguish between Discovery Montessori School's situation and the Church's, the City cited location (which the Court has already addressed) and the difference in "intensity" of the two uses. However, the School's proposed usage of its property in 1994 was at least as "intensive," if not more so, than the Church's proposed use of the Property, with the School proposing to have eighty children using its property every weekday. Now, with the School's 2014 expansion to an additional 175 students in a second, 18,000 square-foot building, its "intensity" of use has only increased.

Undoubtedly, every location and piece of property is unique, every CUP application is different, and no two situations are ever going to be exactly the same. Nevertheless, the Court finds by a preponderance of the evidence that Discovery Montessori School is a similarly situated comparator and that the Church has adduced *prima facie* evidence to support its claim that the City violated the Equal Terms provision of ***1324** RLUIPA by selectively enforcing the LDC in a way that subjected the Church to "less than equal" treatment. [24]

24 By way of contract, in *Primera,* the Eleventh Circuit concluded that the church's proposed comparator was not similarly situated for purposes of an as-applied Equal Terms challenge where the comparator property was many times larger than the church's and the comparator had sought and received an entirely different form of zoning relief. 450 F.3d at 1311–13.

iii. Strict Scrutiny

[21] The burden now shifts to the City to establish that its actions in denying the Church's CUP were narrowly tailored to further a compelling government interest. *Primera,* 450 F.3d at 1308; *see* 42 U.S.C. § 2000cc–2(b). Though raised with respect to the Church's facial challenge, the City maintains that it has a strong interest in preserving the character and safety of its residential neighborhoods through enforcement of its zoning regulations and that the CUP requirement for RS–1 property furthers this interest. (*See* Doc. 110 at 24–26.) Even assuming that this constitutes a compelling government interest under RLUIPA, the Court finds that a blanket denial of the Church's application was not narrowly tailored to further that interest.

In considering the Church's application, the Planning Commission had a number of options at its disposal short of straight-out denial. Section 34–232 of the LDC allows the Commission to consider imposing a range of conditions on the conditional use to address the interests the City now identifies as important, "including, but not limited to: Limitations on size, bulk and location; requirements for landscaping, buffering, lighting, adequate ingress and egress and other on-site or off-site, project-related improvements; duration of the development order; and hours of operation." Even though the City's Planning and Development Department twice recommended approval of the Church's CUP without conditions, during both hearings before the Planning Commission, the Church expressed a willingness to consider and accept some conditions. (*See, e.g.,* Pl.'s Ex 47 at 34–35.) At the second hearing, Mann, the city planner, advised the Commission that it could condition the permit on the Church developing the Property based on the

specific site plan submitted with the application. (*Id.* at 17–18.) Commissioner Dumont moved to do just that, but then voted against her own motion along with the rest of the Commission. (*Id.* at 43.)

On this record, the City has not met its burden of persuading the Court that, when it twice denied the Church's CUP application, but granted Discovery Montessori School's, its actions were narrowly tailored to further the interests it now identifies as compelling. Accordingly, the Court finds that the Church is entitled to judgment in its favor on its as-applied Equal Terms challenge, Count III of the Amended Complaint. [25]

25 The Court has not considered the proposed testimony from Church witness Fred Atwill that locating the Church on the Property would not reduce surrounding property values as it is not helpful in determining any fact at issue.

3. *The Unreasonable Limitations Provision*

[22] **[23]** The Unreasonable Limitations provision prohibits the imposition or implementation of a land use regulation that "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. § 2000cc(b)(3)(B). This provision "prevents government from adopting policies that make it difficult for ***1325** religious institutions to locate anywhere within the jurisdiction." *Bethel World Outreach Ministries v. Montgomery Cnty. Council,* 706 F.3d 548, 560 (4th Cir.2013) (citing *Vision Church v. Vill. of Long Grove,* 468 F.3d 975, 990–92 (7th Cir.2006)). "[T]he purpose of this provision is not to examine restrictions placed on individual landowners, but to prevent municipalities from broadly limiting where religious entities can locate." *Church of Scientology of Ga., Inc. v. City of Sandy Springs, Ga.,* 843 F.Supp.2d 1328, 1377 (N.D.Ga.2012) (citing *Adhi Parasakthi Charitable, Med., Educ. & Cultural Soc'y of N. Am. v. Twp. of West Pikeland,* 721 F.Supp.2d 361, 387 (E.D.Pa.2010) and *Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs,* 613 F.3d 1229, 1238 (10th Cir.2010)). The clear implication of the language of § (b)(3)(B) is that a government could *reasonably* limit religious organizations in a way that does not run afoul of this provision. The Southern District of Florida, following the Seventh Circuit's opinion in *Vision Church,* has held that " 'what is reasonable must be determined in light of all the facts, including the actual availability of land and the economics of religious organizations.' " *Chabad of Nova, Inc. v. City of Cooper City,* 575 F.Supp.2d 1280, 1289 (S.D.Fla.2008) (quoting *Vision Church,* 468 F.3d at 990).

[24] The Church posits that the City's treatment, combined with the Church's limited budget, unreasonably restricts the Church's ability to express its religious beliefs. (Doc. 107 at 26–27.) But again, the focus of the Unreasonable Limitations provision is not on the treatment of a particular landowner, but religious entities in general. *Church of Scientology of Ga.,* 843 F.Supp.2d at 1377. Otherwise, the Unreasonable Limitations provision would largely duplicate the Substantial Burden provision. The Church argues that the Planning Commission's rejection of its applications despite a long history of approving CUPs recommended by the Planning and Development Department is evidence of the City's unreasonable limitation of religious assemblies in general; however, the Church has not supported that argument with more than supposition. In fact, the two recent CUPs the City granted for religious organizations that the Church attached to its amended complaint cut against any argument that the City either routinely denies CUP applications from religious groups or holds them to a higher standard than secular groups. (Docs. 32–19, 32–22.)

The Church has not shown by a preponderance of the evidence that the City has broadly limited religious entities' ability to locate within Jacksonville Beach. The evidence was that at least nineteen churches currently operate within city limits (Doc. 105 at 168) and that the great majority of land in the City remains open for use by religious organizations either by right or as a conditional use (though in actuality much of that land may be too expensive for a church to buy), (Pl.'s Ex. 19); LDC Secs. 34–336 to –348. That some land uses would require a conditional use permit is neither unreasonable nor limited to only religious assemblies, institutions, or structures. *See Vision Church,* 468 F.3d at 990–91. Moreover, while the economics of religious assemblies is a factor to consider, the LDC does not impose special economic hardships on religious assemblies through, for example, oppressive frontage requirements or other restrictions that might force religious assemblies to incur greater costs than secular assemblies. *See Chabad of Nova, Inc.,* 575 F.Supp.2d at 1289–91. For these reasons, the Court finds in favor of the City on Count V of the Amended Complaint.

*1326 **B. "Appropriate Relief"**

[25] Having found in favor of the Church on Count III of the Amended Complaint, the Court must fashion a remedy. It appears undisputed that "appropriate relief" for a RLUIPA violation may include injunctive and declaratory relief. *See Smith v. Allen,* 502 F.3d 1255, 1269–70 (11th Cir.2007). ***abrogated on other grounds by*** *Sossamon v. Texas,* 563 U.S. 277, 131 S.Ct. 1651, 179 L.Ed.2d 700 (2011); 42 U.S.C. § 2000cc–2(a). However, such "appropriate relief" should be limited to the specific violation found and avoid undue interference with the City's authority and processes. The Church urges the Court to order the City to approve its CUP application without condition (Doc. 107 at 30), but suggested at final argument that it might be open to some conditions. The City did not brief the issue of the appropriate remedy should it not prevail at trial, but argued that any remedy should allow the City to follow the procedures provided for in the LDC.

The Court intends to enter judgment directing the City to grant the Church a conditional use permit to operate on the Property. However, the City may consider whether to impose *reasonable* conditions on the permit in accordance with the LDC and subject to its procedures. *See* LDC § 34–232. The Court directs the parties to promptly confer as to what conditions may be appropriate and the proper procedure for issuance of the CUP consistent with the LDC.[26] While the Court expects parties of goodwill to be able to reach agreement on reasonable conditions, the Court will retain jurisdiction in the event further proceedings are required.

