Court of Appeals Docket No. 10-11966-H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COVENANT CHRISTIAN MINISTRIES, INC.
and PASTOR FREDERICK T. ANDERSON,

Plaintiffs-Appellants,

v.

CITY OF MARIETTA, GEORGIA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
CASE NO. 1:06-CV-1994

BRIEF OF APPELLEE

SUBMITTED BY:
Dana K. Maine
FREEMAN MATHIS & GARY, LLP
100 Galleria Parkway Suite 1600
Atlanta, Georgia 30339-5948
(770) 818-0000

Attorneys for Appellee

Court of Appeals Docket No. 10-11966-H
Covenant Christian Ministries, Inc.
And Pastor Frederick T. Anderson
Plaintiffs-Appellants
v.
City of Marietta, Georgia,
Defendant-Appellee

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for appellees shows that the following trial judge(s), attorneys, persons, associations of persons, firms, partnerships, and corporations have an interest in the outcome of this appeal:

1. Anderson, Pastor Frederick T., Plaintiff-Appellant;
2. Bowen, Brandon L., Esq.; Attorneys for Plaintiffs-Appellants;
3. City of Marietta, Georgia, Defendant-Appellee;
4. Cooper, The Honorable Clarence Cooper, (United States District Judge for the Northern District of Georgia);
5. Covenant Christian Ministries, Inc., Plaintiff-Appellant;
6. Freeman Mathis & Gary, LLP, Attorneys for Defendant-Appellee;

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City of Marietta, Georgia,
Defendant-Appellee

7. Jenkins, Olson & Bowen, P.C., Attorneys for Plaintiffs-Appellants;

8. Maine, Dana K., Esq., Attorney for Defendant-Appellee;

9. Olson, Peter R. Olson, Esq., Attorney for Plaintiffs-Appellants;

10. Walker, Robert L. Attorney for Plaintiffs-Appellants.

STATEMENT REGARDING ORAL ARGUMENT

Appellee respectfully submits that oral argument is not necessary because "the facts and legal arguments are adequately presented in the briefs and records, and the decisional process would not be significantly aided by oral argument." Fed. R. App. P. 34(a)(2)(c).

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JURISDICTIONAL STATEMENT

I. District Court Jurisdiction

The United States District Court for the Northern District of Georgia had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331, as Covenant and Anderson's claims were brought pursuant to 42 U.S.C. § 1983, the United States Constitution, and the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, et seq.

II. Court of Appeals Jurisdiction

This Court has jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court properly severed the City's ordinance.

II. Whether the court's decision to deny injunctive relief proper.

III. Whether the court was correct in deciding Covenant was not entitled to monetary damages.

IV. Whether denial of Covenant's motion to amend its complaint was proper.

V. Whether the district court correctly determined that Anderson does not have standing.

VI. Whether the district court vacated its mootness ruling, and Anderson has waived his challenge to the court's determination that Anderson's claims failed on the merits.

VII. Whether the district court correctly ruled that the City did not impose a substantial burden.

VIII. Whether the district court properly ruled that the City did not discriminate on the basis of religion.

IX. Whether the district court correctly ruled the City has not unreasonably limited religious assemblies.

X. Whether the district court erred in finding that the city's ordinance violated the equal terms provision of RLUIPA.

XI. Whether the district court erred in awarding nominal damages.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in the District Court

Covenant Christian Ministries, Inc. and Pastor Frederick T. Anderson (collectively referred to herein as "Covenant") filed this action on August 24, 2006 as a result of the City of Marietta's ("City") denial of Covenant's application to rezone its property. (Vol. 1, doc. 1.) The City answered and filed a partial motion to dismiss. (Vol. 1, docs. 3 and 4.) This motion to dismiss sought to have the district court dismiss Frederick T. Anderson ("Anderson") based on lack of standing, and to dismiss the Fifth Amendment and Fourteenth Amendment equal protection claims. The court granted the motion as to Anderson, but gave him leave to file an amended complaint to buttress his allegations sufficient to demonstrate standing. (Vol. 1, doc. 30.) The court also dismissed the Fifth Amendment claim. (Vol. 1, doc. 30.)

Covenant filed an amended complaint, and the City renewed its motion to dismiss with reference to Anderson's standing. (Vol. 1, docs. 32 and 34, respectively.) In its order, the court agreed with the City about Anderson's lack of standing as to all of the claims related to the use of the property, which is solely owned by Covenant. (Vol. 4, doc. 92.) The court dismissed these claims but allowed the claims which were personal to Anderson to proceed. (Vol. 4, doc. 92.)

After discovery, Covenant filed a motion for summary judgment as to all claims other than the amount of damages to which it was entitled. (Vol. 2, doc. 62.) The court granted Covenant's motion as to a violation of the equal terms provision of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), but denied Covenant's other claims. (Vol. 4, doc. 92.) Thereafter, the City moved for summary judgment. (Vol. 6, doc. 96, Vol. 7, doc. 97.) Initially, the court denied this motion as moot (Vol. 12, doc. 121) but later vacated this ruling. (Vol. 12, doc. 133, pp. 2-3.)

Covenant moved for entry of a final judgment and for a permanent injunction, which the court denied. (Vol. 12, doc. 121.)

In its final order, the district court passed on all issues presented in Covenant's complaint and on which all parties had moved for summary judgment. (Vol. 12, doc. 133.) In that order, the court held that the City's ordinance constituted a facial violation of the equal terms provision of RLUIPA, but Covenant could not prevail on any of its other claims. For the facial violation, the Court awarded Covenant nominal damages of $1. (Vol. 12, doc. 133, p. 8.)

II. Statement Of The Facts

Covenant Christian Ministries, Inc. ("Covenant") is a non-denominational Christian Church that provides worship services and operates a private school at locations within the City of Marietta. (Vol. 1, doc. 32, pp. 2-3). Pastor Frederick

T. Anderson ("Anderson") is the Pastor and CEO of Covenant. (Vol. 5, doc, 81, Deposition of Pastor Anderson, p. 56). Covenant currently occupies two pieces of property at 170 Fairground Street and 528 Fairground Street in the City. (Vol, 5, doc, 81, P. Anderson Dep., p. 24). Besides worship services and the school, Covenant has a televised ministry, a basketball and volleyball team, conducts distribution and advertisement through pamphlets, maintains a webpage, and provides boarding services to some of its basketball players. (Vol. 5, doc, 81, P. Anderson Dep., pp. 24-25, 41).

Covenant holds two Sunday services at its 170 Fairground location. Between the two services at 8:00 a.m. and 10:30 a.m., approximately 450 people attend, although the capacity of the church is 500. (Vol. 5, doc, 81, P. Anderson Dep., pp. 24, 26, 29). The majority of Covenant's members do not live in the City of Marietta. (Vol. 5, doc, 83, Video, City Council Meeting, Aug. 9, 2006).

Covenant[1] admits that growth of the church has slowed in the last few years. (Vol. 5, doc, 81, P. Anderson Dep., p. 33). Covenant Christian Ministries Academy consists of grades 3-K through 12 and operates at both of Covenant's properties. (Vol. 5, doc, 81, P. Anderson Dep., pp. 24, 37). Pastor Anderson's wife, Vanessa Anderson, serves as its superintendent. (Vol. 5, doc, 82, Deposition of Vanessa

[1] Throughout this brief, the City will refer to Anderson and Covenant collectively as "Covenant." To the extent it is necessary to single out Anderson, the City will refer to him by name.

Anderson, p. 22, Exhibit B). Despite the fact that it has adequate facilities, registration at the school is currently down. (Vol. 5, doc, 81, P. Anderson Dep., p. 28, 37). Although the school can accommodate about 240 students, only 187 students enrolled in the 2006-07 school year and as of mid-June 2007, only 118 students had pre-registered for 2007-08. (Vol. 5, doc, 82, Enrollment History Spreadsheet, Exhibits 2 and 3 to V. Anderson Dep., included in Exhibit B; Vol. 5, doc, 81, P. Anderson Dep., pp. 36-37).

On October 29, 2004, Covenant (without Anderson) entered into a sales contract to purchase 8.27 acres of property ("subject property") located in an R-2, residential zoning classification in the City. (Vol. 1, doc. 32, Complaint, ¶ 19). The property is moderately wooded and, except for a single family home, is undeveloped. (Vol. 6, doc. 96, Planning and Zoning Dept. Analysis, p. 6, attached as Exhibit C).

The area surrounding the property is predominately residential, consisting of single family homes and a City park. (Vol. 6, doc, 96, Exhibit C, Planning and Zoning Dept. Analysis, pp. 5, 8). The subject property fronts Powder Springs Street and Chestnut Hill Road, a two-lane residential street. (Vol. 6, doc. 96, Exhibit C, Planning and Zoning Dept. Analysis, p. 5).

