UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

CASE NO.: 07-60516-CIV-DIMITROULEAS/SELTZER

CHRIST COVENANT CHURCH, a Florida non-profit corporation,

Plaintiff,

vs.

THE TOWN OF SOUTHWEST RANCHES, a municipality of Broward County, Florida,

Defendant.
_____/

DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE CAUSE OF ACTION AND SUPPORTING MEMORANDUM OF LAW

Defendant, TOWN OF SOUTHWEST RANCHES (the "Town"), by and through its undersigned counsel, moves to dismiss the "Complaint for Religious Discrimination" filed by Plaintiff CHRIST COVENANT CHURCH (hereinafter, "Plaintiff" or the "Church") for failure to state a cause of action pursuant to Rule 12(b)(6), and, in support thereof, respectfully submits this motion and incorporated memorandum of law, together with the exhibits attached hereto:

INTRODUCTION

This is an action for, *inter alia*, religious discrimination under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc et seq. ("RLUIPA"), arising out of the Town's denial--**almost one year ago**--of Plaintiff's proposed site plan modification, wherein it sought to construct two additional buildings next to its existing house of worship. Despite the fact that Plaintiff, a religious organization which still regularly conducts church services within

the Town, sought to construct two additional buildings totaling approximately 2,500 square feet, it made no provision for extra parking spaces (beyond the existing 71 spaces that it already had). On June 8, 2006, following a public hearing on the issue, the Defendant Town denied the Plaintiff's proposed site plan modification based upon the insufficient number of parking spaces.

Plaintiff, no doubt, vehemently disagreed with the Town's decision. Yet, it had several options available to it at that time. For one thing, Plaintiff could have filed a "modified" application with the Town which provided for a sufficient number of parking spaces. Or, alternatively, Plaintiff could have filed a petition for writ of certiorari with the Broward County Circuit Court seeking to challenge the Town's "quasi-judicial" decision. **It did neither**. Instead, Plaintiff has chosen to file the instant federal lawsuit--**nearly one year after the fact**--claiming that the Town's actions impose a "substantial burden" on Plaintiff's religious practices, in violation of RLUIPA and the "free exercise" clauses of the federal and state constitutions. Additionally, Plaintiff contends that the Town's denial of its application constitutes a violation of RLIUPA's "Equal Terms" provision and the Equal Protection Clause of the Fourteenth Amendment because it treats them on "less than equal terms" than non-religious organizations.

There are several fundamental flaws with Plaintiff's Complaint. **First**, despite claiming a "substantial burden" on its religious practice, which allegation underlies four of its claims (Counts I, III, V, and VI) , Plaintiff does not bother to specify how it is "substantially burdened" by the Town's denial of its application. In lieu of such an explanation, Plaintiff simply makes the naked allegation that it has been "substantially burdened" by the Town's actions, as if just reciting the statutory language is sufficient to state a cause of action for religious discrimination. (*See* Compl., ¶¶ 41, 60, 67 & 72). While the federal rules of pleading are liberal, they are not so liberal as to permit bare, conclusory allegations to support a claim as serious as one for religious

discrimination and various federal civil rights violations. Indeed, the Eleventh Circuit requires Section 1983 plaintiffs to fulfill a higher standard of specificity in their complaints. *See, e.g.*, *Omar v. Lindsey*, 334 F.3d 1246, 1251 (11th Cir. 2003). Accordingly, Counts I, III, V and VI should be dismissed for failure to state a cause of action. (*See infra*, at pp. 10-12 & 16-19).

Second, even assuming, *arguendo*, that Plaintiff had pled its complaint with specificity, it would still not be able to satisfy the Eleventh Circuit's narrow definition of "substantial burden." (*See infra*, at p. 13 [citing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226-27 (11th Cir. 2004) (defining "substantial burden" as "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly.")). The Town's denial of Plaintiff's site plan modification--which sought the construction of two new buildings on Plaintiff's property (but which would not affect the existing church building)--in no way coerces Plaintiff's congregant's into foregoing their religious beliefs, as is required under the Eleventh Circuit's definition of "substantial burden" in *Midrash Sephardi*. By its own admission, Plaintiff still conducts church services at its existing house of worship. (*See infra*, at pp. 16-17).

Third, with respect to its claims of disparate treatment (brought pursuant to RLUIPA's "Equal Terms" provision and the Equal Protection Clause of the Fourteenth Amendment), Plaintiff has not identified *any* non-religious or secular institution, or even any religious organization, which has received better or more preferential treatment under the Town's Unified Land Development Code. Instead, Plaintiff alleges in conclusory fashion that the Town has "*in the past* considered applications by similarly situated non-religious institutions or assemblies." (Compl., ¶ 47). That simply does not cut it. Such a glaring pleading deficiency--which fails to identify so much as a single secular or religious group which has been treated better or more favorably by the Town--requires the dismissal of Counts II and IV. (*See infra*, at pp. 19-22).

Fourth, Plaintiff is impermissibly bringing its RLUIPA statutory claims directly and through 42 U.S.C. § 1983. In *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 125 S.Ct. 1453 (2005), the United States Supreme Court held that a plaintiff may not use § 1983 where the underlying statute has its own comprehensive enforcement scheme. Since RLUIPA has its own comprehensive enforcement scheme (*see* 42 U.S.C. § 2000cc-2(a)), a plaintiff suing for religious discrimination under RLUIPA may not bring it as a Section 1983 action. Accordingly, Counts I and II of the Complaint should be dismissed for this reason as well. (*See infra*, at pp. 22-23).