26 The Court also encourages the parties to take this opportunity to discuss settlement of the entire case without further court involvement.

III. CONCLUSION

[26] A federal court is rightly circumspect when it is asked to interfere with a local government's zoning decision. However, RLUIPA has been held to be a constitutional exercise of Congress's authority. *Midrash,* 366 F.3d at 1237–43; *see Cutter v. Wilkinson,* 544 U.S. 709, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005). Thus, if a "religious assembly or institution" such as the Church proves its case, RLUIPA provides an "appropriate" federal remedy. This is such a case.

Accordingly, it is hereby

ORDERED:

1. Defendant's Motion for Summary Judgment (Doc. 59) and Supplemental Motion for Summary Judgment (Doc. 95) are **DENIED.**

2. Defendant's Motion to Strike Plaintiffs Expert Witness (Doc. 60) is **GRANTED** to the extent reflected above.

3. Plaintiffs Motion to Admit Evidence Pursuant to FRE 1006 (Doc. 62) is **MOOT.**

4. The parties are **DIRECTED** to confer as outlined above and to jointly file a status report on or before **January 12, 2015.** The Court will withhold entry of judgment until after review of the joint report or as otherwise appropriate.[27] Any requests for attorney's fees or costs, if not resolved by the parties, will be heard upon a schedule to be determined by the Court at a later date.

27 The form of the Court's judgment, whether it be a mandatory injunction or some other appropriate vehicle, remains to be determined.

All Citations

69 F.Supp.3d 1299

End of Document

108 F.Supp.3d 1259
United States District Court,
M.D. Florida,
Jacksonville Division.

CHURCH OF OUR SAVIOR, formerly known as Resurrection Anglican Church, Inc., a Florida Nonprofit Corporation, Plaintiff,
v.
The CITY OF JACKSONVILLE BEACH, a Florida Municipal Corporation, Defendant.

Case No. 3:13–cv–1346–J–32JBT.
|
Signed May 19, 2015.

Synopsis

Background: Church brought Religious Land Use and Institutionalized Persons Act (RLUIPA) action against city, challenging city's denial of its request for a conditional use permit (CUP) to build church building on property zoned residential. The District Court, Timothy J. Corrigan, J., 2014 WL 3587494, denied city's motion to dismiss. Following bench trial, the same court, 69 F.Supp.3d 1299, 2014 WL 6685484, entered order in favor of church, and subsequently entered order directing city to grant church CUP. City moved for reconsideration, and church moved for attorneys fees and costs.

Holdings: The District Court, Timothy J. Corrigan, held that:

[1] denial of city's motion for reconsideration was warranted;

[2] modification of condition of CUP requiring church to develop property without exception and without seeking variance was warranted;

[3] condition of CUP requiring church to install fence was not improper exaction;

[4] modification of condition of CUP requiring church to prepare pedestrian-only access easement across city-owned property was not warranted;

[5] condition of CUP requiring church to secure development plan approval within 12 months of issuance of CUP was sufficiently burdensome so as to operate as effective denial of church's CUP application; and

[6] court would reduce by 50% attorneys' requested fees.

As ordered.

West Headnotes (36)

[1] **Federal Civil Procedure**
Error by court

Federal Civil Procedure
Further evidence or argument

A court may only grant a motion for reconsideration if it is based on newly-discovered evidence or manifest errors of law or fact.

Cases that cite this headnote

[2] **Federal Civil Procedure**
Extraordinary remedy;motion not favored

Motions for reconsideration should be viewed with caution and granted only sparingly.

Cases that cite this headnote

[3] **Federal Civil Procedure**
Further evidence or argument

A motion for reconsideration is not a substitute for an appeal, and cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment.

1 Cases that cite this headnote

[4] **Federal Civil Procedure**
Grounds and Factors

Reconsideration may be justified on one of three grounds: (1) an intervening change in controlling law; (2) the availability of new

evidence; and (3) the need to correct clear error or manifest injustice.

Cases that cite this headnote

[5] **Federal Civil Procedure**
Further evidence or argument

Moving for reconsideration in the hope that a court will change its mind is inappropriate.

Cases that cite this headnote

[6] **Federal Civil Procedure**
Grounds and Factors

In deciding whether reconsideration of a pre-judgment order is appropriate, courts look to similar factors as those a court considers on motions to alter or amend a judgment or a motion for relief from a final judgment, order, or proceeding. Fed.Rules Civ.Proc.Rules 59(e), 60(b), 28 U.S.C.A.

Cases that cite this headnote

[7] **Federal Civil Procedure**
Grounds and Factors

Denial of city's motion for reconsideration of district court's ruling finding city in violation of Equal Terms provision of Religious Land Use and Institutionalized Persons Act (RLUIPA), based on city's denial of church's request for conditional use permit (CUP) to build church building on property zoned residential, was warranted; there was no newly-discovered evidence, there was no intervening change in controlling law since court issued its findings of fact and conclusions of law, and city did not identify any manifest error. Religious Land Use and Institutionalized Persons Act of 2000, § 2, 42 U.S.C.A. § 2000cc.

Cases that cite this headnote

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

As opposed to typical discrimination cases in which the comparator and subject must be aligned in all material respects before they will be deemed to be similarly situated, in an as-applied Equal Terms challenge under Religious Land Use and Institutionalized Persons Act (RLUIPA), the comparison must be between a religious assembly or institution and a non-religious assembly or institution. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

Cases that cite this headnote

[9] **Federal Civil Procedure**
Error by court

Federal Civil Procedure
Further evidence or argument

A party's disagreement with a court is not the same as finding a manifest error in its reasoning for purposes of a motion for reconsideration.

Cases that cite this headnote

[10] **Zoning and Planning**
Churches and religious uses

Modification of condition on conditional use permit (CUP) granted by city to church to build church buildings in residential zone, requiring church to develop property in conformance with land development code standards, without exception and without seeking a variance in any respect, was warranted, so that church would be allowed to seek variances; city had never granted CUPs on condition that an applicant not seek a variance, city only did so to prevent litigation on any future variance application, and city's land development code allowed property owners to seek variances.

Cases that cite this headnote

[11] **Zoning and Planning**
Churches and religious uses

Condition of conditional use permit (CUP), granted by city to church to build church building in residential zone, requiring

church to install fence, designed to prevent churchgoers from unauthorized use of city-owned property, across face of church property adjacent to city-owned property, was not improper exaction; city's land development code (LDC) allowed planning commission to impose conditions on conditional use that were necessary to accomplish purposes of comprehensive plan and LDC, included, but not limited to, adequate ingress and egress and other on-site or off-site projected related improvements.

Cases that cite this headnote

[12] **Zoning and Planning**

Churches and religious uses

Modification of condition on conditional use permit (CUP) granted by city to church to build church building in residential zone, requiring church to prepare pedestrian-only access easement across city owned property between church's two parcels, to allow broader easement, was not warranted; neither CUP process nor city's land development code required city to allow unlimited easement rights to church across city-owned property.

Cases that cite this headnote

[13] **Zoning and Planning**

Churches and religious uses

Condition on conditional use permit (CUP) granted by city to church to build church building in residential zone, requiring church to secure development plan approval of its proposed facilities within 12 months of issuance of CUP, was sufficiently burdensome so as to operate as effective denial of church's application for CUP, in violation of district court order requiring city to grant CUP, and thus, modification of condition was warranted, such that church would be required to secure development plan approval within 12 months of mandate from appellate court, or other final resolution of city's appeal of district court's order.

Cases that cite this headnote

[14] **Civil Rights**

Amount and computation

In evaluating whether fees requested by a prevailing party in a case brought under the Religious Land Use and Institutionalized Persons Act (RLUIPA) are reasonable, a court considers the reasonable hourly rate multiplied by the number of hours reasonably expended on the litigation, the product of which is the lodestar reasonable sum the party may recover. 42 U.S.C.A. § 1988(b); Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

Cases that cite this headnote

[15] **Federal Civil Procedure**

Amount and elements

In determining reasonable hourly rate for purposes of determining a lodestar amount, a court considers the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation.

2 Cases that cite this headnote

[16] **Federal Civil Procedure**

Amount and elements

In determining the prevailing market rate in a relevant legal community for purposes of determining reasonable hourly rates for determining lodestar amounts, the "relevant legal community" is generally the place where the case is filed.