After purchasing the property, Covenant planned to build an 800-seat church, a religious school to accommodate 500 students, a dormitory to house

approximately 24-26 male high school students, a gymnasium, and an activity field. (Vol. 6, doc. 96, Exhibit C, Planning and Zoning Dept. Analysis, pp. 5-6; Vol. 5, doc. 81, P. Anderson Dep., pp. 31, 43; Vol. 6, doc. 96, City Council Minutes, Aug. 9, 2006, attached as Exhibit D).

At no time did Covenant look at the zoning ordinance or attempt verify that the church, or any other place of assembly, was allowed in the R-2 classification. (P. Anderson Dep., p. 12). On November 30, 2005, nearly one year after signing the sales contract, Covenant closed on the property. (Vol. 1, doc, 32, Complaint, ¶ 37). Prior to closing, Covenant again failed to investigate what types of uses were allowed on the property. (Vol. 5, doc. 81, P. Anderson Dep., pp. 12, 14).

Before November 10, 2004, the City's Zoning Ordinance ("ordinance") allowed religious institutions in residential and nonresidential zoning classifications but imposed a minimum lot size requirement of five acres. (Vol. 4, doc. 72, Deposition of Rusty Roth, p. 35, [hereinafter "Roth Dep.]). This five acre minimum served to provide a buffer to ensure that residential areas were protected from activities associated with large, modern-day churches, including high traffic volumes, consistent activity throughout the week, and large crowds. (Vol. 4, doc. 72, Roth Dep., pp.107-08).

In September 2004, the City became involved in a lawsuit that alleged the City was violating the Religious Land Use and Institutionalized Persons Act of

2000, 42 U.S.C. § 2000cc, et seq. ("RLUIPA") because it imposed the acreage minimum for religious institutions but did not require it of other similar uses. (Vol. 6, doc. 96, Consent Decree, attached as Exhibit F; Vol. 4, doc. 72, Roth Dep., pp. 35-36).

The City became concerned that religious institutions were regulated differently and less favorably than similar uses, such as assembly halls, union halls, fraternal halls, and clubs, which were not subject to the minimum lot size. (Vol. 6, doc. 96, Memo to Mayor and City Council, Nov. 8, 2004, attached as Exhibit G). In response to the lawsuit and to comply with RLUIPA, the City amended its Zoning Ordinance on November 10, 2004 to disallow all places of assembly, including religious institutions, in residential zoning districts. This amendment eliminated the risk that religious organizations were subject to requirements that did not apply to other places of assembly. (Vol. 6, doc. 96, City Council Minutes, November 10, 2004, attached as Exhibit; Vol. 6, doc. 96, Exhibit F, Consent Decree).

However, by simply removing the five acre minimum while continuing to allow churches in residential areas, the City was concerned that large places of assembly could locate anywhere in residential areas and could potentially encroach upon single-family neighborhoods. (Vol. 4, doc. 72, Roth Dep., pp. 53, 107-08). The City disallowed all places of assembly, secular and nonsecular, in order to

protect residential communities while complying with RLUIPA. (Vol. 4, doc. 72, Roth Dep., pp. 107-08).

The ordinance defines "places of assembly" as, "[a] building, or part of a building, in which facilities are provided for such purposes as meetings for civic, educational, political, religious or social purposes and may include a banquet hall, private club, fraternal organization or religious institution." (Vol. 6, doc. 96, Zoning Ordinance § 724.02, pertinent portions of which are attached as Exhibit I).

Places of assembly are permitted in 10 types of nonresidential zoning districts. These categories include Commercial, Industrial, LI (Light Industrial), HI (Heavy Industrial), CBD (Central Business District), OS (Office Services), OHR (Office High-Rise), RRC (Regional Retail Commercial), CRC (Community Retail Commercial), and NRC (Neighborhood Retail Commercial). (Vol. 6, doc. 96, Exhibit I, Zoning Ordinance, §§ 708.15-708.18, 708.23-708.27)). These nonresidential areas consist of 47.6% of the land area of the City. (Vol. 6, doc. 96, Land Use Statistics, attached as Exhibit J).

Places of assembly, including churches, have the potential to negatively impact established residential areas by introducing more traffic more days a week, increasing crowds, and lowering property values. (Vol. 4, doc. 72, Roth Dep., pp. 23, 105-06). The modern day church typically draws people from outside of

the local community and does not just serve the residents of the surrounding area surrounding area. (Vol. 4, doc. 72, Roth Dep., p. 25).

Churches today typically have a lot of different ministries and their activities are not just on Sundays, but on days throughout the week. (Vol. 4, doc. 72, Roth Dep., p. 23).

Retail stores in apartment homes are permitted uses in some residential districts; these stores are ancillary to residential use and are provided primarily for residents of the adjacent apartments. (Vol. 4, doc. 72, Roth Dep., p. 101-02). Fraternities and retirement homes are permitted uses in some residential districts; the primary purpose of these multifamily homes is for residential use. (Vol. 4, doc. 72, Roth Dep., pp. 93, 96).

Private parks, playgrounds, and neighborhood recreation centers or swimming pools are permitted uses in the R-2 residential zoning district. (Vol. 6, doc. 96, Exhibit I, Zoning Ordinance, § 708, Vol. 6, doc. 96, Affidavit of Russel J. Roth, ¶ 4 [hereinafter "Roth Aff."], attached as Exhibit K). The City does not consider private parks, playgrounds, and neighborhood recreation centers or swimming pools to be the same as places of assembly. (Vol. 6, doc. 96, Exhibit K, Roth Aff., ¶ 5).

Unlike a religious institution, banquet hall, or private club, where people meet and convene together for a common purpose, private parks serve no such

purpose, as the reasons for visiting may include exercise, relaxation, or solitude. (Vol. 6, doc. 96, Exhibit K, Roth Aff., ¶ 7). The type of permitted park and playground is distinct from an organized commercial venture, which is only allowed in Regional Retail Commercial district and the Light Industrial district as commercial indoor and outdoor recreational uses, as set forth in § 708.17 of the City's zoning ordinance. (Vol. 6, doc. 96, Exhibit K, Roth Aff., ¶ 8).

Neighborhood recreation centers are primarily for the use by residents of the surrounding neighborhood and their guests. (Vol. 6, doc. 96, Exhibit K, Roth Aff., ¶ 9). Unlike neighborhood recreation centers, places of assembly typically draw visitors from outside the local community and, therefore, they have a greater impact on traffic volumes than recreation centers. (Vol. 6, doc. 96, Exhibit K, Roth Aff., ¶ 10). Unlike places of assembly, the neighborhoods can control the volume of traffic and visitors by limiting the events held at the recreation centers or swimming pools. (Vol. 6, doc. 96, Exhibit K, Roth Aff., ¶ 11).

The City does not anticipate that private parks, playgrounds, and recreation centers would create the same traffic levels as a property with a church, school, playing field, gymnasium, and dormitory which would experience traffic year round and on most days of the week. (Vol. 6, doc. 96, Exhibit K, Roth Aff., ¶ 12).

Funeral homes are not actually listed as a permitted use in the R-2 zoning district, but must be associated with a cemetery or a mausoleum. (Vol. 6, doc. 96,

Exhibit I, Zoning Ordinance § 708; Vol. 4, doc. 72, Roth Dep., p. 89, Vol. 6, doc. 96, Exhibit K, Roth Aff., ¶ 13). Cemeteries and mausoleums are special uses that only are allowed in R-2 if they locate on a minimum of 10 acres and meet set back and various other requirements. (Vol. 6, doc. 96, Exhibit I, Zoning Ordinance § 708; Vol. 4, doc. 72, Roth Dep., p. 89; Vol. 6, doc. 96, Exhibit K, Roth Aff., ¶ 14). The City does not consider funeral homes to be similar to places of assembly. (Vol. 6, doc. 96, Exhibit K, Roth Aff., ¶ 15). Those who come to funeral homes do not visit on a regular basis to attend scheduled meetings or events; rather, they are there for the sole, one-time purpose of mourning a death. (Vol. 6, doc. 96, Exhibit K, Roth Aff., ¶ 16).

Unlike a religious institution, banquet hall, or private club, funeral homes do not implicate the same traffic concerns as places of assembly. (Vol. 6, doc. 96, Exhibit K, Roth Aff., ¶ 18). The City does not anticipate that funeral homes, which experience sporadic visitors, would have the same regularity or intensity of traffic as a property with a church, school, playing field, gymnasium, and dormitory that would experience traffic year round and on most days of the week. (Vol. 6, doc. 96, Exhibit K, Roth Aff., ¶ 19).