For each of the foregoing reasons, as well as others discussed herein, this Court should dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6) for failure to state a cause action.

FACTUAL ALLEGATIONS

A. The Church Has Conducted Religious Services on its Property Since 1995

Plaintiff, CHRIST COVERNANT CHURCH (hereinafter, "Plaintiff" or the "Church") is a non-profit corporation and church located in the Town of Southwest Ranches. (Compl., ¶ 5). The Church owns three contiguous parcels of real property totaling 5.17 acres--referred to in the Complaint as Parcels "A," "B," and "C" (the "Property")--within the limits and boundaries of the Town, located at 4700 SW 188th Avenue. (*Id.*, ¶¶ 11 & 13). In 1995, the Church acquired Parcels "A" and "B" from the Diocese of Southeast Florida, Inc., an Episcopalian religious organization which had previously used the parcels to conduct religious activities, including church services. (*Id.*). When the Church acquired Parcels "A" and "B" in 1995, it also obtained a Certificate of Use Permit from Broward County allowing the existing house to be used for religious worship and related religious activities. (*Id.*). In or about November 1999, the Church acquired Parcel "C," consisting of 1.16 acres of land improved with a dome house. (*Id.*, ¶ 12).

In 1998, the Church started building a sanctuary on Parcel "A" which became, and to this day remains, the main church building where religious worship services are conducted. (*Id.*, ¶ 20). In January 2000, the Church obtained a certificate of occupancy for the sanctuary and began conducting religious services from that site. (*Id.*). Since then, the Church has continuously utilized the main building on Parcel "A" as a house of worship for its congregation. (*Id.*). The Church currently has 71 parking spaces on its Property to accommodate congregants. (*Id.*, ¶ 33).

B. The Church's Application for Site Plan Modification to Add Two New Buildings

In late 2002, the Church began exploring the feasibility and requirements to continue its development of Parcel "A," by providing its congregation with facilities for supporting related usages. (*Id.*, ¶ 21). The Church first met with the Town's zoning consultant, Michele Mellgren & Associates, Inc. (hereinafter, "MMA"), which advised the Church to provide the Defendant Town with an overall site plan for the Property, as well as architectural drawings and construction plans for the proposed facility (which would be located on Parcel "A"). (*Id.*, ¶ 22).

In 2005, the Church filed a proposed site plan modification (the "Application") with the Town. (*Id.*, ¶¶ 23-25). The Application, which is referred to in the Town's administrative records by the designation SP-018-05, proposed the following changes to the Church's Property:

(1) the construction of an approximately 2,000 square-foot, multi-use building with an open floor plan that is divisible into four rooms via partitions situated on tracks. The building would be 27 feet tall.

(2) the construction of an approximately 540 square-foot addition to the existing administrative/multi-use building;

(3) the construction of a "port-o-cochere" covering a proposed pick-up/drop-off lane on the south side of the existing worship building.

(*See* Compl., ¶ 24 and the following public records: (i) Town of Southwest Ranches, Town Council Meeting Minutes, February 2, 2006, Item No. 19 [Exhibit "A" hereto]; and (ii) Town of

Southwest Ranches, Town Council Agenda Report, dated April 10, 2006 [Exhibit "B" hereto].[1] Despite the magnitude of the Church's request--which contemplated the construction of two new buildings--there was no provision anywhere in the Application for additional parking spaces.

C. The Town's Consideration of the Church's Site Plan Modification Application

The Church's Application was placed on the agenda of the June 8, 2006 Regular Meeting of the Town Council of the Town as a "quasi-judicial" matter. (*See* Town of Southwest Ranches, Town Council Regular Meeting Minutes, June 8, 2006, Item 10 [Exhibit "C" hereto]). The meeting was opened for public comment, and sworn testimony was given both in favor of and in opposition to the Application. (Compl., ¶ 30). One of the Town Council members, Forrest Blanton, expressed his concern that the proposed site plan modification had an insufficient number of parking spaces to accommodate the proposed new structures (consisting of two separate buildings, totaling approximately 2,500 square feet). The Church apparently believed that the existing number of parking spaces--71--was more than sufficient to accommodate the expected increased traffic resulting from activities at the modified Church complex.. (*Id.*, ¶ 33).

Following extensive discussion and testimony, the Town Council voted to deny the Application on the basis that the Church's proposed site plan modification did not have a sufficient number of parking spaces. (*Id.*, ¶ 32). The Town Council's denial of the Church's Application is memorialized in Ordinance No. 2006-0072, which states, in pertinent part, that:

> That, at a duly noticed public hearing held on June 8th, 2006, following the review of the staff report and all written and oral evidence received during the advertised public hearing, the Town Council hereby denies the Christ Covenant Church site plan modification finding that the

[1] Although Plaintiff did not attach the foregoing public records to its Complaint, the law in this Circuit is clear that the Court may look beyond the complaint to "matters of public record," including records of administrative bodies, without converting a motion to dismiss into a motion for summary judgment. *See Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1280 (11th Cir. 1999) ("[i]n determining whether to grant a Rule 12(b)(6) motion, the court primarily considers the allegations in the complaint, although matters of public record . . . may be taken into account.") (quoting 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure*, § 1357 (2d ed. 1990)).

> applicant has failed to demonstrate by competent substantial evidence that the criteria and requirements of the Town of Southwest Ranches Unified Land Development Code have been satisfied.