2 Cases that cite this headnote

[17] **Federal Civil Procedure**

Amount and elements

In determining if a requested rate is reasonable for purposes of determining lodestar amounts, a court may rely on its own knowledge and experience, and may consider the applicable *Johnson* factors, which include:

(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and the ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Cases that cite this headnote

[18] **Federal Civil Procedure**

Attorney fees

An applicant for an award of attorney fees bears the burden of producing satisfactory evidence that a requested hourly rate is in line with prevailing market rates, which must be more than just the affidavit of the attorney performing the work.

4 Cases that cite this headnote

[19] **Federal Civil Procedure**

Attorney fees

The weight to be given to opinion evidence regarding whether a requested hourly rate, for purposes of a lodestar amount, is in line with prevailing market rates, is affected by the detail contained in testimony on matters such as similarity of skill, reputation, experience, similarity of case and client, and breadth of the sample of which the expert has knowledge.

Cases that cite this headnote

[20] **Civil Rights**

Parties entitled or liable;immunity

Denial of award of any fees for attorneys for church, who did not appear in church's Religious Land Use and Institutionalized Persons Act (RLUIPA) action against city, was warranted. Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

Cases that cite this headnote

[21] **Civil Rights**

Time expended;hourly rates

Appropriate rate for attorney fees for experienced, qualified, Detroit attorney, practicing in Jacksonville, Florida, as lead attorney for church in church's Religious Land Use and Institutionalized Persons Act (RLUIPA) action against city, was $390 per hour, despite church's claim for $416.50 per hour based on attorney's usual and customary hourly rate for all litigation matters of $490 per hour, discounted by 15% based on rates in Middle District of Florida; rate of $416.50 was not in line with legal market for Jacksonville or Middle District of Florida, and attorney had previously been awarded $325 per hour in Hattiesburg, Mississippi, and $300 per hour in Detroit. Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

1 Cases that cite this headnote

[22] **Civil Rights**

Time expended;hourly rates

Appropriate rate for attorney fees for Jacksonville, Florida attorney, who represented church in its Religious Land Use and Institutionalized Persons Act (RLUIPA) action against city, was $225 per hour; attorney had practiced law for approximately eight years with focus on real and personal property, contracts, and religious liberties, was a member of the church and thus was engaged to represent it as legal counsel, and attorney's usual and customary hourly rate was $300 per hour. Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

Cases that cite this headnote

[23] **Civil Rights**

Time expended;hourly rates

Appropriate rate for attorney fees for associate attorney representing church in its Religious Land Use and Institutionalized Persons Act (RLUIPA) action against city, in Jacksonville, Florida, was $157.25 per hour; attorney had been practicing law for approximately three years. Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

Cases that cite this headnote

[24] **Federal Civil Procedure**

Amount and elements

For purposes of determining lodestar amounts, "reasonable hours expended" are those that are not excessive, redundant, or otherwise unnecessary and that reflect an attorney's exercise of billing judgment.

Cases that cite this headnote

[25] **Federal Civil Procedure**

Amount and elements

In determining lodestar amounts, a court may conduct an hour-by-hour analysis to evaluate the reasonableness of hours expended or, if appropriate, apply an across-the-board reduction, which is often preferable so as to avoid the "pick and shovel work" of pouring through voluminous billing records.

Cases that cite this headnote

[26] **Civil Rights**

Time expended;hourly rates

Excess and redundancy in church's billing records would be factored into court's overall determination of fee award for church's attorneys in church's Religious Land Use and Institutionalized Persons Act (RLUIPA) action against city. Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

Cases that cite this headnote

[27] **Civil Rights**

Services or activities for which fees may be awarded

In determining hours expended by church's counsel for purposes of determining lodestar amount, in church's Religious Land Use and Institutionalized Persons Act (RLUIPA) action against city, court would decline to award time spent by attorney traveling from other state, where qualified attorney within church's district could have been found. Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

Cases that cite this headnote

[28] **Federal Civil Procedure**

Amount and elements

In determining a lodestar amount, after calculating the appropriate rate and number of hours worked, a court has the opportunity to adjust the lodestar to account for other considerations that have not yet figured into the computation, the most important being the relation of the results obtained to the work done.

Cases that cite this headnote

[29] **Federal Civil Procedure**

Amount and elements

Federal Civil Procedure

Attorney fees

An enhancement to a lodestar rate may be permitted in rare or exceptional cases, like those involving superior performance, an extreme outlay of expenses, or exceptionally protracted litigation resulting in delay, and the fee applicant bears the burden of providing specific evidence supporting an enhanced award.

Cases that cite this headnote

[30] **Civil Rights**

Amount and computation

Enhancement to lodestar reasonable rate for attorney fees for church, in its Religious Land Use and Institutionalized Persons Act (RLUIPA) action against city, based on results obtained, was not warranted, even if church succeeded in attaining relief sought; church succeeded on only one of eight counts it initially brought and on only one of four counts it took to trial, claim on which church succeeded was factually and legally distinct from other claims, and at least some evidence introduced by church on that claim had been in church's possession before it filed its first complaint. Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

Cases that cite this headnote

[31] **Civil Rights**

Amount and computation

Behavior of lead attorney for church, in church's Religious Land Use and Institutionalized Persons Act (RLUIPA) action against city, would be factored into court's attorney fee award for church's attorneys, in lieu of sanctions against attorneys; attorney engaged in unprofessional conduct, including repeatedly improperly disclosing what were supposed to be confidential settlement discussions, repeatedly referred to city and its lawyers in discourteous terms, and, as lead trial counsel, allowed his appellate cocounsel to write letter directly to city officials, without advance notice to city's lawyers or their permission, that advised city that it had little chance of winning on appeal, and promised further fees should city choose to appeal, which impeded final resolution of the case. Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

Cases that cite this headnote

[32] **Civil Rights**

Costs

For purposes of determining lodestar amount in church's Religious Land Use and Institutionalized Persons Act (RLUIPA) action against city, attorneys' undifferentiated "office supplies" constituted unrecoverable overhead costs ordinarily built into attorney's billing rate. Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

Cases that cite this headnote

[33] **Civil Rights**

Costs

For purposes of determining lodestar amount in church's Religious Land Use and Institutionalized Persons Act (RLUIPA) action against city, costs associated with rental van to shuttle non-witness church members to and from court hearings were not recoverable expenses. Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

Cases that cite this headnote

[34] **Civil Rights**

Costs

Expert witness fees incurred in a Religious Land Use and Institutionalized Persons Act (RLUIPA) action are not recoverable under § 1988. 42 U.S.C.A. § 1988(b); Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

Cases that cite this headnote

[35] **Civil Rights**

Costs

Unrecoverable expenses charged by attorneys for church, in church's Religious Land Use and Institutionalized Persons Act (RLUIPA) action against city, including airfare, lodging, rental cars, meals, travel expenses for attorneys, undifferentiated office supplies, and costs associated with rental van to shuttle non-witness church members to and

from court hearings, would be factored into attorney fees for church's attorneys. Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

Cases that cite this headnote

[36] **Civil Rights**

Amount and computation

Court would reduce by 50% attorneys' requested fees in church's Religious Land Use and Institutionalized Persons Act (RLUIPA) action against city, given church's excessive and redundant billing records, fact that church succeeded on only one of eight counts it initially brought and only one of four counts it took to trial, unprofessional behavior of lead attorney, and amount attorneys charged for unrecoverable expenses. Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

Cases that cite this headnote

Attorneys and Law Firms

***1264** Charles L. Stambaugh, Stambaugh & Associates, PA, Jacksonville, FL, Daniel P. Dalton, Katharine Elizabeth Brink, Dalton & Tomich, PLC, Detroit, MI, for Plaintiff.

Dale A. Scott, Michael J. Roper, Bell & Roper, PA, Orlando, FL, for Defendant.

Opinion

ORDER

TIMOTHY J. CORRIGAN, District Judge.