In February, 2006, Covenant discovered that it could not move forward with its project under the current zoning. (Vol. 5, doc. 81, P. Anderson Dep., pp. 8-9). Thereafter, Anderson met with Rusty Roth, the City's Planning and Zoning

Manager, to discuss what needed to be done and Roth advised him as to the necessary rezoning. (Vol. 5, doc. 81, P. Anderson Dep. pp.18-19). Covenant then applied to rezone the property to the commercial zoning classification CRC (Community Retail Commercial). (Vol. 5, doc. 81, P. Anderson Dep. pp.18-19; Vol. 6, doc. 96, Exhibit C, Planning and Zoning Dept. Analysis, p.1).

Following a review of Covenant's application, development proposal, and site plan, as well as reliance on the City's comprehensive plan, site visitations, and peer review and discussion, the City's Planning and Zoning Department expressed concerns about Covenant's proposed rezoning. (Vol. 4, doc. 73, Deposition of Nathan Lawrence, p. 25, [hereinafter "Lawrence Dep."]).

The Planning and Zoning Department relied on their experience as city and land planners, observations of the effect of such places of assembly in residential areas, development trends, and the site plan submitted by Covenant. (Vol. 4, doc. 72, Roth Dep., pp. 21-22, 25-26). The City was concerned about encroachment into the nearby residential area; lowering of property values; the potential for a subsequent retail or commercial use should Covenant sell the property; the impact on the environment due to destruction of woods and greenspace; and increased vehicle traffic. (Vol. 6, doc. 96, Exhibit C, Planning and Zoning Dept. Analysis, pp. 5-6).

The Planning Department analyzed the application and concluded that "rezoning of this particular property would constitute a substantially more intense land use than currently allowed under the existing R-2 zoning, and would result in an encroachment into an established residential area along Powder Springs." (Vol. 6, doc. 96, Exhibit C, Planning and Zoning Dept. Analysis, p. 5).

The City was concerned that rezoning the property could result in an even higher density zoning in the future and the long-range impacts of rezoning the property. (Vol. 4, doc. 73, Lawrence Dep., p 68). Covenant's proposed gymnasium and playing fields would bring large numbers of people on a year-round basis. (Vol. 4, doc. 72, Roth Dep., p. 23). Lights from the playing fields for any night activities could negatively impact the residential area because of the glare into the neighborhoods. (Vol. 4, doc. 72, Roth Dep., p. 23).

Rezoning the property to allow for Covenant's proposed use could negatively impact property values of surrounding properties due to the size of the proposed church, parking concerns, the activity field, gymnasium, dormitory, and increased traffic. (Vol. 4, doc. 73, Lawrence Dep., p. 64-65). Introducing a gymnasium or a playing field to a residential neighborhood, regardless of whether or not it is religious-based, has the potential to negatively impact a residential area. (Vol. 4, doc. 72, Roth Dep., p. 24). Further, rezoning the property to commercial

would also be inconsistent with the Future Land Use Plan. (Vol. 6, doc. 96, Exhibit C, Planning and Zoning Dept. Analysis, p. 5).

Based on this analysis, the Marietta Planning Commission recommended denial of Covenant's application. (Vol. 6, doc. 96, Exhibit M, Planning Comm'n Minutes, Aug. 1, 2006). The City Council considered Covenant's application on August 9, 2006. (Vol. 6, doc. 96, Exhibit D, City Council Minutes, Aug. 9, 2006).

At the meeting, residents who lived in the neighborhood of the property expressed concern about the elimination of greenspace, traffic congestion, and parking issues surrounding the property. Other residents were concerned about the impacts of Covenant's plans on the character of their neighborhood and their property values. (Vol. 6, doc. 96, Exhibit D, City Council Minutes, Aug. 9, 2006). At the meeting, it was also noted that Covenant's proposed uses would generate 455 additional vehicles per day near and around the subject property. (Vol. 6, doc. 96, Exhibit D, City Council Minutes, Aug. 9, 2006). The City Council heard these comments, as well as Covenant's rebuttal, and denied the application. (Vol. 6, doc. 96, Exhibit D, City Council Minutes, Aug. 9, 2006).

The record shows that the council members were concerned about changing the property from residential to commercial. (Vol. 6, doc. 96, Exhibit D, City Council Minutes, Aug. 9, 2006). Since their application was denied, Covenant has

not looked for other nonresidentially zoned property to locate their church. (Vol. 5, doc. 81, P. Anderson Dep., p. 50; Vol. 5, doc. 82, V. Anderson Dep., pp. 57-58).

City Planner Nathan Lawrence testified that with nearly half the City zoned non-residential, "I know that there are vacant properties or properties that could definitely have the potential for redevelopment." (Vol. 4, doc. 73, Lawrence Dep., p. 101).

Other religious institutions that received approval for some type of development from the City after the zoning ordinance was amended in November 2004 and are distinguishable from Covenant in that they either: (1) applied for, and in some cases, received development approval, before the zoning ordinance changed, or (2) existed prior to November 2004 and the modifications to the existing uses were minimal. (Vol. 6, doc. 96, Exhibit N, documents pertaining to Roswell Street Baptist Church, Pleasant Grove Missionary Baptist Church, Wesleyan Fellowship Church, North Metro Church).

The ordinance includes a severability clause in section 700.04. That clause states as follows:

> It is hereby declared to be the intention of the Mayor and Council that the sections, paragraphs, sentences, clauses, and phrases of this article are severable, and if any phrase, clause, sentence, paragraph, or section of this article be declared unconstitutional or invalid, it shall not affect any or the remaining phrases, clauses, sentences, paragraphs and sections of this article.

(Vol. 6, doc. 96, Exhibit I, Zoning Ordinance § 700.04).

Further, the November 10, 2004 Ordinance amending the zoning ordinance contains its own severability clause, which reads:

> It is hereby declared to be the intention of this Ordinance that its sections, paragraphs, sentences, clauses and phrases are severable and if any section, paragraph, sentence, clause or phrase of this Ordinance is declared to be unconstitutional or invalid, it shall not affect any of the remaining sections, paragraphs, sentences, clauses or phrases of this Ordinance.

(Vol. 6, doc. 96, Exhibit O, p. 22, Ordinance No. 6753, § 17).

Section 700.03 of the Zoning Ordinance contains a statement of purpose, which is applicable to the entire Zoning Ordinance, including the November 10, 2004 amendments. The statement reads:

> The purpose shall be to protect the aesthetic values of land and property, public health and the following purposes listed below:
>
> A. To protect existing development in the City.
> B. To prevent flooding of improved property.
> C. To prevent overcrowding of schools and other public facilities.
> D. To achieve such timing, density, and distribution of land development and use as will prevent overloading public infrastructure systems for providing water supply, sewage disposal, drainage, sanitation, police and fire protection, and other public services.
> E. To achieve such density, distribution and design of land development and use as will protect the traffic movement capabilities of streets within the City and prevent traffic hazards.

> F. To encourage such distribution of population, land development and use as will facilitate the efficient and adequate provision of public services and facilities.
> G. To achieve such density, design, and distribution of housing as will protect and enhance residential property values and facilitate the provision of adequate housing for every citizen.
> H. To secure such accessibility, design and density of land development and use as will reduce fire hazards and fire losses.
> I. To promote the continued and safe operation of general purpose airports within the general vicinity of Marietta.
> J. To promote the health, safety, morals, convenience, order, prosperity, and welfare of the present and future inhabitants of the City of Marietta.
> K. To encourage greater efficiency and economy of land development through natural resource conservation.
> L. To preserve the City's natural beauty and encourage architecturally pleasing development.
> M. To improve the quality of life through protection of the City's total environment including the prevention of air, visual, water and noise pollution.

(Vol. 6, doc. 96, Exhibit I, Zoning Ordinance §700.03).

III. STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo. Miccosukee Tribe of Indians of Fla. v. U.S., 566 F.3d 1257, 1264 (11th Cir. 2009).

This Court reviews de novo the district court's grant of a motion to dismiss under Rule 12(b)(1) for Anderson's standing, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff. American Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1288 (11th Cir. 2010).

SUMMARY OF THE ARGUMENT

Covenant raised numerous claims in its complaint and amended complaint. The only claims at issue in this appeal are those brought under RLUIPA.[2] RLUIPA prohibits governments from imposing land use decisions that discriminate against or impose a substantial burden on religious activities. RLUIPA is not intended, however, to provide religious institutions with immunity from land use regulations. 146 Cong. Rec. S7774-01. Covenant asserted four RLUIPA claims: (1) substantial burden of its religious exercise; (2) unequal treatment of religious and non-religious assemblies; (3) discrimination against an assembly on the basis of religion, and (4) unreasonable limitation of religious assemblies, institutions, or structures within the City. The district court denied all of Covenant's RLUIPA claims other than the facial unequal treatment claim, which the City appeals herein.[3]

The district court properly determined that the City's ordinance did not constitute a substantial burden on Covenant's religious exercise, was not discriminatory, and did not unreasonably limit religious assemblies within the City.