(*See* Town Ordinance No. 2006-0072, § 2, at p. 2 [a copy of Town Ordinance No. 2006-072 is attached hereto as Exhibit "D"; and a copy of the "Town of Southwest Ranches Unified Land Development Code," which sets forth the requirements and criteria concerning the number of parking spaces needed for a structure located within the Town, is attached hereto as Exhibit "E"). Significantly, Ordinance 2006-072 does not foreclose the possibility of approving a "modified" Application from the Church which provides for a sufficient number of parking spaces.

D. The Church Fails to Seek Certiorari Review or Submit a Modified Application

Following the denial of its application, the Church had an opportunity to seek certiorari review of the Town's adverse decision. Florida law provides a specific mechanism for obtaining judicial review of "quasi-judicial" zoning decisions, . Pursuant to Rule 9.100(c)(1) of the Florida Rules of Appellate Procedure, an unsuccessful applicant may challenge a municipality's zoning decision by filing a petition for writ of certiorari with the appropriate Florida circuit (here, the Broward County Circuit Court) **w**ithin thirty (30) days of the quasi-judicial action to be reviewed. *See* Fla. R. App. 9.100(c)(1); *Bd. of County Comm'rs of Brevard County v. Snyder*, 627 So.2d 469, 474-75 (Fla. 1993); *Haines City Cmty. Dev. v. Heggs*, 658 So.2d 523, 530 (Fla. 1995).[2] The failure to file a Petition for Writ of Certiorari within 30 days forecloses the right to seek judicial review. *See Wibbens v. State, Dept. of Highway Safety and Motor Vehicles*, 2007 WL 1146610, at *1 (Fla. 1st DCA 2007) (thirty-day time limit for filing certiorari petition is jurisdictional and failure to meet it will result in dismissal of petition) (citing Rule 9.100(c)(1)).

[2] *See also* 130-060 of the Town of Southwest Ranches Unified Land Development Code [Exhibit "F" hereto] ("In furtherance of § 9.100 et seq. of the Florida Rules of Appellate Procedure, as may be amended from time to time, an appeal of a decision of the Town Council shall be by writ of certiorari to a court of competent jurisdiction within thirty (30) days of the Town Council's decision.").

The Ordinance denying the Church's Application was approved on June 8, 2006. Therefore, under Fla. R. App. 9.100(c)(1), the latest date by which the Church could have filed a Petition for Writ of Certiorari seeking judicial review of the Town's denial of the Application was July 8, 2006, nearly one year ago. Plaintiff did not file a Petition for Writ of Certiorari by July 8, 2006, and, to this date, has not sought certiorari review by a Florida circuit court. Nor has the Church sought to ameliorate the Town's concern over the insufficient number of parking spaces by submitting a "modified" Application which provides for additional parking spaces.

E. Plaintiff Files This Lawsuit Nearly One Year After the Denial of the Application

On April 23, 2006, the Church filed the instant action, alleging that the Town's denial of the Application constitutes religious discrimination and a violation of its constitutional rights. The Church has purported to assert six causes of action. In Counts I and II, Plaintiff attempts to utilize the federal civil rights statute--42 U.S.C. § 1983--as a basis for advancing claims under the "Substantial Burden" and "Equal Terms" provisions of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.* (hereinafter, the "RLUIPA"). In Count I, Plaintiff alleges that "[t]he Town's refusal to grant the Application has and continues to be a substantial burden upon the Plaintiff's religious exercise," in violation of the RLUIPA. (Compl., ¶ 41). This allegation also underlies Plaintiff's claims in Count III ("Free Exercise of Religion," U.S. Const. amend. 1 and 42 U.S.C. § 1983), Count V ("Religious Freedom," Florida Const. art. 3), and Count VI ("Florida Religious Freedom Restoration Act of 1998 ["FRFRA"]).

The remaining counts of the Complaint are addressed to Plaintiff's claims of "disparate" treatment. In Count II, Plaintiff alleges that the Town has violated Section 2000cc(b)(1) of the RLUIPA by treating Plaintiff "on less than equal terms with non-religious institutions or assemblies with respect to the implementation of the Town's zoning and land use regulations."

(*Id.*, ¶ 47). Plaintiff, however, does not identify any non-religious institution or assembly which has been treated better by the Town**.** In Count IV, Plaintiff alleges that the Town's denial of the Application was "arbitrary, capricious, and without any rational basis" and "constitutes a burden upon the religious beliefs and practice of the Plaintiff," in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. (*Id.*, ¶¶ 59-61).

For the reasons discussed below, Plaintiff's Complaint should be dismissed.

MEMORANDUM OF LAW

A. Conclusory Allegations Do Not Prevent Dismissal of a Complaint

A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of a complaint and requests that the Court determine whether the complaint sets forth sufficient allegations to establish a claim for relief. *See Milburn v. United States*, 734 F.2d 762, 765 (11th Cir. 1984). "Although a plaintiff is not held to a very high standard in a motion to dismiss for failure to state a claim, some minimal pleading standard does exist." *Jackson v. BellSouth Telecommunications*, 372 F.3d 1250, 1262 (11th Cir. 2004). "[**C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal**." *Id.* (quoting *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002)) (emphasis supplied)). *See also Fullman v. Graddick*, 739 F.2d 553, 556-57 (11th Cir. 1984) (""[M]ore than mere conclusory notice pleading is required. . . . [A] complaint will be dismissed where the allegations it contains are vague and conclusory."); *Cummings v. Palm Beach County*, 642 F. Supp. 248, 249 (S.D. Fla. 1986) (noting that although "[t]he federal rules of pleading are liberal, . . . something more than conclusory allegations are required."). Thus, to survive a motion to dismiss, plaintiffs "must do more than merely state legal conclusions; they are required to allege some specific factual bases for those conclusions or face dismissal of their claims." *Jackson*, 372 F.3d at 1262.