On November 25, 2014, the Court entered Findings of Fact and Conclusions of Law (Doc. 116) ruling that the City of Jacksonville Beach had violated the Equal Terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc, when it refused to grant the Church of Our Savior a conditional use permit ("CUP") to construct a church. 69 F.Supp.3d 1299. The Court then proceeded to the remedy phase. Trying to fashion the least intrusive remedy consistent with the RLUIPA violation it had found, the Court stated its intention to direct the City to grant a CUP but to allow the City to consider "*reasonable* conditions on the permit in accordance with the [City's Land Development Code ("LDC")] and subject to its procedures." (Doc. 116 at 45.) The Court directed the parties to attempt to work together to identify appropriate conditions. Rather than do so, however, the parties chose to engage in unnecessarily contentious litigation on topics like how and where they should negotiate on possible conditions, what they should or should not be permitted to say in court filings, the correctness of the Court's original decision, the appropriate remedy, and the amount of attorneys' fees and costs to which the Church's attorneys are entitled.

In light of this impasse, on February 17, 2015, after a teleconference with the parties a week earlier (Doc. 144), the Court entered an Order directing the City to grant the Church a CUP containing any reasonable conditions no later than March 25, 2015 (Doc. 145). The City Planning Commission held a meeting on March 9, 2015, at which time it issued the CUP with certain conditions. (Doc. 164–2.)

On April 10, 2015, the Court conducted a hearing on three issues: the City's motion for reconsideration of the Court's original ruling finding the City to be in violation of the Equal Terms provision of RLUIPA,[1] ***1265** the Church's objections to some of the conditions imposed by the City on the CUP, and the Church's motion for attorneys' fees and costs. (Doc. 184.) The Court now addresses each of these issues and proceeds to entry of final judgment.

1 The City actually filed two motions for reconsideration, one after the Court's ruling and one after the Court ordered the City to issue the CUP. The second motion makes no new arguments, though, and simply adopts those from the first motion. (*Compare* Doc. 160, *with* Doc. 124.)

I. THE CITY'S MOTIONS FOR RECONSIDERATION

[1] [2] [3] [4] [5] [6] A court may only grant a motion for reconsideration if it is based on "newly-discovered evidence or manifest errors of law or fact."[2] *Arthur v. King,* 500 F.3d 1335, 1343 (11th Cir.2007). Motions for reconsideration should be viewed with

caution and granted only sparingly. *United States v. Bailey*, 288 F.Supp.2d 1261, 1267 (M.D.Fla.2003). "[A] motion for reconsideration is not a substitute for an appeal," and " 'cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment.' " *Chesnut v. Ethan Allen Retail, Inc.*, 17 F.Supp.3d 1367, 1370 (N.D.Ga.2014) (quoting *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir.2005) and citing *Jacobs v. Tempur–Pedic Int'l, Inc.*, 626 F.3d 1327, 1344 (11th Cir.2010)). Instead, reconsideration may be justified on one of three grounds: "(1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or manifest injustice." *Stalley v. ADS Alliance Data Sys., Inc.*, 296 F.R.D. 670, 687 (M.D.Fla.2013) (quotations omitted). Simply moving for reconsideration in the hope the court will change its mind, however, is inappropriate. *Bryan v. Murphy*, 246 F.Supp.2d 1256, 1259 (N.D.Ga.2003).

2 The City moves pursuant to either Federal Rules of Civil Procedure 59(e) or 60(b). Neither rule perfectly applies, as they both provide for relief from judgment, and the Court has not yet entered judgment in the case. Regardless, courts look to similar factors in deciding whether reconsideration of a pre-judgment order is appropriate. *See Madura v. BAC Home Loans Servicing L.P.*, 851 F.Supp.2d 1291, 1296 (M.D.Fla.2012).

The City's motion essentially argues that if the City had known the Court was going to rule against it on Count III, the as-applied Equal Terms challenge, it would have paid more attention to that count at trial and in its earlier briefing. Half of the motion for reconsideration is given over to the City's collection and review of twelve cases it had not previously cited that it now contends are important for the Court's consideration. The second half of the motion endeavors to more clearly differentiate the circumstances of the Church and Discovery Montessori School than the City had in its motions for summary judgment, at trial, or in its proposed findings of fact. The City also asserts that its motion and the chart attached thereto rely only on evidence that was introduced at trial, none of which the Church actually disputes.

[7] The motion for reconsideration is due to be denied. Though the City resists the charge, even when viewed in the most charitable light, the motion is a do-over, an attempted second bite at the apple. The City acknowledges there is no newly-discovered evidence[3] and points to no intervening change in controlling law since the Court issued its Findings of Fact and Conclusions of Law. Instead, the City tries to more fully present the law and the facts ***1266** than it did originally, under the guise of helping the Court avoid a supposedly manifest error. Consistent with the standard of review for motions for reconsideration, the Court need not devote much space here to restating the bases for its original ruling, but will only briefly address the arguments raised in the motion to the extent necessary to assure itself no manifest error has been made. Giving the City every possible consideration, the Court also engaged in a full discussion of the motion for reconsideration with the City's counsel during the April 10, 2015 hearing. (*See* Doc. 184.)

3 The motion does include a statement that the City's believes "the evidentiary record here [is] incomplete, in that the Court has not conducted an in-person view of the [Discovery Montessori School] property, and [the City] requests that the Court do so prior to ruling on this motion." (Doc. 124 at 1–2.) The City never requested a site visit of the Discovery Montessori School before or during trial. The Court declines the request to conduct one now, after trial, on a motion for reconsideration.

The Court does not understand the City to suggest any legal error in the Court's ruling. After previously supplying no standard for deciding whether a comparator was "similarly situated" for an as-applied Equal Terms challenge, the City now agrees in the motion with the standard identified by the Court that, after close review of the circumstances of the projects, the comparator must be identical to the project in question "for all *relevant* purposes." (*See* Doc. 116 at 35 (citing *Campbell v. Rainbow City, Ala.*, 434 F.3d 1306 (11th Cir.2006)).) The Courts interprets the City's lengthy review of cases from outside the Eleventh Circuit (mostly Equal Protection cases) as its effort to glean relevant characteristics for the analysis and to muster examples showing that proving projects are identical is a heavy burden. An observation less explicit in the City's motion, but that the Court takes from these cases, is that the analysis is inherently fact-driven and that care should therefore be taken in extrapolating from one case to another.

Many of the cases upon which the City now belatedly attempts to rely are not RLUIPA cases, but involve claims with an intentional discrimination element. Such cases

are not particularly useful in an Equal Terms challenge under RLUIPA where the Church "need not further show that the City was motivated by discriminatory animus or intent. Put another way, if the City treated the Church unequally to a similarly situated, non-religious assembly or institution, the Church need not prove *why* the City did so." (Doc. 116 at 27.)

[8] In arguing that the Church's proposed use of the property as a church is not "similarly situated" enough to the private school the Court used as a comparator, the City overlooks another important aspect of an Equal Terms challenge under RLUIPA that differentiates it from other types of cases that require similarly situated comparators. In a more typical discrimination case, the comparator and the subject must be aligned in all material respects before they will be deemed to be similarly situated. In this as-applied Equal Terms challenge under RLUIPA, however, the most obvious comparator—another church—is no comparator at all. Rather, the comparison must be between a "*religious* assembly or institution," such as the proposed church, and a "*non-religious* assembly or institution." 42 U.S.C. § 2000cc(b)(1) (emphasis added). It is within this framework —where the Church and the secular comparator are necessarily dissimilar in some respects—that the Court must determine whether "the comparator is identical for all *relevant* purposes." (Doc. 116 at 35 (citing *Campbell,* 434 F.3d at 1314).) For the reasons stated in the Finding of Facts and Conclusions of Law, the Court has determined that Discovery Montessori School is a valid secular comparator under RLUIPA. (Doc. 116 at 37–41.)

[9] The motion does not appear to contest the factual findings that led the Court to this conclusion. Instead, the City contends the Court erred in applying the above legal standard to those findings when it held the Church and the Discovery ***1267** Montessori School to be identical in all relevant aspects. The City identifies a number of allegedly "significant differences" between the Church and Discovery Montessori School that it contends make them less than identical.[4] The Findings of Fact and Conclusions of Law reflect that the Court has already considered these aspects of the projects, however, and either found them not significant or disagreed with the City's present characterization. But a party's disagreement with the Court is not the same as finding a manifest error in its reasoning requiring reconsideration. *See Madura,* 851 F.Supp.2d at 1296. The Court adheres to its reasoning, the City has not identified any manifest error, and the Court therefore determines that the City's motion for reconsideration is due to be denied.