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[2] Covenant included in its statement of issues (Issue X) non-RLUIPA claims brought by Anderson, but did not present any argument as to that issue in its brief. Therefore, that issue has been waived.

[3] Covenant argued to the district court that the ordinance, as applied, violated the equal terms provision. The court denied this claim (Vol. 4, doc. 92, pp. 27-28), and Covenant did not appeal that part of the court's order.

The court did err, however, in its determination that the ordinance treated non-religious uses more favorably than religious uses, in violation of the equal terms provision. As part of this decision, the court erred in determining that the classification present in the City's ordinance did not pass strict scrutiny.

As for Anderson, the district court properly decided that he did not have standing to assert any claim related to the ownership of the property. In fact, it determined that Anderson had no separate RLUIPA claim from that asserted by Covenant.

A significant amount of Covenant's brief concerns the court's ruling that the City's subsequent adoption of a new zoning ordinance mooted most of Covenant's claims. This is not an issue for this Court, however, because the district court vacated this ruling in its final order (Vol. 12, doc. 133, pp. 2-3).

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT PROPERLY SEVERED THE CITY'S ORDINANCE

Covenant's entire appeal hinges on the outcome of the appropriateness of the how the district court severed the City's zoning ordinance. Significantly, Covenant does not assert that it was an error for the district court to sever the ordinance, only that the court severed it in the wrong way. (Appellants' brief p. 32). According to Covenant, the court should have removed the November 2007 amendment. Instead, the district court severed the portion of the ordinance that rendered it a violation of RLUIPA by striking private parks, play grounds, neighborhood recreation centers and swimming pools as permitted uses in the R-2 zoning district. (Vol. 12, doc. 133, p. 5).

In its argument that the district court erred in the way it severed the ordinance, Covenant puts forth two grounds. First, Covenant asserts that because it has not found a reported case wherein a court severed an ordinance in the same manner, it must be error. Second, allegedly, the ordinance's severance clause does not support the severance. Neither of these grounds supports overturning the district court's ruling.

As for the first issue, fruitless legal research is not grounds for overturning a well-reasoned decision of the district court. In this regard, Covenant asserts that it has only found cases in which a court has struck language that is unconstitutional

in and of itself. Here, the court found that inclusion of three uses, in combination with the exclusion of one category (religious institutions), violated RLUIPA, so it struck the three uses. Covenant would rather that the court actually rewrite the ordinance by eliminating the 2004 amendments. To do this, the court would have to strike the definition of "places of assembly," add back in assembly halls, union halls, fraternal clubs, clubs, and religious institutions as of right to the R-2 district. (Vol. 6, doc. 96, exhibits G and H). Additionally, the court would have to add back in the previously-challenged acreage minimum for religious institutions. This type of alteration to the ordinance by the court would have conflicted with the explicit law about severance.

Severability of a local ordinance is a question of state law. City of Lakewood v. Plain Dealer Pub. Co., 486 U. S. 750, 772, 108 S. Ct. 2138 (1988). Under Georgia law, a severability clause creates a presumption that the city intended for invalid provisions not mutually dependent on other provisions to be severed, leaving the remainder of the ordinance intact. Union City Board of Zoning Appeals v. Justice Outdoor Displays, 266 Ga. 393, 404 (1996); City Council of Augusta v. Mangelly, 243 Ga. 358 (1979). In this regard, the Georgia Supreme Court has "long favored upholding legislative enactments where invalid provisions therein are stricken[.]" Union City, 266 Ga. at 403.

There are two separate severability clauses applicable to this action. First, the Zoning Ordinance of the City of Marietta includes a severability clause in § 700.04. That clause states as follows:

> It is hereby declared to be the intention of the Mayor and Council that the sections, paragraphs, sentences, clauses, and phrases of this article are severable, and if any phrase, clause, sentence, paragraph, or section of this article be declared unconstitutional or invalid, it shall not affect any or the remaining phrases, clauses, sentences, paragraphs and sections of this article.

(Vol. 6, doc. 96, Exhibit I, Zoning ordinance § 700.04).

Further, the November 10, 2004 Ordinance amending the zoning ordinance contains its own severability clause, which reads:

> It is hereby declared to be the intention of this Ordinance that its sections, paragraphs, sentences, clauses and phrases are severable and if any section, paragraph, sentence, clause or phrase of this Ordinance is declared to be unconstitutional or invalid, it shall not affect any of the remaining sections, paragraphs, sentences, clauses or phrases of this Ordinance.

(Vol. 6, doc. 96, Exhibit O, p. 22, Ordinance No. 6753, § 17).

The Georgia Supreme Court in Union City stated:

> When a statute cannot be sustained as a whole, the courts will uphold it in part when it is reasonably certain that to do so will correspond with the main purpose which the legislature sought to accomplish by its enactment, if, after the objectionable part is stricken, enough remains to accomplish that purpose.

Id. at 404 (citing cases).

In this case, the district court determined that it was appropriate to strike the three uses from the zoning ordinance. This approach is in keeping with the appellate court's direction to save a legislative enactment, if possible. Reverting to the pre-2004 ordinance would not fulfill the City's stated intention found in the two severability clauses.

The Georgia Supreme Court unequivocally approved of parsing of Union City's ordinance. In that case, the trial court found that the ordinance contained content restrictions and severed all references to content in the ordinance. Union City's ordinance with the offending provisions and terms excised continued to fulfill the city's purpose of regulating signs "'in the interest of the public safety and welfare by the establishment of standard for the location, size, illumination, number, construction and maintenance of all signs and advertising structures . . . .'" Id. at 404. Section 700.03 of the City's Zoning Ordinance contains a statement of purpose, which is applicable to the entire Zoning Ordinance, including the November 10, 2004 amendments.

Section 700.03 reads:

> The purpose shall be to protect the aesthetic values of land and property, public health and the following purposes listed below:
>
> A. To protect existing development in the City.
>
> B. To prevent flooding of improved property.

C. To prevent overcrowding of schools and other public facilities.

D. To achieve such timing, density, and distribution of land development and use as will prevent overloading public infrastructure systems for providing water supply, sewage disposal, drainage, sanitation, police and fire protection, and other public services.

E. To achieve such density, distribution and design of land development and use as will protect the traffic movement capabilities of streets within the City and prevent traffic hazards.

F. To encourage such distribution of population, land development and use as will facilitate the efficient and adequate provision of public services and facilities.

G. To achieve such density, design, and distribution of housing as will protect and enhance residential property values and facilitate the provision of adequate housing for every citizen.

H. To secure such accessibility, design and density of land development and use as will reduce fire hazards and fire losses.

I. To promote the continued and safe operation of general purpose airports within the general vicinity of Marietta.

J. To promote the health, safety, morals, convenience, order, prosperity, and welfare of the present and future inhabitants of the City of Marietta.

K. To encourage greater efficiency and economy of land development through natural resource conservation.

L. To preserve the City's natural beauty and encourage architecturally pleasing development.

> M. To improve the quality of life through protection of the City's total environment including the prevention of air, visual, water and noise pollution.

(Vol. 6, doc. 96, Exhibit I, Zoning ordinance §700.03). Furthermore, the ordinance contains a specific purpose for the R-2 zoning classification as follows: "The R-2 district is intended to be used for low density single-family detached housing and residentially compatible uses requiring large amounts of open space." (Vol. 6, doc. 96, Exhibit I, Zoning ordinance section 708.02(A)).

Tinsley Media, LLC v. Pickens County, Georgia, 203 Fed. Appx. 268 (11th Cir. 2006), cited by Covenant, does not change the applicability of the zoning ordinance's purpose clause or the City's statement about the purpose of the R-2 zoning. In Tinsley, the trial court declined to consider testimony by a sole commissioner as to the reasons he enacted a sign ordinance. The sign ordinance itself did not have a purpose clause.

There are two reasons Tinsley is inapplicable here. First, the City's ordinance contains a purpose clause. It is not the "after the fact" rationale that the Tinsley court found unreliable. Secondly, and more importantly, the Tinsley court was considering the purpose clause in relation to the First Amendment analysis. Severability law does not require the same level of certitude in determining the intent of a legislative enactment.