B. Plaintiff's Failure to Identify the "Substantial Burden" on its Religious Exercise Allegedly Caused by the Town's Actions Warrants Dismissal of its RLUIPA Claim (Count I), Free Exercise Claims (Counts III & V), and FRFRA Claim (Count VI)

Throughout its Complaint, Plaintiff alleges only conclusory allegations of religious discrimination. For example, in Counts I, III, V and VI of the Complaint, Plaintiff alleges that the Town's denial of its land use application--in which it sought to construct several additional structures on its property (**but without providing for additional parking spaces**)--imposes a "substantial burden" upon Plaintiff's religious exercise, in violation of (1) RLUIPA (Count I), (2) the Free Exercise Clause of the First Amendment (Count III), (3) the Free Exercise Clause of the Florida Constitution (Count V; mislabeled as Count IV); and (4) Florida's Religious Freedom Restoration Act of 1998, Fla. Stat. § 761.03 ("FRFRA") (Count VI). (Compl., ¶¶ 41-44, 54-56, 59-62 & 72-75). Plaintiff, however, does not articulate how it is--or would be--"substantially burdened" by the Town's alleged actions. As explained below, the absence of such an essential allegation is fatal to Plaintiff's claims under RLUIPA, the Free Exercise Clauses, and FRFRA.

1. Conclusory Allegations of "Substantial Burden" Do Not State a RLUIPA Claim

RLUIPA was passed by Congress in 2000, mainly in response to concerns that land use regulations were being increasingly utilized by local governments to discriminate against religious institutions. *See The Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 406 F. Supp. 2d 507, 514 (D.N.J. 2005). RLUIPA has two particular provisions at issue in this case. First, the RLUIPA has a "Substantial Burden" provision that requires land use regulations that substantially burden religious exercise to be the least restrictive means of advancing a compelling governmental interest. *Id.* Second, RLUIPA has an "Equal Terms" provision, which prohibits land use regulations that disfavor religious uses relative to nonreligious uses. *Id.*

The "substantial burden" provision of RLUIPA, contained in § (a)(1), states as follows:

> 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 the burden on that person, assembly, or institution--(A) is in furtherance of a compelling interest; and (B) is the least restrictive means of furthering that compelling government interest.

42 U.S.C. § 2000cc(a)(1). In order to state a cognizable RLUIPA claim, however, it is not enough to simply allege in *ipse dixit* fashion that the government's actions impose a "substantial burden" on religious exercise. A plaintiff suing under RLUIPA's "substantial burden" provision must articulate the substantial burden it faces as a result of the government's land use regulation; otherwise, its complaint will be dismissed for failure to state a cause of action. *See, e.g.*, *Hollywood Community Synagogue, Inc. v. City of Hollywood*, Fla., 430 F. Supp. 2d 1296, 1319 (S.D. Fla. 2006) (dismissing plaintiff's "substantial burden" claim under section (a)(1) of RLUIPA where plaintiff "merely offered vague and conclusory statements that . . . relocation [of its synagogue] would substantially burden its ability to continue to provide religious teaching and worship to the community. **Such bare and unspecific assertions are insufficient to support Plaintiff's claims under RLUIPA section (a)(1)**.") (emphasis added); *see also Florer v. Johnson*, 2007 WL 760524, at *3 (W.D. Wash. 2007) ("Plaintiff's claims under RLUIPA suffer from the same deficiencies as his Section 1983 claim as he alleges only the same conclusory allegations noted . . . above. Plaintiff must describe the conduct that imposed a substantial burden on the exercise of his religion. In addition, Plaintiff must describe . . . how those actions or inactions violated his constitutional rights under RLUIPA."); *Greene v. Solano County Jail*, 2006 WL 2067056, at *9 (E.D. Cal. 2006) (holding that "bare allegations" of

religious discrimination by plaintiff "does not demonstrate, or even suggest, that there has been a substantial burden placed on his ability to exercise his religion by defendant's actions.").

Here, Plaintiff has failed to state, specifically or generally, how it has been "substantially burdened" in the exercise of its religion beliefs by the Town's application of its Zoning Code. It merely alleges in *ipse dixit* fashion that the Town's refusal to grant the Application "has and continues to impose a substantial burden upon the Plaintiff's religious exercise." (Compl., ¶ 41). Nothing more is alleged, as if simply invoking the magic words "substantial burden" is enough to state a cause of action for religious discrimination under section (a)(1) of RLUIPA. Clearly, that is not the state of the law. Even under notice rules of pleading, the complaint must state a cause of action sufficient to affirmatively show the plaintiff is entitled to relief, for

> [i]t is not enough to indicate merely that the plaintiff has a grievance but sufficient detail must be given so that the defendant and the Court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some legal basis for recovery.

Fullman v. Graddick, 739 F.2d 553, 556 (11th Cir. 1984). While Plaintiff is verbose and far-reaching in its 75-paragraph Complaint, not once does Plaintiff state *what* the "substantial burden" is that prevents it from engaging in religious activities on the land it already owns and which is currently being utilized for such activities. Accordingly, Count I of the Complaint should be dismissed since it makes only bare, conclusory allegations of a "substantial burden."