4 Again, the City admits that all of the evidence for these alleged differences was available to it at trial. (Doc. 162 at 3.)

II. THE CHURCH'S OBJECTIONS TO THE CONDITIONAL USE PERMIT

In its Findings of Facts and Conclusions of Law, the Court advised the parties that it intended to enter judgment directing the City to grant the Church a CUP. The Court stated, however, that the "City may consider whether to impose *reasonable* conditions on the permit in accordance with the LDC and subject to its procedures." (Doc. 116 at 45.) After the Court entered its February 17, 2015 Order directing the City to proceed with this remedial phase of the case, the Planning and Development Department prepared a report recommending certain conditions (Doc. 164–1), and the Planning Commission then approved the CUP with those conditions, as follows:

1. The applicant shall develop the subject property in conformance with applicable Land Development Code standards, including but not limited to Residential, single-family: RS–1 zoning district regulations, without exception and without seeking a variance in any respect, including but not limited to lot coverage. No City—owned property may be used by the applicant to meet such standards.

2. The applicant shall provide a seven-foot wide buffer between the subject property and any adjacent residential uses, in conformance with LDC Sec 34–425(b)(2) standards, and including a continuous six-foot high opaque screen or barrier.

3. The applicant shall pay to have installed, a six-foot high opaque fence with 24–foot wide vehicular access gate across the City-owned property known as 11 Hopson Road, between the easterly corner of the property known as # 9 Hopson Road and the northerly corner of the property known as # 13 Hopson Road. This access to the City's property shall be for exclusive use by City employees.

4. The City shall prepare a pedestrian-only access easement agreement to the benefit of church staff and congregants across the portion of the City-owned

property at # 11 Hopson Road lying adjacent to and between the applicant's two parcels. Such agreement shall include a liability insurance policy with coverage of $1,000,000.00 per incident, and shall list the City as an additional insured. The Church shall maintain these policies for so long as it continues to use the City-owned property at # 11 Hopson Road for access to the southern parcel. The Church shall ***1268** submit proof of coverage to the City on an annual basis. The agreement shall otherwise provide that the Church shall indemnify, defend, and hold harmless the City, as to any and all claims for damages which are caused by or suffered by Church staff, congregants, guests, or members while upon the City-owned property at # 11 Hopson Road, including but not limited to bodily injury and damage to City property and improvements.

5. The applicant shall secure Development Plan approval for the development of its proposed facilities within twelve months of issuance of the conditional use permit by the planning commission granting the applicant's conditional use request, or the conditional use approval shall be rendered null and void.

6. The applicant shall be responsible for payment of applicable water and sewer tap fees, storm water and mobility fees, any related work required to extend existing public utilities to the subject property, and any other development and permit fees associated with its proposed development. However, pursuant to Section 7–21 of the Code of Ordinances, no fees shall be charged to the applicant for permits and inspections for the construction of the applicant's religious facilities, provided the applicant files the required documentation described in Section 7–21 whenever such permit application is filed with the City.

(Doc. 164–2.)

The Church objects to some of these conditions (Doc. 174), and the City has responded (Doc. 183). The Court fully reviewed the objections at the April 10, 2015 hearing. As the Church does not specifically object to Conditions 2 and 6, the Court will not discuss them further.

Before considering the Church's individual objections, the Court reiterates that it sits neither as a zoning appeals board nor as a state court on a writ of *certiorari*. *See Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1314 (11th Cir.2006). Deciding whether the City correctly followed its procedures and founded the conditions on "competent, substantial evidence" is not this Court's task. As such, the Church's general objections to the imposition of any conditions on these grounds are rejected. Instead, the Court's task at this stage is to ensure that the City has complied with the Court's ruling and to provide narrowly tailored, "appropriate" relief under RLUIPA. With that understanding, the Court now turns to the Church's primary objections. [5]

5 A number of the Church's specific objections warrant no discussion and are hereby rejected.

On Condition 1, the Church objects primarily to the portion that prohibits it from "seeking a variance in any respect, including but not limited to lot coverage." During the hearing, the Church argued that, while it does not anticipate seeking a variance, it should not be prohibited in advance from doing so. The Court agrees.

[10] The current head of the Planning and Development Department testified at the hearing that, to his knowledge, the City had never granted a CUP on the condition that the applicant cannot seek a variance, and conceded that the City only did so here to prevent litigation on any future variance application. A condition imposed for such a purpose is at odds with the Court's February 17, 2015 Order and the LDC. *See* LDC § 34–231 (setting forth appropriate factors for the Commission ***1269** consideration of a CUP application). The LDC allows property owners to seek variances, LDC § 34–284, and the Church, as a property owner, should not be stripped of the same rights allowed any other owner simply to avoid a potential lawsuit. Therefore, while it rejects the Church's other objections to Condition 1, the Court will strike from Condition 1 the phrase "without exception and without seeking a variance in any respect, including but not limited to lot coverage," such that the Church may apply for a variance in accordance with the LDC.

That being said, the Court imposes no obligation on the City concerning any potential variance request by the Church other than to follow the LDC and give the Church's request the same fair consideration it would give any other applicant. The Court does not opine on the proper outcome of any variance request and does not

suggest that this Court would have jurisdiction to hear in this case any potential dispute regarding such a request. In all other respects, Condition 1 will remain in full force and effect.

[11] Turning to Condition 3, the Court rejects the Church's contention that the condition requiring the Church to install a fence across the western face of the adjacent City-owned property is an improper "exaction." [6] Under the LDC, the Planning Commission may "impose such conditions on a conditional use that are necessary to accomplish the purposes of the comprehensive plan and the LDC ... including, but not limited to ... adequate ingress and egress and other on-site or off-site projected related improvements...." LDC § 34–232. Affording appropriate deference to the Planning Commission's authority, the Court rejects the Church's objection to the installation of the fence, designed to prevent churchgoers from unauthorized use of City-owned property. [7]

6 The Church's present objection to this condition stands in stark contrast to the statements of its representatives at the Planning Commission's meetings specifically proposing this fence as a condition and saying, "You can make [the fence] a condition, we're not going to use [the City-owned property] in terms of traffic." (Doc. 33 at 20; Doc. 33–1 at 34–35).

7 The Court declines to get involved in the Church's new argument that it, not the City, owns this property. This issue has not been litigated and is not a part of this case.

[12] The Church's primary objection to Condition 4 is that the easement across the City-owned property between the Church's north and south parcels is restricted to a "pedestrian-only access easement," as opposed to a broader easement which would, for example, permit utilities to be installed. [8] However, the Church has identified nothing in the CUP process or the LDC that would require the City to allow unlimited easement rights to the Church across City-owned property. [9] While the Court does not preclude the City and the Church from negotiating further easement rights in the future, Condition 4—a pedestrian-only access easement agreement with liability insurance and indemnification requirements—is within the discretion afforded the Planning Commission by the LDC and does not violate the Court's Order.

8 As depicted in the satellite map accompanying the Findings of Fact and Conclusions of Law (Doc. 116 at 5), the Church's property is bisected by a strip of City-owned property that houses a sewer lift station.

9 Additionally, the Church's CUP application designated the south parcel as either a children's play area or a public park, not any kind of development requiring utilities or more intensive access across the City property. (Doc. 116 at 10, 12.) The Planning Commission could only base its decision on the proposal presented to it.

[13] Condition 5 requires the Church to secure development plan approval of its ***1270** proposed facilities "within twelve months of issuance of the conditional use permit ..." As the CUP was approved on March 9, 2015, under this provision, the Church would have until March 8, 2016 to secure approval of its development plan. [10] This condition, as presently stated, is sufficiently burdensome as to operate as an effective denial of the Church's application in violation of the Court's February 17, 2015 Order.

10 The City's formal approval letter is dated March 18, 2015, so the Church may have a few more days to meet the one-year deadline. However, because of the Court's ruling on the deadline, the Court need not decide that question.