In Ayotte v. Planned Parenthood, 546 U.S. 320, 126 S. Ct. 961 (2006), the United States Supreme Court reaffirmed the general rule that "when confronting a statute's constitutional flaw, [courts try] to limit the solution to the problem preferring to enjoin only the statute's unconstitutional applications while leaving the others in force, see United States v. Raines, 362 U.S. 17, 20-22, 80 S. Ct. 519, 4 L.Ed.2d 524, or to sever its problematic portions while leaving the remainder intact, United States v. Booker, 543 U.S. 220, 227-229, 125 S. Ct. 738, 160 L.Ed.2d 621.." Ayotte, 126 S. Ct. at 967. Invalidating an entire ordinance, or amendment in this case, would frustrate "'the intent of the elected representatives of the people.'" Ayotte, 546 U.S. at 329 (quoting Regan v. Time, Inc., 468 U.S. 641, 652, 104 S. Ct. 3262 (1984)(plurality opinion)).

Identical to Union City, striking the three categories from the City's ordinance undoubtedly will uphold the purposes for which the zoning ordinance was adopted. Severing these provisions leaves behind a completely intact ordinance that prevents places of assembly from locating in residential districts. See Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684, 107 S. Ct. 1476, 1480 (1987) ("Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.")

II. THE COURT'S DECISION TO DENY INJUNCTIVE RELIEF PROPER

As part of the relief it was seeking in this litigation, Covenant wanted the court to order the City to issue a development permit for Covenant's church complex. In determining the damages to which Covenant was entitled, in its March 2010 order, the court ruled Covenant was not entitled to damages related to the delay or inability to build its church because, after severing the ordinance, the ordinance still prohibited Covenant's intended use of the R-2 property. (Vol. 12, doc. 133, p. 5). In a footnote, the court ruled, hypothetically, that if it had allowed Covenant to amend its complaint to raise a claim as to the May 2008 permit application, injunctive relief would be inappropriate because the severed ordinance prevented the proposed use. (Vol. 12, doc. 133, p. 5, n. 4).

As part of its determination about the relief to which Covenant was entitled, the court referenced Georgia vested rights law. (Vol. 12, doc. 133, p. 5 -6). The concept of vested rights is applicable when an ordinance changes and a property owner wants to have the superseded ordinance apply to development of its property. It is in this context that the district court mentioned Covenant's lack of vested rights. (Vol. 12, doc. 133, p. 5 -6). The court said the City's ordinance, as severed, remained in effect and Covenant had no vested rights to build its church complex in the R-2 district. While lack of vested rights is technically accurate, Covenant might be accurate in its position that it did not need to prove vested

rights under the circumstances. If Covenant is correct in this position, it is only because it could not build the church under the 2004 ordinance before or after severance. Thus, there is no previous ordinance it is claiming is applicable to its development.

Covenant makes much of the district court's mention of the fact that Covenant's development plan submitted for its commercial rezoning request failed to comply with the commercial zoning requirements. (Appellants' brief p. 34-35). The court did not mention this fact in conjunction with its determination that Covenant was not entitled to injunctive relief, however. Further, this fact has no bearing on the denial of injunctive relief. Even if Covenant's plans had complied with commercial zoning requirements, the City denied the rezoning request and the 2004 ordinance, before and after severance, prevented Covenant from building its church complex on the R-2 property.

Interestingly, in this portion of its brief, Covenant tries to take the position that there was no ordinance preventing it from using its property to build a church at the time of its rezoning. Therefore, according to Covenant, the court should have ordered the City to accept a development permit application. Of course, this position is contrary to the courts ruling that the severed 2004 ordinance still prevented the development of Covenant's property as a church complex.

Even if the court had rewritten the City's ordinance to allow religious uses in R-2 as of right, in the face of the 2008 ordinance, Covenant cannot build its church complex without applying for a special use permit. Under these circumstances, the concept of vested rights is the determining factor.

In support of its argument, Covenant relies on Tilley Properties v. Bartow County, 261 Ga. 153 (1991). There are two reasons Tilley is not applicable in this circumstance. First, the ordinance at issue in Tilley was struck because of the procedure used to adopt it. Thus, it never came into being. Second, Tilley did not concern "vested property rights in the face of a subsequent, new ordinance." Crown Media, LLC v. Gwinnett County, 380 F.3d 1317, 1328 n.23 (11th Cir. 2004). Without a subsequently adopted ordinance, there was no need for the Tilley court to ask the question about vested rights, because there is no restriction left to apply to the proposed use.

Vested rights are those "interests which it is proper for [the] state to recognize and protect and of which [the] individual cannot be deprived arbitrarily without injustice." Recycle & Recover v. Georgia Bd. of Natural Resources, 266 Ga. 253, 466 S.E.2d 197, 199 (1996). "To be vested, in its accurate legal sense, a right must be complete and consummated[.]" Goldrush II v. City of Marietta, 267 Ga. 683, 694, 482 S.E.2d 347 (1997). Vested rights in Georgia rely on a "principle of equitable estoppel in that the landowner, relying in good faith, upon some act or

omission of the government, has made a substantial change in position or incurred such extensive obligation and expenses that it would be highly inequitable and unjust to destroy the rights he has acquired." Cohn Communities v. Clayton County, 257 Ga. 357, 358, 359 S.E.2d 887, 889 (1987).

The law in Georgia is very specific about the elements of vested rights. WMM Properties, Inc. v. Cobb County, 255 Ga. 436, 339 S.E.2d 252 (1986) is the case cited most often by courts in analyzing when rights vest. According to WMM Properties, in order to acquire a vested right, a party must prove one of four conditions: (1) valid building or other permits were actually issued, (2) a building permit was actually applied for, and then the ordinance changed, (3) a development plan was approved either formally or informally, or (4) they made a substantial change in position by expenditures in reliance upon the probability of the issuance of a building permit. WMM Properties Inc., 255 Ga. at 438-39, 339 S.E.2d at 254-55.

Applying the strict language of WMM Properties, the only time Covenant could have acquired vested rights is when it applied for permits in May 2008, which is not part of this litigation. (The City previously explained how deficient those applications were and why even they did not confer any right to pre-ordinance amendment treatment.) Even then, it was applying for something it

knew was not permitted. Covenant did not change any position or rely on the ordinance that was later changed to its detriment.

Following through on the estoppel concept, under no circumstances can Covenant claim that it was planning for a use that then became illegal under the ordinance. Covenant knew or should have known that its church and school were not allowed at all times after November 2004. Covenant did not change any position or rely on the ordinance to its detriment and could not possibly have acquired vested rights prior to the City's adoption of a new ordinance.

Courts have looked upon identical attempts to grab vested rights with derision. For example, in Petra Presbyterian Church v. Village of Northbrook, 489 F.3d 846, (7th Cir. 2007), cert. den., 128 S. Ct. 914 (2008), the Seventh Circuit stated,

> We cannot find any basis, whether in cases or other conventional sources of law, or in good sense, for the proposition that the federal Constitution forbids a state that has prevented a use of property by means of an invalid (even an unconstitutional) enactment to continue to prevent that use by means of a valid one. From the proposition that the Village should not have discriminated in the industrial zone in favor of secular membership organizations it does not follow that when it eliminated the discrimination by banning all membership organizations from the zone, this entitled the victim of the discrimination to claim, by way of remedy, discrimination in *its* favor.

Petra, 489 F.3d at 849 (emphasis in original). Accord General Auto Service Station v. City of Chicago, 526 F.3d 991 (7th Cir. 2008).

This Court in Tanner Advertising Group LLC, v. Fayette County, 451 F.3d 777 (11th Cir. 2006), addressed some of the state law cases upon which Covenant relies for its vested rights argument. The Tanner court distinguished Recycle & Recover, Inc. v. Georgia Board of Natural Resources, 266 Ga. 253, 466 S.E.2d 197 (1996) and WMM Properties, Inc. v. Cobb County, 255 Ga. 436, 339 S.E.2d 252 (1986), by stating that "Tanner never received a sign permit that was superseded by the enactment of an ordinance." Tanner, 451 F.3d at 789. As for Tilley, supra, the Eleventh Circuit cited to its previous ruling in Crown Media when explaining that Tilley did not involve the question of vested property rights when a new ordinance had been granted.

The fact is that Covenant had not filed for any type of permit prior to the permits in May 2008. Covenant implies that it was prevented from filing proper permits by the City. If that were the case, Covenant's remedy is mandamus to get the Court to order the City to process the applications. This case simply is not a situation when a land owner legally proceeded with development plans that were not allowed under a subsequently adopted ordinance. Nothing prevents the City's current ordinance from applying to Covenant's property. See Hayes v. Howell,

251 Ga. 580, 584-85, 308 S.E.2d 170, 175-76 (1983) (explaining general rule of police power).

III. THE COURT DID NOT ERR IN DECIDING COVENANT WAS NOT ENTITLED TO MONETARY DAMAGES

There is no validity to Covenant's only basis for its claim that this Court should reverse the district court's ruling that Covenant was not entitled to damages. Covenant's only basis is its disagreement about the manner in which the district court severed the City's 2004 ordinance. As the court's ruling on severance is valid, Covenant's argument has no merit.