2. The Town's Denial of the Application Due to Insufficient Parking Spaces Does Not Constitute a "Substantial Burden" on Plaintiff's Religious Practices Because It Does Not Coerce Plaintiff Into Foregoing Its Religious Beliefs

Even if Plaintiff amended its Complaint to provide greater specificity, it still would not be able to state a cause of action for a violation of RLIUPA's "substantial burden" provision. The Eleventh Circuit has emphasized that an individual's exercise of religion is substantially burdened only if a regulation "completely prevents an individual from engaging in religiously

mandated activity or if the regulation requires participation prohibited by religion." *Men of Destiny Ministries, Inc. v. Osceola County*, 2006 WL 3219321, at *4 (M.D. Fla. 2006) (citing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226-27 (11th Cir. 2004)). "**Short of such extremes, however, the Eleventh Circuit has held that a 'substantial burden' for purposes of RLUIPA 'requires something more than an incidental effect on religious exercise**.'" *Id.* (emphasis supplied). As the Eleventh Circuit explained in *Midrash Sephardi*:

> 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.

366 F.3d at 1227. Applying this standard, the Eleventh Circuit, in *Midrash Sephardi*, found that a zoning provision which excluded religious uses in a business district did not impose a substantial burden on the exercise of religion even though the provision made it harder for some members of two Jewish congregations to walk to the synagogue on the Sabbath. *Id.* at 1228.[3]

Likewise, here, the Town's denial of the Church's proposed site plan modification due to an insufficient number of parking spaces does not impose a "substantial burden" on Plaintiff's religious practice. For one thing, the Town's decision does not affect the ability of Plaintiff or its congregants from continuing to attend religious services in the Church's existing house of worship located on Parcel "A" of the Property. (Compl., ¶ 20). Since at least January 2000, the Church has utilized the main church building on Parcel "A" as a house of worship for its congregants, and Plaintiff does not allege--nor could it allege--that there has been any cessation

[3] The Court found significant the facts that the synagogue's current location held no particular religious significance, that the synagogue could apply for a permit to operate only a few blocks away, and that municipalities would find it nearly impossible to ensure that no individual would be burdened by the walk to a temple of choice. *Id.* at 1228.

or interruption of its conduct of such religious services since that time period. (*Id.*). The Town's denial of Plaintiff's site plan modification--which related solely to the construction of two new buildings on Church-owned property (but which does not affect the existing house of worship)--**in no way** coerces Plaintiff's congregant's into foregoing their religious beliefs, as is required under the Eleventh Circuit's definition of "substantial burden" in *Midrash Sephardi*. *See, e.g.*, *Konikov v. Orange County*, Fla., 410 F.3d 1317, 1323 (11th Cir. 2005) (holding that zoning ordinance requiring application for special exception did not constitute "substantial burden," within meaning of RLUIPA, because ordinance "does not prohibit [plaintiff] from engaging in religious activity" and "does not coerce conformity of a religious adherent's behavior."); *Williams Island Synagogue, Inc. v. City of Aventura*, 358 F. Supp. 2d 1207, 1214 (S.D. Fla. 2005) (holding that city's denial of synagogue's conditional use permit did not substantially burden congregants' ability to worship according to their beliefs; "[a]s in *Midrash Sephardi*, the undersigned concludes as a matter of law that Defendants' denial of Plaintiff's conditional use permit has not coerced Plaintiff's congregants into foregoing their religious beliefs.").

Plaintiff has not--and, indeed, cannot--point to a single instance where, as a result of the Town's denial of its site plan modification, it was prevented from engaging in a religiously-mandated activity or was "directly coerced" (to quote *Midrash Sephardi*) to participate in an activity prohibited by its religion. This case is about nothing more than "parking spaces," and Plaintiff's refusal to include a sufficient number of parking spaces to support its grandiose expansion plans. The Town's refusal to overlook the Church's inadequate parking situation does not transform a "run-of-the-mill" zoning case into one involving religious discrimination.

In *Midrash Sephardi*, for example, the Eleventh Circuit stated that "reasonable 'run of the mill' zoning considerations," **such as those relating to the availability of parking**, "do not

constitute substantial burdens on religious exercise." 366 F.3d at 1227 & n.11. The factually similar case of *Germantown Seventh Day Adventist Church v. City of Philadelphia*, 1994 WL 470191 (E.D. Pa. 1994), is instructive in this regard. In *Germantown*, a church applied for a permit to build an addition to its existing church building. Defendant city refused to issue the building permit because plaintiff's plans "**did not demonstrate sufficient off-street parking to comply with [the city's] zoning requirements**." 1994 WL 470191, at *1 (emphasis supplied). The plaintiff then brought suit under RLUIPA, alleging that the city's denial of its building permit imposed a "substantial burden" on its religious exercise. Characterizing the case before it "**as a zoning dispute masquerading as a civil rights action**," *Id.*, the Pennsylvania federal district court dismissed plaintiff's RLUIPA challenge to the city's parking space requirement and held that plaintiff "utterly failed to show that anyone's freedom of religion was affected, let alone 'substantially burdened,' by the City's zoning provisions." *Id.* at *2 (emphasis supplied).