The evidence at the April 10 hearing revealed that preparation of a development plan might cost the Church as much as $20,000 or $30,000. The City has made clear it intends to appeal this Court's ruling, leaving open the possibility that the Eleventh Circuit could reverse this Court's decision and revoke the CUP needed for the Church to build on the property. The Court recognizes that section 34–232 of the LDC allows the City to put a time limit on a CUP and also appreciates that the City would want some timeframe for the Church to proceed with this project. However, an appeal is unlikely to be decided by March 2016, so the twelve-month deadline puts the Church in the position of having to spend time and money to secure approval of a development plan before knowing whether it will ultimately be allowed to implement that plan. Therefore, the Court will modify Condition 5 to read:

> The applicant shall secure Development Plan approval for the development of its proposed facility within twelve months of the mandate from the Eleventh Circuit or other final resolution of the federal case, *Church of Our Savior v. The City of Jacksonville Beach,* Case No. 3:13–cv–1346–J–32JBT (M.D.Fla.), or the conditional use approval shall be rendered null and void.

Thus, the Court upholds the conditions imposed by the City on the CUP issued in favor of the Church as stated in the March 18, 2015 letter (Doc. 164–2), with the exceptions of the prohibition on seeking a variance in Condition 1, which the Court has stricken, and the twelve-month deadline as stated in Condition 5, which the Court has modified.

III. THE CHURCH'S FEE PETITION

The Church seeks $851,352.59 in attorney's fees and costs. 42 U.S.C. § 1988 provides a court with the discretion to award the prevailing party in a case under RLUIPA "a reasonable attorney's fee as part of the costs...." 42 U.S.C. § 1988(b). The City agrees that the Church is the prevailing party and, as such, is entitled to reasonable fees and costs. However, the City says that between $72,300.00 and $102,875.00 in fees and no more than $8,092.26 in costs would be reasonable. [11]

11 The Court reaches these numbers by adding the fee number from the City's initial response (Doc. 163 at 20) and their expert's opinion of a reasonable range of fees for activity between January 25, 2015 and March 31, 2015 (Doc. 182–1, ¶ 32). The Court has not added any costs amount to the City's initial calculation because it appears the City opposes recovery for any of the Church's recent expenses. (Doc. 187.)

[14] The Church argues that its request is fully justified by the results in the case and represents reasonable rates and hours spent on the case, plus a well-earned enhancement to the lodestar. The City responds that the rates and the hours are excessive and contends that no enhancement is appropriate, particularly since the Church succeeded on just one of eight counts it originally filed against the City. In evaluating whether the fees requested ***1271** are reasonable, a court considers the reasonable hourly rate multiplied by "the number of hours reasonably expended on the litigation," the product of which is the "lodestar" reasonable sum the party may recover. *Bivins v. Wrap It Up, Inc.*, 548 F.3d 1348, 1350 (11th Cir.2008).

A. Rates Charged

[15] **[16]** **[17]** **[18]** **[19]** In determining the reasonable hourly rate, the court considers "the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Norman v. Hous. Auth. of Montgomery,* 836 F.2d 1292, 1299 (11th Cir.1988). "The relevant legal community" is generally the place where the case is filed. *Am. Civil Liberties Union of Ga. v. Barnes,* 168 F.3d 423, 437 (11th Cir.1999). In determining if the requested rate is reasonable, the court may consider the applicable *Johnson* factors [12] and may rely on its own knowledge and experience. *Norman,* 836 F.2d at 1299–1300, 1303 ("The court, either trial or appellate, is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value." (quotations omitted)); *see Johnson,* 488 F.2d at 717–19. "The applicant bears the burden of producing satisfactory evidence that the requested rate is in line with prevailing market rates," which must be more than just "the affidavit of the attorney performing the work." *Norman,* 836 F.2d at 1299 (citations omitted). Instead, satisfactory evidence may be opinion evidence or the charges of lawyers in similar circumstances. *Id.* "The weight to be given to opinion evidence of course will be affected by the detail contained in the testimony on matters such as similarity of skill, reputation, experience, similarity of case and client, and breadth of the sample of which the expert has knowledge." *Id.*

12 The *Johnson* factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and the ability of the attorney;

(10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson v. Ga. Hwy. Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir.1974).

[20] The Church seeks recovery of fees for three attorneys: lead attorney Daniel Dalton and associate Katharine Brink, both of Dalton & Tomich, PLC in Detroit, and local counsel Charles Stambaugh of Stambaugh & Associates in Jacksonville. [13] The Church seeks to recover at $416.50 per hour and $157.25 per hour for Dalton and Brink, respectively, which it contends reflects a 15% discount from their normal rates of $490 per hour and $185 per hour, respectively, to account for the difference between the Detroit and Jacksonville legal markets. [14] The Church seeks to recover for Stambaugh's work at his ordinary rate of $300 per hour. As evidence that the requested rates are reasonable, the Church submits the declarations of Dalton and Stambaugh, their firms billing records, ***1272** the declarations of two Florida attorneys, and three secondary sources.

13 In a summary of the hours expended per attorney requested by the Court, the Church for the first time mentions time spent on this case by Zana Tomich and Lawrence Opalewski, both also with the Dalton & Tomich firm. (Doc. 185.) Neither attorney has appeared in this case. The Court declines to award any fees for their time.

14 The Church later proposes to make up for this discount with a 15% lodestar enhancement due to the supposedly excellent results obtained.

The City contests each of the three rates as unwarranted by the attorneys' experience and out of line with the Jacksonville legal market. The City argues that Brink, an associate with less than three years of legal experience, should bill at between $135 and $150 per hour. The City prices Stambaugh's time at between $150 and $175 per hour based on his limited federal court experience and limited role in the case. The City concedes that Dalton is an experienced and qualified attorney, but asserts that his RLUIPA experience only supports a rate between $300 and $325 per hour. To support its positions, the City submits an affidavit of an experienced Florida attorney, as well as orders from some of Dalton's recent cases awarding him a rate within the range proposed by the City. The City also propounded interrogatories regarding Dalton's RLUIPA expertise and concludes from its research into his response that no rate premium is justified.

Upon review of the parties' submissions, the Court finds that the Church has not met its burden of producing satisfactory evidence of the reasonableness of the requested rates for Dalton and Stambaugh on either an absolute basis or in relation to the Jacksonville legal market. The Court will start its review with Dalton.

1. *Daniel Dalton*

As the Church's lead attorney, the fees for Dalton's time, $551,737.55, make up the majority of the fees requested by the Church. The Church describes Dalton variously as "the most experienced and most highly sought after attorney representing religious entities throughout the United States," as a "national leader in land use and RLUIPA litigation matters" who is "in the top 1% of RLUIPA litigators nationally," and the author of "the book on litigating religious land use cases." He has twenty-four years of legal experience and is the founding member of Dalton & Tomich. The Church contends that this expertise justifies his "usual and customary hourly rate for all litigation matters" of $490 per hour, which is in turn verified by the 2014 Michigan Bar survey of legal salaries and billing rates and something called "the Laffey Matrix." Recognizing that rates in the Jacksonville legal market rate are lower than in Detroit, though, the Church seeks only $416.50 per hour. The Church relies on the two Florida attorney declarations to confirm that this discounted rate is reasonable and is consistent with rates in the Middle District of Florida. The Court disagrees with both conclusions.

Dalton is an experienced and qualified attorney. Though his claim to be the best RLUIPA litigator in the country appears hyperbolic, [15] he does have experience in the field that would warrant a somewhat above-median hourly rate. But how he arrived at the rate requested here is unclear. The discounted $416.50 per hour rate is built off of his purported "usual and customary hourly rate" of $490 per hour, then discounted by 15%. Dalton's declaration does not say, however, whether $490 is the "usual and customary hourly rate" that any client has ever actually paid or that any court has ever awarded him. *See Dillard v. City of Greensboro*, 213 F.3d 1347, 1354–55 (11th Cir.2000) (finding that rates actually charged to and

paid by clients is "powerful, and perhaps the best, evidence of [the attorneys'] market rate."). The 2014 Michigan Bar survey gives the median rate billed by attorneys with between ***1273** sixteen and twenty-five years of practice as $269 per hour, with a mean rate of $291 per hour. Dalton's Detroit rate of $490 per hour would place him above the 95th percentile of rates charged by attorneys with his level of experience.[16] Dalton's experience does warrant a rate above the median level, but not the kind of premium the Church requests.

15 The City sought to verify these statements through interrogatories and by researching Dalton's track record in RLUIPA cases. The Court agrees with the City's assessment that "Dalton, like most attorneys, has had some success, as well as some losses." (*See* Doc. 163 at 7.)