Furthermore, as discussed above, even if the court had severed the ordinance by rewriting it, Covenant lacked vested rights and is still prevented from building its church after the City's adoption of its 2008 ordinance. Even if Covenant had a right in theory to damages, the court was correct in granting judgment to the City because there is no evidence in the record of any damages unrelated to Covenant's delay in building its church and school. As the court ruled Covenant is not entitled to construct a facility on this site, Covenant has no evidence of damages to present to a jury.

Covenant has offered no evidence of damages except those related to delayed construction costs of being able to build a church on the subject property, lost profits, and increased mortgage costs. During a 30(b)(6) deposition in June 2007, Covenant's representative testified to the following damages: (1) Lost

enrollment in education ministry totaling $1,300,000; (2) Increased development costs in the amount of $1,600,000; (3) Lost tithes of $550,000; and (4) Mortgage costs in the amount of $26,000 per month from August 2006. (Vol. 6, doc. 96,# 25, Exhibit P, Deposition of Eddie Price, pp. 33-34, 40-41, 50-51, 84-85, 87-88).

All of these alleged damages are due Covenant's claim that it has not been able to build on the subject property. See e.g. Vol. 8, doc. 99, attachment # 1, pp. 7-11, Plaintiffs' Response to Defendant's Statement of Material Facts, ¶¶ 23, 26 ("Because of Covenant's inability to build its proposed facilities on the subject property due to the restrictions placed on religious assemblies by the City's November 10, 2004 zoning ordinance, Covenant has suffered a loss of tuition of approximately $1.3 million per year by Covenant Christian Ministries Academy (citing Eddie Price Deposition, p. 40) (emphasis added); "Because of Covenant's inability to build its proposed facilities on the subject property due to the restrictions placed on religious assemblies by the City's November 10, 2004 zoning ordinance, Covenant's costs to build its proposed facilities on the subject property, as of January 1, 2007, had increased by $1,606,141.00." (Citing Eddie Price Deposition, pp. 33-34) (emphasis added).

Furthermore, Covenant claims that because of the restrictions on being able to build on the property, its monthly mortgage payment for the property increased from an original amount of $26,000.00 in late 2005, to approximately $46,000.00

as of September 1, 2007. (Vol. 8, doc. 99-2, Exhibit B, pp. 6-7, Second Affidavit of Pastor Anderson, ¶¶ 13-16). Covenant claims that because of the "restrictions," and the inability to use the property as a church, it was forced to secure additional financing. Id. However, Covenant could not have built a church on the property because its application did not comply with the relevant ordinance requirements. Therefore, Covenant cannot establish a casual connection between the increase in mortgage payments and the facial violation of RLUIPA.

Furthermore, Covenant's lost profits – i.e. lost tuition and lost tithes – are too speculative and are all based on the imaginary church they planned to build on the property. As argued in the City's motion for partial summary judgment, "there can be no recovery on a claim for loss of expected profits except where such loss can be shown with reasonable certainty." Morey v. Brown Milling Co., 220 Ga. App. 256, 259, 469 S.E.2d 387, 391 (1996). An assertion of lost profits is "without value in the absence of any records or statements reflecting the . . . [claimant's] previous and present profits or losses." Tri-State Systems, Inc. v. Village Outlet Stores, Inc., 135 Ga. App. 81, 84, 217 S.E.2d 399, 403 (1975). Further, in order to show lost profits, the claimant must compare the profits or losses from similar circumstances and conditions. Morey, 220 Ga. App. at 259, 469 S.E.2d at 391.

Aside from the fact that Covenant could not have built a school or a church on the subject property because its application did not conform with the ordinance,

there is absolutely no evidence that Covenant's tithes would have risen or that it would have automatically had full enrollment at a new school. Thus, lost profits and loss tithes are not recoverable.

In sum, with no right to build its building, Covenant has no right to damages. City of Hampton v. Briscoe, 207 Ga. App. 501, 503, 428 S.E.2d 411, 413 (1993). The only damages Covenant has identified are related to the delay in being able to build its church complex. Because Covenant has never offered any evidence of damages, a jury trial on the amount of damages for the facial violation of RLUIPA is unnecessary and unwarranted. There simply are none. Thus, the court's ruling on this point was correct.

IV. DENIAL OF COVENANT'S MOTION TO AMEND ITS COMPLAINT WAS PROPER

Covenant's argument to this Court about overturning the district court's denial of its motion to amend the complaint is based on a completely false factual underpinning. Covenant claims the court erred in denying the motion because Covenant is still "disadvantaged" under the 2008 ordinance. By this pronouncement, Covenant would have this Court believe that its amended complaint was seeking to challenge the 2008 ordinance. It was not. In Covenant's counsel's own words, "It is the purpose of this motion to amend or supplement to address the City's failure to process the May 2008 application." (Vol. 12, doc.

125, Brief in Support of Motion for Leave to Amend or Supplement the Complaint, p. 2.)

Significantly, Covenant makes no argument as to the court's denial of its motion to amend to pursue its May 2008 permit application.[4] The trial court based its denial of the motion to amend on a lack of timeliness. (Vol. 12, doc. 133, p. 3-4, n. 3.) Covenant proffers no argument challenging the propriety of this ruling. The only argument Covenant makes is related to a claim that was not included in its proposed amendment to the complaint. Covenant has not provided this Court with any basis for disturbing the district court's denial of Covenant's motion to amend the complaint.

V. THE DISTRICT COURT CORRECTLY DETERMINED THAT ANDERSON DOES NOT HAVE STANDING

The district court placed Anderson's claims into two categories – those related to ownership of Covenant's property on which it proposed to build a church complex, and those personal to Anderson. As for the property-related claims, the court determined Anderson did not have standing to assert those claims and proceeded to rule against Anderson on the merits as to the remaining claims. (See Vol. 12, doc. 121 p. 13 n. 10; doc. 92, pp. 5-9.) In the appellate brief, Anderson offers no legal justification to overturn this part of the district court's ruling. His

[4] Although Covenant referenced this part of the proposed amended complaint in the heading of this section, it did not include any argument about why the district court erred.

argument that he has standing because he cannot preach on the property is unavailing.

"The doctrine of standing is an essential and unchanging part of the case-or-controversy requirement of Article III, which itself defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 663, 113 S. Ct. 2297, 2301 (1993). See also Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60, 112 S. Ct. 2130, 2135-36 (1992).

The Eleventh Circuit has held that a plaintiff must satisfy three requirements for standing.

> [A] plaintiff must show (1) ***it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical***; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

White's Place, Inc. v. Glover, 222 F.3d 1327, 1329 (11th Cir. 2000) (quotation omitted) (emphasis added). "The Supreme Court has described these three requirements as the 'irreducible minimum' of constitutional standing requirements." Pittman v. Cole, 267 F.3d 1269, 1282 (11th Cir. 2001) (citing Valley Forge

Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982)).

Finally, Anderson has the burden of alleging and proving an "injury in fact" in order to satisfy the jurisdictional threshold issue of standing. White's Place, Inc., 222 F.3d at 1329 ("The burden is on the party seeking to exercise jurisdiction to allege and then to prove facts sufficient to support jurisdiction."). Anderson did not meet his burden of proof with reference to the property-related claims, including RLUIPA.[5]

According to the complaint, while Anderson is the pastor of Covenant and its CEO, the property at issue in this litigation is solely owned by Covenant. (Complaint ¶¶ 5, 13, 16, 31.) All of the rights Anderson alleged were violated belong to Covenant and not Anderson. (See i.e., Vol. 1, doc. 32, Amended Complaint ¶ 54 – city allegedly applied more restrictive land use classification to subject property; ¶ 56 – city's conduct constituted a taking of private property.)

To establish an actual injury in fact, a plaintiff must demonstrate that the defendant has invaded some "legally protected interest" of his. Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295, 1304

[5] The City moved to dismiss all of Anderson's claims based on lack of standing. The district court ruled that Anderson had standing to assert the personal claims, but proceeded to dispose of those claims on their merits. As Anderson did not appeal the court's merits ruling, it is unnecessary for the City to challenge the court's decision on standing for these claims.

(11th Cir. 2006). The interest "must consist of obtaining compensation for, or preventing, the violation of a legally protected right." Bochese v. Town of Ponce Inlet, 405 F.3d, 964, 980-81 (11th Cir. 2005). Although the Eleventh Circuit has held that a zoning restriction on property use constitutes an injury in fact, Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1224 (11th Cir. 2004), Anderson is not the owner of the subject property and cannot establish that the City has violated a legally protected interest of his.