The matter at bar is likewise "a zoning dispute masquerading as a civil rights action." Just like the plaintiff in *Germantown*, the Church has not alleged any facts showing that its congregants' adherence to its religious precepts was affected, much less substantially burdened, by the Town's zoning decision. This is underscored by the fact that the Church continues to conduct religious services unabated at its existing church building on Parcel "A." (Compl., ¶ 20). If the Plaintiff or its congregants were truly "substantially burdened" in their religious practices, then why did Plaintiff wait **nearly one full calendar year** before commencing the instant action? Clearly, the lengthy delay in filing suit--during which time Plaintiff continued to conduct church services on its property--militates quite heavily against any notion of a "substantial burden." In fact, the only burden worked upon the Church here is one of financial cost and inconvenience, as well as the frustration of not getting what it wants. None of these

burdens, however, constitutes a "substantial burden" within the meaning of RLUIPA. *See Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792, at *11 (W.D. Tex. 2004).

Furthermore, the Town's denial of Plaintiff's site plan modification does not preclude the possibility of the Church submitting a modified Application curing the parking space deficiency. Two federal circuit courts of appeal recently have held that the opportunity to re-submit rejected building plans--curing the cited deficiency--precludes a finding of a "substantial burden" under RLUIPA. *See, e.g.*, *Vision Church v. Village of Long Grove*, 468 F.3d 975, 1000 (7th Cir. 2007) (finding no "substantial burden" under RLUIPA because plaintiff "was free to submit modified plans to the Board that could have 'cure[d] the problems and deficiencies cited by the Board."); *Westchester Day School v. Village of Mamaroneck*, 386 F.3d 183, 188 (2d Cir. 2004) (finding no "substantial burden" where this same opportunity was available to the plaintiff). The Church, however, has not bothered to submit a modified proposal to the Town, preferring, instead, to go the route of litigation, with the hope of a substantial monetary recovery. RLUIPA, however, was not intended to serve as a "lottery ticket" for religious groups who are simply dissatisfied with a local zoning decision and who have made no effort to submit a modified proposal or to challenge the zoning decision in state court certiorari proceedings. RLUIPA was intended to counteract true religious discrimination; not to serve as a financial "windfall" for religious organizations.

3. Because the Free Exercise Clause's "Substantial Burden" Requirement is More Stringent than its RLUIPA Counterpart, Plaintiff's Pleading Deficiencies With Respect to Its RLUIPA Claim is Fatal to its Federal Free Exercise Clause Claim

Plaintiff's pleading deficiencies with respect to the "substantial burden" requirement of RLUIPA also warrant the dismissal of its First Amendment "Free Exercise" claim in Count III.[4] To establish a violation of the federal Free Exercise Clause, Plaintiff must demonstrate, among

[4] The First Amendment to the United States Constitution provides, *inter alia*, that Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof. *See* U.S. CONST., AMEND. 1

other elements, "a **substantial burden** on the observation of a central religious belief or practice." *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699, 109 S.Ct. 2136 (1989) (emphasis supplied). Because the Free Exercise Clause's "substantial burden" requirement is more difficult to satisfy than its counterpart under RLUIPA, *see Farrow v. Stanley*, 2005 WL 2671541, at *9 (D.N.H. 2005); *Ashanti v. California Dep't of Corrections*, 2007 WL 520958, at *10 (E.D. Cal. 2007),[5] any determination by this Court that Plaintiff has failed to state a cognizable RLUIPA claim mandates the dismissal of its "Free Exercise" claim as well. *See, e.g.*, *Farrow*, 2005 WL 2671541, at *9 ("my determination that none of [plaintiff's] claims . . . satisfy RLUIPA's substantial burden test necessarily means that his corresponding claims under the Free Exercise Clause are also deficient"; citing the more stringent standard under Free Exercise Clause); *The Lighthouse Institute*, 406 F. Supp. 2d at 520 ("If Plaintiff's claims can not succeed RLUIPA, they can not succeed under the Free Exercise Clause."). Therefore, for the same reasons that Plaintiff's RLUIPA claim is legally deficient (*i.e.*, the failure to articulate any "substantial burden" on its religious practices caused by the Town's actions), Plaintiff's "Free Exercise" claim (Count III) should likewise be dismissed for failure to state a cause of action.

4. Florida's Free Exercise Clause is "Coequal" With Its Federal Counterpart

Plaintiff's claim under Florida's "Free Exercise" Clause (Count V) should be dismissed for the same reasons.[6] Because Florida's Free Exercise Clause has been interpreted by Florida

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[5] The Free Exercise Clause's "substantial burden" requirement is more difficult to satisfy than its counterpart under RLUIPA because, unlike RLUIPA, the Free Exercise Clause requires that a defendant's conduct substantially burden one or more of the plaintiff's *central* religious beliefs or practices. *Farrow*, 2005 WL 2671541, at *9. By contrast, RLUIPA defines religious "exercise" broadly to include practices that are not central to, or compelled by, one's religion. *See Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003).

[6] Florida's Free Exercise Clause is found in Article I, Section 3 of the Florida Constitution, and provides, in pertinent part, that "[t]here shall be no law respecting the establishment of religion or penalizing the free exercise thereof."

courts as being "coequal" with its federal counterpart,[7] any determination by this Court that Plaintiff has failed to state a cause of action for a violation of the federal Free Exercise Clause (Count III) necessarily means that Plaintiff has likewise failed to state a cause of action for a violation of Florida's Free Exercise Clause. Accordingly, Count V should be dismissed as well.

5. FRFRA Applies the Same Definition of "Substantial Burden" as RLUIPA

The dismissal of Plaintiff's RLUIPA claim likewise requires the dismissal of its FRFRA claim in Count VI. FRFRA is patterned after the federal statute of the same name (42 U.S.C. §§ 2000bb-2000bb-4), which was declared unconstitutional by the United States Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157 (1997), because its enactment exceeded the authority of Congress to pass legislation to enforce the Fourteenth Amendment. *See First Baptist Church of Perrine v. Miami-Dade County*, 768 So.2d 1114, 1117 (Fla. 3d DCA 2000).