16 According to the Michigan Bar survey, Dalton's Detroit rate is also a good deal above the median and mean rates charged by attorneys of all experience levels who practice in downtown Detroit.

[21] But even if the Court were to assume Dalton's full Detroit rate is reasonable, his discounted rate is not in line with the Jacksonville legal market or the market in the broader Middle District of Florida. The two attorney declarations submitted by the Church are not helpful. One of the attorneys, Judi Setzer, practices regularly in Florida state court and handles adoption law, estate planning, probate, and guardianship. With none of her own experience with cases of this nature, her basis for finding Dalton's rate (and Brink's and Stambaugh's rates) reasonable is her "knowledge of colleagues who litigate religious liberty cases through the United States." (Doc. 127–8, ¶ 8.) Such a secondhand opinion is not competent evidence of the prevailing market rate for the kind of work at issue here. *See Norman,* 836 F.2d at 1299. The second attorney, Roger K. Gannam, does have experience in the areas of religious liberty and other civil rights cases. Only slightly more detailed than Setzer's, his opinion that the rates "charged" to the Church are reasonable is presented in conclusory fashion with little support.[17] (Doc. 127–9.)

17 The Laffey Matrix is not competent evidence of the prevailing market rate either, as one page submitted by the Church indicates that the matrix is meant to reflect an appropriate rate for attorneys in Washington, D.C. If the Robert Half survey of legal salaries submitted by the Church is any indication of billing rates, rates in the Washington D.C. legal market may be more than 35% higher than in Jacksonville.

The most compelling evidence here, of course, are rates court have actually awarded Dalton. As recently as last year, the Southern District of Mississippi in Hattiesburg awarded Dalton $325 per hour after he sought $390 per hour. (Doc. 1633.) Before that, in 2010, the Eastern District of Michigan in Detroit cut his requested $425 per hour rate down to $300 per hour. (Doc. 163–4.) Hattiesburg and Detroit are different legal markets than Jacksonville. But based on the Court's review of the materials submitted by the parties, and its own knowledge and experience, the Court finds that a rate of $325 per hour for Dalton's services is reasonable and consistent with the prevailing market rate. *See Norman,* 836 F.2d at 1303.

2. *Charles Stambaugh*

Stambaugh's declaration represents that he has practiced law since 2007 and focuses on real and personal property, contracts, and "religious liberties." As a member of the Church, he was engaged to represent it before the Planning Commission and then as local counsel after this case was filed. Along with Stambaugh's declaration, the Church also relies on the same two attorney declarations discussed above to show that Stambaugh's $300 per hour rate is reasonable in this market for this kind of case. The City counters these declarations with one from its own expert, opining that Stambaugh's limited federal court experience and role in this case supports a range of $150–175 per hour.

[22] The Court finds a rate somewhere in the middle to be reasonable here. Like Dalton, Stambaugh does not state whether ***1274** he charges paying clients his supposed "usual and customary hourly rate" of $300 per hour. *See Dillard,* 213 F.3d 1347 at 1354–55. The Church's attorney declarations touch on Stambaugh's rate even more briefly, and more conclusorily, than they do Dalton's. The City's expert declaration is both more detailed and more helpful. Given Stambaugh's experience and role in the case, the Court finds a $225 per hour rate appropriate.

3. *Katharine Brink*

[23] The Court finds the $157.25 per hour rate requested for Brink reasonable. She has been practicing since 2012, and the billing records reflect that she performed work commensurate with her experience. Based on the Court's own knowledge and experience, her rate is within the range of reasonable rates for attorneys with her experience working on a case of this nature. *See Norman,* 836 F.2d at 1303.

B. Hours Expended

[24] [25] Reasonable hours expended are those that are not " 'excessive, redundant or otherwise unnecessary' " and that reflect the attorney's exercise of " 'billing judgment.' " *Id.* at 1301 (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 434, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). The court may conduct an hour-by-hour analysis to evaluate the reasonableness of the hours expended or, if appropriate, apply an across-the-board reduction. *Bivins,* 548 F.3d at 1351. An across-the-board method is often preferable so as to avoid the "pick and shovel work" of pouring through voluminous billing records. *Kenny A. v. Perdue,* 532 F.3d 1209, 1220 (11th Cir.2008); *Loranger v. Stierheim,* 10 F.3d 776, 783 (11th Cir.1994) ("Where fee documentation is voluminous, such as the instant case, an hour-by-hour review is simply impractical and a waste of judicial resources.... In cases like this one, where the fee motion and supporting documentation are so voluminous, it is sufficient for the court to provide a concise but clear explanation of its reasons for the reduction."); *Trujillo v. Banco Central del Ecuador,* 229 F.Supp.2d 1369, 1375 (S.D.Fla.2002).

The fee records in this case are lengthy and determining how much time either Dalton or Brink spent on a particular task is made more difficult by their practice of block billing.[18] The Court has, nevertheless, reviewed the records and the declarations submitted in support and finds that the hours requested are excessive and do not reflect the exercise of appropriate billing judgment. Dalton's declaration represents that he waived certain hours and excluded excessive or redundant hours, but there is no evidence of it in the records. Neither his declaration nor the billing records identify any hours that were written down as excessive, redundant, or otherwise unnecessary.

18 The review is also made more difficult by the Church's submission of multiple billing records that appear to cover some of the same time periods. (*Compare* Doc. 1431 at 2, *with* Doc. 177–4 at 17.) Also, the Church had not initially provided a breakdown of hours spent by each attorney. It has since done so, at the Court's request. (Doc. 185.) The City disputes the accuracy of the Church's calculations. (Doc. 186.)

[26] As well reconstructed by the City, plenty of excessive time and redundant entries remain in the Church's billing records. By the City's calculation, the attorneys for the Church worked on this case for a total of 1,811 hours during the 389 days from its commencement to the issuance of the Findings of Fact and Conclusions of Law, roughly the equivalent of working an average of 6.6 hours every business day during that period. A few ***1275** specific examples are illustrative of the excess and redundancy:

- The Church seeks to recover for 29 hours that Dalton and Brink together billed for a motion to compel that was never filed;
- The records reflect that, even though Dalton was the only attorney ever to question a witness at trial or deposition or to speak in court, two, and sometimes three, attorneys attended every case event for the Church;
- Brink spent much more time preparing summaries of certain depositions than it took to actually conduct the depositions; and
- Dalton and Brink together spent 104 hours, the equivalent of thirteen eight-hour days, preparing the joint final pretrial statement.

The Court agrees that these and other tasks identified by the City reflect excessive time. The level of excess is surprising in light of the RLUIPA expertise claimed by Dalton, which should have brought efficiency. Rather than pick through each and every excessive or redundant charge and determine whether to reduce the charge and by how much, the Court will instead factor the level of excess and redundancy evident in the billing records into its overall determination of the fee award.

[27] The Court also declines to award the Church all of the time spent by Dalton and Brink traveling from Detroit. There is no indication that qualified counsel within the Middle District of Florida could not have been found.[19] *Brother v. Int'l Beach Club Condo. Ass'n, Inc.,*

No. 6:03–CV–444–ORL28DAB, 2005 WL 1027240, at *5 (M.D.Fla. Apr. 28, 2005); ("Travel time is not properly visited on one's adversary, absent a showing of a lack of qualified local counsel."); *see Johnson v. Univ. Coll. of Univ. of Alabama in Birmingham,* 706 F.2d 1205, 1208 (11th Cir.1983) ("[T]he exclusion of out-of-town counsel's travel time is proper only if it was unreasonable not to hire qualified local counsel."). The time (at least 158.1 hours) associated with Dalton's and Brink's travel constitute a substantial chunk of the Church's request. The Court will factor this into its ultimate award, as well. [20]

19 This point is made, ironically, by one of the Church's own declarations from an attorney in Orlando who specializes in constitutional civil liberties cases.

20 The Court will not eliminate all travel-related time and expenditures, however. Even the City's counsel travelled from Orlando though there was surely qualified counsel in Jacksonville.

Though the parties have done everything possible to complicate this matter, the required factual development was relatively limited, with much of the record fixed or undisputed. The trial itself only lasted two days, and was followed by two telephone conferences and two in-person hearings. On the other hand, the City heavily litigated this case, particularly after it lost at trial, requiring the Church to respond in kind. The Court will bear these factors in mind, as well.