This Court's opinion in Koziara v. City of Casselberry, 392 F.3d 1302 (11th Cir. 2004), is on point and supports the district court's ruling. In that case, plaintiff Koziara was an employee of a business that had its license revoked by the defendant city. The lack of this license prevented Koziara from working at the business. In determining that Koziara did not have standing to challenge the license revocation or the application of the ordinance to the business, this Court held that Koziara's injury was abstract and that she was not "'directly' affected apart from her 'special interest in the subject.'" Koziara, 392 F.3d at 1305 (citing Lujan, 504 U.S. at 563, 112 S. Ct. at 2138)). Anderson has no more connection with the City's application of its zoning ordinance to Covenant's property than Koziara did.

While Anderson is prohibited from carrying out his religious calling on the subject property, he may conduct worship services and spread Christian messages

in any zoning classification allowing places of assembly, including areas in nearly half of the city. Simply because Anderson cannot conduct worship services on the subject property does not constitute an actual injury in fact, as Anderson does not own the property and has no legally protected right to carry out his calling on this particular piece of property.

Furthermore, constitutional rights are personal in nature and cannot be assigned. Anderson was not the rezoning applicant or the property owner. The United States Supreme Court has construed civil rights claims as tort claims for personal injuries. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 709, 119 S.Ct. 1624 (1999). The right to sue in tort for personal injury is non-assignable under Georgia law. O.C.G.A. § 44-12-24.

Additionally, courts have held that a claim pursuant to 42 U.S.C. § 1983 to enforce civil rights must be based upon a violation of plaintiff's personal rights, not the rights of someone else. See Rose v. City of Los Angeles, 814 F. Supp. 878, 881 (C.D. Cal. 1993); Archuleta v. McShan, 897 F.2d 495, 497 (10th Cir. 1990); Eaton v. City of Solon, 598 F. Supp. 1505, 1514 (N.D. Ohio 1984).

Love Church v. City of Evanston, 671 F. Supp. 508 (N.D. Ill. 1987) is instructive in analyzing Anderson's standing. In Love Church, a church sought to lease property within the city in order to hold services and run a Sunday/nursery school. Id. at 510. When it was unable to secure property, the church and its

pastor filed a lawsuit, alleging that the city's zoning ordinance violated their due process, equal protection, and free exercise rights. Id. Before reaching the merits of the case, the court dismissed the pastor for lack of standing. Id. at 511, n.4. It reasoned, "[n]othing in the complaint indicates that [the pastor] suffers an injury distinct from the injury suffered by Love Church. His injury ***derives*** from the fact that the ordinance requires ***churches*** to get special use permits." Id. See also Eaton, 598 F. Supp. at 1514 (plaintiff-builder, who did not own the property but alleged that she was the authorized agent and representative of the owners of the property, did not have standing to maintain § 1983 action).

As for injunctive or declaratory relief, to establish standing based on an imminent threat of injury, a plaintiff must demonstrate that "a credible threat" of injury exists, not just a speculative threat, which is insufficient for Article III purposes. Am. Charities For Reasonable Fundraising Regulation, Inc. v. Pinellas County, 221 F.3d 1211, 1214 (11th Cir. 2000). A plaintiff can meet this standard "by showing that either:' (1) he was threatened with prosecution; (2) prosecution is likely; or (3) there is a credible threat of prosecution.'" Id. (quoting Jacobs v. Florida Bar, 50 F.3d 901, 904 (11th Cir. 1995)).

Here, Anderson has not alleged that he faces an imminent injury because he has not alleged that prosecution against him is likely or that a credible threat of prosecution exists. First, Anderson's allegation that he would be subject to fines

and/or imprisonment if he were to conduct organized religious exercise in a residential zoning classification within the City is too speculative to demonstrate that Anderson faces an imminent injury. The amended complaint contains no facts to show that Anderson intends to or has taken steps towards conducting organized religious activity in other areas of the City. Rather, the allegation appears to be a carefully crafted response to the pleading deficiencies the district court noted in its order partially granting defendant's motion to dismiss.

Moreover, Anderson's claim that he would be subject to penalties for leading organized religious activity out of his own home does not demonstrate that he faces an imminent injury. The amended complaint is the first sighting of this allegation. Anderson, however, did not include any allegations that he actually intends to conduct organized services out of his residence. To show an imminent threat of injury, "a credible threat of injury" must exist and the district court was correct in concluding that Anderson did not alleged sufficient facts to demonstrate the credible threat. (Vol. 4, doc. 92, p. 7 n. 1).

Here, all rights asserted by Anderson derive from those alleged by Covenant. The basis of Anderson's claims is the zoning ordinance's prohibition of places of assembly in residential areas and the City's denial of Covenant's application to rezone. While Anderson and Covenant allege it is Anderson who "leads the congregation" by "preaching, teaching, praying, and worshiping," (Vol. 1, doc. 32,

Amend. Comp. ¶ 9), Anderson does not own the subject property and any injuries sustained by him ***derive*** from the fact that the zoning ordinance requires ***churches*** to establish in specified districts or apply to have their property rezoned. Therefore, the district court was correct in its ruling that Anderson lacked standing for all of the claims related to the property.

VI. THE DISTRICT COURT VACATED ITS MOOTNESS RULING, AND ANDERSON HAS WAIVED HIS CHALLENGE TO THE COURT'S DETERMINATION THAT ANDERSON'S CLAIMS FAILED ON THE MERITS

In part VI of their appellate brief, Covenant and Anderson claim the district court erred in finding that their claims were moot, that those claims failed as a matter of law, and in failing to recognize that Anderson suffered a redressable injury. As for the issue of mootness and the related concept of redressability, the district court specifically vacated this ruling. (See Vol. 12, doc. 133, pp. 2-3 ("The Court's conclusion regarding the mootness of Covenant's constitutional claims, therefore, was unnecessary and the portion of the Court's April 28, 2009 Order addressing this issue, including this Court's ruling on the City's supplemental motion for partial summary judgment, is hereby VACATED.")). Therefore, this portion of Covenant's brief is unnecessary as the part of the order it challenges has already been changed.

As for an appeal of the district court's ruling on the merits of Anderson's claims that survived the City's motion to dismiss (Counts I, II, and X), while

Covenant and Anderson included reference to this issue in the heading for this section, they did not include any argument about it in the text. Therefore, this portion of Anderson's appeal is waived.

VII. THE DISTRICT COURT CORRECTLY RULED THAT THE CITY DID NOT IMPOSE A SUBSTANTIAL BURDEN

The substantial burden provision of RLUIPA reads:

> 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.

42 U.S.C. 2000cc(a)(1).

Covenant bears the burden of presenting prima facie evidence to show that the actions of the City constitute a "substantial burden" on their exercise of religion. 42 U.S.C. § 2000cc-2(b)(2). Only if Covenant proves this does the burden shifts to the City to show that the burden is in furtherance of a compelling governmental interest and constitutes the least restrictive means of furthering that interest. Id. As the district court determined that Covenant failed in its burden of proving a substantial burden, it did not examine the facts for the conditions under which a substantial burden could legally exist.

The drafters of RLUIPA deliberately did not define the term "substantial burden," intending that the term should be interpreted by reference to Supreme Court jurisprudence. 146 Cong. Rec. S7774-01.[6] The Eleventh Circuit has defined "substantial burden" in the context of RLUIPA as placing more than an inconvenience on religious exercise; rather, "a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." Midrash Sephardi, Inc. v Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004). Thus, a substantial burden is one that tends to force adherents to forego religious precepts. Id.

This Court has provided guidance as to the parameters of a substantial burden. In Midrash, this Court stressed that commercial unavailability of other suitable property for a church in another zoning area does not constitute a substantial burden. Id. at 1227, n.1. This Court explained: "[t]he harsh realities of the marketplace sometimes dictate that certain facilities are not available to those who desire them." Id. When a church congregation is simply unable to find a suitable alternative site, this burden does not rise to the level of a *substantial* burden. Id. at 1227, n.11 (citing Love Church v. City of Evanston, 896 F.2d 1082,

[6] According to the Congressional Record, "it is not the intent of this Act to create a new standard for the definition of 'substantial burden' on religious exercise." 146 Cong. Rec. S7774-01.

1086 (7th Cir. 1990) ("whatever specific difficulties [the church] claims to have encountered, they are the same ones that face all [land users].")