Under FRFRA, "[t]he government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability." *See* Fla. Stat. § 761.03. In order to state a claim under FRFRA, a plaintiff must allege that the local governmental entity "placed a **substantial burden** 'on a practice motivated by a sincere religious belief.'" *Freeman v. Department of Highway Safety and Motor Vehicles*, 924 So.2d 48, 56 (Fla. 5th DCA 2006) (emphasis added). Although "substantial burden" is not defined in FRFRA, the Florida Supreme Court, in *Warner v. City of Boca Raton*, 887 So.2d 1023 (Fla. 2004), adopted the same definition of "substantial burden" employed by the Eleventh Circuit with respect to RLUIPA claims. *Id.* at 1033 ("we conclude that the narrow definition of substantial burden adopted by the . . . Eleventh Circuit [in *Midrash Sephardi*] is most consistent with the language and intent of FRFRA.").

[7] *Warner v. City of Boca Raton*, 887 So.2d 1023, 1030 (Fla. 2004) (stating that "Florida courts have 'treated the protection afforded under the [Florida Free Exercise Clause] as coequal with the federal [provision], and have measured government regulations against it accordingly.") (citing cases). *But see Warner v. City of Boca Raton*, 267

As with its deficient RLUIPA claim in Count I, Plaintiff does not state in Count VI, either generally or specifically, how it is--or would be--"substantially burdened" in the exercise of its religion by the Town's actions. Plaintiff simply just recites the words "substantial burden," as if that alone is enough to state a valid claim for a violation of FRFRA. (Compl., ¶ 72). It is not. Plaintiff must do more than simply recite the statutory language of FRFRA; it must allege *how* it is burdened. Just as the failure to articulate a "substantial burden" is fatal to Plaintiff's claims under RLUIPA, so, too, here, is the failure to articulate a "substantial burden" fatal to Plaintiff's FRFRA claim. Accordingly, Count VI should be dismissed for failure to state a cause of action.

C. Plaintiff's "Equal Terms" Claim (Count II) and "Equal Protection" Claim (Count IV) Fail to State a Cause of Action Because Plaintiff Has Failed to Identify Any Religious or Non-Religious Group that has been Treated Differently than Plaintiff

In Count II of the Complaint, Plaintiff alleges that the Town has violated Section (b)(1) of the RLUIPA by treating Plaintiff "**on less than equal terms** with non-religious institutions or assemblies with respect to the implementation of the Town's zoning and land use regulations." (Compl., ¶ 47) (emphasis supplied). Section (b)(1) of the RLUIPA states in pertinent part:

> Equal Terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligous assembly or institution.

42 U.S.C. § 2000cc(2)(b)(1). This statutory command "require[s] equal treatment of secular and religious assemblies [and] allows courts to determine whether a particular system of classifications adopted by a city subtly or covertly departs from requirements of neutrality and general applicability." *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1307 (11th Cir. 2006) (citing *Midrash Sephardi*, 366 F.3d at 1232).

F.3d 1223, 1226 n.3 (11th Cir. 2001) ("the very text of the Florida Constitution suggests that it affords less absolute protection than that provided by the United States Constitution.").

In order to state a cognizable claim under RLUIPA's "Equal Terms" provision, a plaintiff must allege that it is a "religious assembly or institution" which is subject to a government land use regulation that treats it "**on less than equal terms with a nonreligious assembly or institution**." *Id.* at 1307 (citing *Midrash Sephardi*, 366 F.3d at 1232) (emphasis supplied). This requires, at a bare minimum, that Plaintiff **identify** the specific "non-religious" assembly (or assemblies) or institution(s) which has received better, or more preferential treatment, under the Town's land use regulations. *See Men of Ministries*, 2006 WL 3219321, at *5 ("To demonstrate a violation of RLUIPA's Equal Terms provision, [plaintiff] would need to show that a secular [group] or the like had been [or would be] treated better than its own religious-based facility.").

Here, Plaintiff has not identified *any* "non-religious" or secular institution which has been treated better--or even differently--under the Town's facially-neutral land use regulations. Instead, Plaintiff alleges in bare conclusory fashion that the Town has "***in the past*** considered applications by similarly situated non-religious institutions or assemblies." (Compl., ¶ 47) (emphasis supplied). However, Plaintiff does not name even *one* such institution or assembly. Nor does Plaintiff allege that there has been any "disparate" treatment; only that the Town had previously "***considered***" the applications of unnamed secular institutions or assemblies. (*Id.*).

Such glaring pleading deficiencies--which fail to identify so much as a single *secular* group which has been treated more favorably by the Town--require the dismissal of Plaintiff's "Equal Terms" claim. *Compare*, *Vision Church, United Methodist v. Village of Long Grove*, 397 F. Supp. 2d 917, 930 (N.D. Ill. 2005) (rejecting religious organization's "Equal Terms" claim under RLUIPA because organization "has not identified a non-religious group that has received more favorable treatment."), *aff'd*, 468 F.3d 975 (7th Cir. 2007), *and, Men of Destiny Ministries*, 2006 WL 3219321, at *5 (rejecting religious organization's "Equal Terms" claim where it failed

to identify any secular organization which had been treated better by defendant city), *with*, *Hollywood Community Synagogue*, 430 F. Supp. 2d at 1320 (allegation that city "granted Special Exceptions to [secular groups such as] day care centers and educational facilities, while denying [plaintiff] Synagogue a Special Exception," while characterized by the court as "cursory at best," was sufficient to withstand defendant city's motion to dismiss plaintiff's "Equal Terms" claim).