C. Results Obtained

[28] **[29]** A major dispute between the parties is whether and to what extent any fee award should be reduced or enhanced. After calculating the appropriate rate and number of hours worked, "the court has the opportunity to adjust the lodestar to account for other considerations that have not yet figured into the computation, the most important being the relation of the results obtained to the work done." *Dillard,* 213 F.3d at 1353; *see Hensley,* 461 U.S. at 436, 103 S.Ct. 1933 (holding that a fee application based on claims that were ***1276** "interrelated, nonfrivolous, and raised in good faith" may still be excessive where the applicant achieved only partial or limited success). In rare or exceptional cases, like those involving superior performance, an extreme outlay of expenses, or exceptionally protracted litigation resulting in delay, an enhancement to the lodestar rate may be permitted. *North Pointe Ins. Co. v. City Wide Plumbing, Inc.,* 2014 WL 3540645, *4 (M.D.Fla.2014) (citing *Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 552–53, 130 S.Ct. 1662, 176 L.Ed.2d 494 (2010)). However, "the fee applicant bears the burden of providing specific evidence supporting an enhanced award." *Id.*

The Church contends that it achieved excellent results in spite of the City's alleged bad faith settlement negotiations and intentional multiplication of the proceedings. The Church seeks a 15% enhancement to the lodestar reasonable rate. The Court disagrees that any enhancement is appropriate here.

The City argues, on the other hand, for a fee reduction to reflect that the Church succeeded on only one of the eight counts it initially brought and on only one of the four counts it took to trial. The Church counters that no such reduction is appropriate because, while it did not win on every count of its complaint, it attained the only relief it ever sought, namely an injunction directing the City to issue a CUP.

[30] Counsel for the Church succeeded on the Equal Terms challenge and achieved relief for the Church. However, the Court agrees with the City that the as-applied Equal Terms challenge in Count III on which the Church succeeded was both factually and legally distinct from its other claims and that the fees awarded should reflect some reduction for the Church's only partial success. The evidence introduced on Count III consisted mainly of the Church's CUP application files and the files of the two secular schools the Church proposed as comparators, at least some of which the Church had in its possession before it filed its first complaint. The Church focused its efforts on its Substantial Burden challenge, which, along with its Unreasonable Limitations challenge, employs a different legal standard and required different proof, and on which it lost. [21] The final fee award will reflect this.

21 The Court will not exclude from the fee award any time spent on Count II of the amended complaint, the facial Equal Terms challenge. This claim was rendered moot only after the City amended the LDC shortly before trial.

[31] While they do not fit neatly into the traditional attorney's fee calculus, certain aspects of Dalton's work warrant further comment. From almost the beginning—when he requested sanctions against the City for filing a

motion to dismiss the Court had specifically authorized (Doc. 41 at 14–15)—but especially after the Court ruled in favor of his client after trial, Dalton has engaged in conduct the Court views as unprofessional. Dalton repeatedly and improperly disclosed what were supposed to be confidential settlement discussions. He repeatedly referred to the City and its lawyers in discourteous terms. As lead trial counsel, he allowed his appellate co-counsel to write a letter directly to City officials (without advance notice to the City's lawyers or their permission) that advised the City it had little chance of winning on appeal and promised further fees should the City choose to appeal. (Doc. 120–1.) This last act, if not unethical, was at best unseemly.[22] The Court expects more from lawyers who practice in ***1277** this Court.[23] Moreover, these actions impeded the final resolution of this case. The Court will factor these findings into its fee award in lieu of considering the City's motions for sanctions.

22 In fact, the Court was so concerned about this letter that it convened a telephone hearing to discuss it. (Doc. 121.)

23 This is not to say that the City's attorneys always covered themselves in glory either. But they are not the ones seeking court-awarded attorney's fees.

D. Expenses

[32] [33] [34] [35] The City also challenges certain expenses the Church seeks to recover. A good portion of the challenged expenses (at least $25,072.51) reflects airfare, lodging, rental cars, meals, and other travel expenses for Dalton and Brink, which the Court has already indicated are not fully recoverable. The Court also agrees with the City that undifferentiated "office supplies" constitute unrecoverable overhead costs ordinarily built into an attorney's billing rate. Expert witness fees incurred in a RLUIPA action are not recoverable under 42 U.S.C. § 1988. *Hodges v. School Bd. of Orange County, Fla.*, No. 6:11–cv–135–Orl–36GJK, 2014 WL 6455436, at *16 (M.D.Fla.2014); *see W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991). Costs associated with a rental van to shuttle non-witness Church members to and from court hearings are also not recoverable. The Court will factor all of these reductions in its final award of expenses.

E. The Court's Award

To recap, the Church seeks recovery for 1324.7 hours of Dalton's time, 702.6 hours of Brink's time, and 98 hours of Stambaugh's time.[24] The Court has determined that reasonable rates for Dalton, Brink, and Stambaugh are $325 per hour, $157.25 per hour, and $225 per hour, respectively. Therefore, if the Court were to award every hour requested by the Church at the rate determined by the Court, the total fee award would be $563,071.35, or $430,537.5 for Dalton's time, $110,483.85 for Brink's time, and $22,050.00 for Stambaugh's time. Adding in the full $47,224.16 in expenses requested,[25] the fee and costs award would total $610,295.51.[26]

24 Again, the Court declines to award fees for either Tomich's or Opalewski's time. The Court also recognizes that the City disputes the accuracy of these hour totals. The Court will factor any inaccuracies in these numbers into its final award.

25 The Court refers to Church's April 2, 2015 submission for the total expenses requested, not its April 14 submission. Though it does not separately state the expenses requested, the April 14 submission actually indicates that the Church is now seeking $54,711.89 in expenses, or $7,487.73 more than the amount requested twelve days earlier on April 2. (*Compare* Doc. 185, *with* Doc. 177.) The Church has not provided any explanation or evidentiary support for the increase, however.

26 The Church's requested 15% fee enhancement would bring the fee total to $647,532.05 and the total fee and costs award to $694,756.21.

[36] The Court finds that an across-the-board reduction of 50% appropriately accounts for all of the factors the Court has considered in this Order. The Court will therefore award $281,535.68 in fees and $23,612.08 in expenses, for a total of $305,147.76.[27]

27 The Court rejects the last-minute request by the Church for prejudgment interest on its fees, made only vaguely at the April 10 hearing and not in any of its briefs. The Court has reviewed the case referenced by counsel at the hearing, *Corder v. Brown*, 25 F.3d 833 (9th Cir.1994), and finds that it does not support the Church's request in this case.

Accordingly, it is hereby

ORDERED:

1. Defendant's Motion for Reconsideration (Doc. 124) and Defendant's Second ***1278** Motion for Reconsideration (Doc. 160) are **DENIED.**

2. Plaintiff, Church of Our Savior's Objections to the Conditions Imposed by the Planning Commission with Respect to the Adoption of the Conditional Use Permits on March 9, 2015 (Doc. 174) are **SUSTAINED** as to Conditions 1 and 5 only to the extent set forth above, and are otherwise **OVERRULED.**

3. Plaintiff Church of Our Savior's Motion for Attorney Fees and Cost Pursuant to 42 U.S.C. § 1988(b) (Doc. 127), Plaintiff Church of Our Savior's Supplemental Motion for Attorney Fees and Cost Pursuant to 42 U.S.C. § 1988(b) (Doc. 143), Plaintiff Church of Our Savior's *Amended* Supplemental Motion for Attorney Fees and Cost Pursuant to 42 U.S.C. § 1988(b) (Doc. 146), and Plaintiff Church of Our Savior's *Further Amended* Supplemental Motion for Attorney Fees and Cost Pursuant to 42 U.S.C. § 1988(b) (Doc. 177) are **GRANTED in part** and **DENIED in part** to the extent discussed above.

4. Defendant's Motion to Strike and Motion for Sanctions (Doc. 136), Defendant's Motion to Strike Portions of Plaintiff's Motions for Attorney Fees and Costs, and Motion for Sanctions (Doc. 149), and Defendant's Supplemental Motion to Strike (Doc. 172) are **DENIED as moot.**

5. The Court will enter Final Judgment consistent with this Order.

All Citations

108 F.Supp.3d 1259

End of Document