Plaintiff's claims under the Equal Protection Clause of the Fourteenth Amendment (Count IV) suffer from the same deficiencies as its "Equal Terms" claim in Count II. In Count IV of the Complaint, Plaintiff alleges that the Town violated its right to "equal protection" under the Fourteenth Amendment of the United States Constitution. (Compl., ¶ 61). The Equal Protection clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249 (1985). **Plaintiff, however, does not identify any other religious or non-religious group which was treated differently by the Town.** To state an Equal Protection claim, Plaintiff must allege (1) "that it was treated differently from other similarly situated entities, and (2) "that Defendant unequally applied a facially neutral ordinance for the purpose of discriminating against Plaintiff." *Hollywood Community Synagogue*, 430 F. Supp. 2d at 1322 (citing *Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1314 (11th Cir. 2006)). Additionally, Plaintiff must **identify** the "similarly situated" entity that was allegedly treated differently by defendant. *See Congregation Kol Ami v. Abingdon Twp.*, 309 F.3d 120, 137 (3d Cir. 2002) ("the initial burden is on the complaining party first to demonstrate that it is similarly situated to an entity that is being treated differently before the local municipality must offer a justification for its ordinance.").

Plaintiff's equal protection allegations fall considerably short of this benchmark. The Complaint does not identify *any* similarly-situated entity that was treated differently under the

Town's zoning ordinance. Having failed to make such an essential allegation, Plaintiff's equal protection claim (Count IV) should be dismissed for failure to state a cause of action. *Compare*, *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 326 F. Supp. 2d 1140, 1155 (E.D. Cal. 2003) (dismissing religious organizations' equal protection claim because "they have pointed to *no* similarly situated entities that received disparate treatment."), *with*, *Hollywood Community Synagogue*, 430 F. Supp. 2d at 1322-23 (denying city's motion to dismiss synagogue's equal protection claim where complaint pointed to specific instances where other houses of worship located in the city had been granted special exceptions similar to the one sought by plaintiff); *and Ventura County Christian High School v. City of San Buenaventura*, 233 F. Supp. 2d 1241, 1247 (C.D. Cal. 2002) (complaint identified "several private, non-religious institutions that have been able to erect modular units similar to those of [plaintiff], without obtaining a CUP."). *See also*, *Asad v. Bush*, 170 Fed.Appx. 668, 673, 2006 WL 622726, at *4 (11th Cir. 2006) ("To the extent [plaintiff] raises an equal protection claim, it fails because he made only 'vague and conclusory' allegations suggesting that similarly situated people were treated more favorably.").

D. Plaintiff is Improperly Using 42 U.S.C. § 1983 to Advance RLUIPA Claims

Counts I and II of the Complaint are legally deficient for the additional reason that they improperly invoke the federal civil rights statute--42 U.S.C. § 1983--to advance claims under RLIUPA. Plaintiff alleges in both Counts that "[f]or this violation of RLIUPA, the Plaintiff is entitled to appropriate relief under **42 U.S.C. §§ 1983** and 2000cc-2(a)." (Compl., ¶¶ 45 & 49). However, it is well settled that "[a] plaintiff may not use Section 1983 where the underlying statute has its own comprehensive enforcement scheme." *Chase v. City of Portsmouth*, 2005 WL 3079065, at *5 (E.D. Va. 2005) (dismissing § 1983 claim asserting violation of RLUIPA) (citing *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 121, 125 S.Ct. 1453, 1458 (2005)).

RLIUPA clearly has its own comprehensive enforcement scheme--the statute specifically provides for "appropriate relief" against a governmental entity. *See* 42 U.S.C. § 2000cc-2(a).[8] Accordingly, Plaintiff may not use Section 1983 as a vehicle for advancing RLIUPA claims. *See, e.g.*, *Chase*, 2005 WL 3079065, at *5 ("As a threshold matter, the plaintiffs raised a claim under RLIUPA directly and through Section 1983. Consistent with Section 1983 jurisprudence, the Court finds that the plaintiffs cannot use Section 1983 as a vehicle for a RLUIPA claim because the statute provides for 'appropriate relief' against the government.") (citing 42 U.S.C. § 2000cc-2(a)); *Christian Methodist Episcopal Church v. Montgomery*, 2007 WL 172496, at *6 (D.S.C. 2007) (dismissing § 1983 claim asserting a violation of RLIUPA based upon recognition by court that RLIUPA "allows for remedial relief for a violation" thereof, namely, the right to obtain "appropriate relief.") (citing *Chase*, 2005 WL 3079065, at *5; and *Abrams*, 544 U.S. at 12). Since a § 1983 action does not lie under RLUIPA, Counts I and II should be dismissed.

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a cause of action should be granted in its entirety.

Respectfully submitted,

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[8] 42 U.S.C. § 2000cc-2(a) provides as follows: "A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via electronic notification and United States regular mail this 7th day of June, 2007 upon the following counsel of record: JORGE E. REYNARDUS, ESQ., Holland & Knight, LLP, Attorneys for Plaintiff Christ Covenant Church, 701 Brickell Avenue, Suite 3000, Miami, Florida 33131.

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