Recognizing the futility of an argument that a substantial burden is created based on the limitation of zoning districts wherein a church can locate, Covenant claims the substantial burden is created because nonresidential zones "are not the natural and traditional location of churches." (Appellants' Brief, p. 55). The district court rejected this position, and this Court should also. (Vol. 5, doc. 92, p. 21). In so doing, the court cited to the fact that nothing in the City's ordinance requires churches to be in the middle of a nonresidential zoning classification. In fact, a church can locate on the edge of residential zoning, it just cannot be in the middle of residential zoning. (Vol. 5, doc. 92, p. 21).

The Seventh Circuit noted that churches being unable to locate in a particular zone "cannot in itself constitute a substantial burden on religion, because then every zoning ordinance that didn't permit churches everywhere would be a prima facie violation of RLUIPA." Petra Presbyterian Church v. Village of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007). "When there is plenty of land on which religious organizations can build churches . . . the fact that they are not permitted to build everywhere does not create a substantial burden." Id.

Here, the Zoning Ordinance does not prohibit Covenant from engage in religious exercise. Grace Church of Roaring Fork Valley, v. Board of County

Commissioners of Pitkin County, 2010 WL 3777286, *5 (D. Colo. 2010) (no substantial burden because land use decision did not prevent plaintiffs from assembling or engaging in their religious practices within the county). Covenant and Anderson already conduct worship services on property in the City and there are 10 zoning districts where places of assembly are allowed as a matter of right, including Commercial, Office Services, and Community Retail Commercial.[7] There is plenty of land where places of assembly can locate, as non-residential areas constitute 47.6% of the City's land area. Covenant never presented evidence that it would be substantially burdensome to locate in an area where places of assembly are permitted.

In fact, Covenant, through Anderson, has barely investigated other locations on which to locate the church, relying instead on the direction God gave him to locate the church on 838 Powder Springs Street. (Vol. 5, doc. 81, Frederick Anderson deposition ["F. Anderson Dep."] pp. 47-50; Vol. 5, doc. 82, Vanessa Anderson Deposition ["V. Anderson Dep."] pp. 57-58). Anderson even admitted that he had not thought of looking at any other property because God led him to this particular piece. (Vol. 5, doc. 81, F. Anderson Dep. p. 50).

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[7] Covenant asserted that it is a burden to them to compete in the marketplace for commercial property, but the undisputed fact in the record is that commercial property is not necessarily more expensive than residential property in the City. (Vol. 5, doc. 84, p. 107).

To the contrary, City Planner Nathan Lawrence testified that with over half the City zoned to allow for places of assembly, "I know that there are vacant properties or properties that could definitely have the potential for redevelopment" and that there are "thousands of parcels in the city." (Vol. 4, doc. 73, Lawrence Dep., pp. 101, 103). While property in these areas might not be Covenant's first choice, there are other locations that are reasonably available and Covenant remains free to locate to another location in the City. See Men of Destiny Ministries v. Osceola County, 2006 WL 3219321 (M.D. Fla. Nov. 6, 2006) (no substantial burden when plaintiff "free to relocate its program to another location in the County where it can operate as of right").

Further, Covenant did not demonstrate that the Zoning Ordinance substantially burdens its ***religious*** activity. Certainly, Covenant has never argued that it can *only* exercise religion at the subject property. See Men of Destiny Ministries, supra (no argument that plaintiff can *only* exercise its religion at chosen location). In fact, there is no evidence that the Zoning Ordinance has hindered their religious activity. Pastor Anderson himself testified that any action on the City's part has not burdened his religious exercise:

> Q: Has the [denial of your rezoning application] impacted the way you go about your daily ministry, meaning your preaching and your ministering to people?
>
> A: No. I preach and teach as I have done in the past. It has not changed that.

(Vol. 5, doc. 81, F. Anderson Dep. p. 96).

Further, although Covenant's plan included an 800-seat sanctuary and a school, evidence obtained during discovery showed that the school was not at full capacity at its present school or worship center and, in fact, its growth had slowed. Between the two services at 8:00 a.m. and 10:30 a.m., approximately 450 people attend, although the capacity of the church is 500 at any one time. Although the school can accommodate about 240 students, only 187 students enrolled in the 2006-07 school year and as of mid-June 2007, only 118 students had pre-registered for 2007-08. Not a single student had pre-registered for the 10th grade for the 2007-08 school year. (Vol. 5, doc. 81, F. Anderson Dep., pp. 26, 29, 33, 36-37; Vol. 5, doc. 82, Exhibits 2, 3, 4 to V. Anderson Dep. p. 28,. Enrollment History Spreadsheets).

In terms of quality of education, Covenant's school is not harmed by its current location. According to its treasurer and board member, Eddie Price, the school is providing an "excellent" education in its current location and Mr. Price is completely satisfied with the education his three children are receiving from the school. (Vol. 4, doc. 75, Exhibit C, Eddie Price Dep. pp. 6, 45).

Oddly, Covenant makes the assertion that the Zoning Ordinance "forces congregants to win the approval of their neighbors in order to locate in residential areas." (Appellants' brief, p. 56). However, Covenant presents no rationale as to

why a meeting to address concerns of nearby residents to a proposed development constitutes a substantial burden on religious activity. Public meetings with those who may be affected by a rezoning decision are a common part of the rezoning process in jurisdictions throughout the country.

This Court should not allow a religious organization to utilize RLUIPA to receive an exemption from having to endure similar marketplace difficulties as secular uses. Covenant's argument that there is no land available and that it must compete with other businesses for property in the City is essentially the same "inconvenience" argument rejected by the Eleventh Circuit in Midrash. Securing property is a difficulty that every entity deals with when building a new complex, particularly one the size of Covenant's that involves multiple structures and parking space. Covenant cannot employ RLUIPA to locate its proposed use wherever it pleases, on property that was neither planned nor zoned for such a use.[8]

VIII. THE CITY DID NOT DISCRIMINATE ON THE BASIS OF RELIGION

Covenant asserted both a facial and an as-applied claim under the provision of RLUIPA preventing discrimination based on relition. 42 U.S.C. § 2000cc(b)(2).

[8] It should be noted that favoring religious institutions runs the danger of violating the Establishment Clause. See Westchester Day Sch. v. Village of Mamaroneck, 386 F.3d 183, 189-90 (2nd Cir. 2004) ("If [RLUIPA] is interpreted to place religious institutions in *too* favorable a position in relation to other land users, there is a danger that it will run afoul of the clause of the First Amendment that forbids Congress . . . to establish a church).

This provision states that, "No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." On appeal, Covenant's only argument as to the facial claim is that because the district court determined that the ordinance violated the equal terms, inference of discrimination naturally follows. (Appellants' brief, p. 56). Covenant does not even attempt to address the district court's factual finding to the contrary. (Vol. 5, doc. 92, p. 28). As there is no legal or logical support for Covenant's contention that an equal terms violation automatically requires a finding of violation of the nondiscrimination provision, the Court should affirm the district court's ruling on this point.

Switching to the as-applied discrimination claim, the district court found that Covenant's claim failed because it did not present any evidence of a secular assembly that received the zoning Covenant sought but was denied. (Vol. 5, doc. 92, pp. 28-29). There is very little case law on this provision of RLUIPA. Acknowledging the dearth of legal guidance, the district court applied the requirement of proof of a similarly situated comparator from the equal terms analysis. Under an as-applied equal terms claim, a plaintiff must present evidence that a ***similarly situated*** nonreligious group received differential treatment under a land use regulation. See Primera, 450 F.3d at 1310-11 (emphasis in original) (school was not a valid comparator because the "rezoning process" is an entirely

different form of relief from obtaining a "variance"); Ventura County Christian High Sch. v. City of Buenaventura, 233 F.Supp.2d 1241, 1246-47 (C.D. Cal. 2002) (in evaluating claims under RLUIPA, the Court must first inquire as to whether defendants have treated plaintiffs in an unequal manner to similarly situated entities).

To the extent Covenant is asserting on appeal that the City discriminated against it based on its denomination, such evidence is not in the record before this Court. Under this provision, at least one district court has required evidence of an intent to discriminate on the part of the local government. See Grace Church of Roaring Fork Valley, v. Board of County Commissioners of Pitkin County, 2010 WL 3777286, *7-8 (D. Colo. 2010). Covenant never presented such evidence, and none is contained in the record. Instead, as evidence, Covenant listed four other churches that applied for some type of land use approval and were approved by the City. There is no evidence in the record as to the denomination of these churches, other than the inclusion of "Baptist" in the names of two of the churches. Aside from the fact that these other churches were approved under entirely different circumstances, there is no evidence that these churches received better treatment than Covenant because of Covenant's denomination.

The Roswell Street Baptist Church is a place of assembly that formerly was zoned residential. This church existed before the Zoning Ordinance was changed

in November 2004. It wished to expand its current facility where there was currently a "sea of parking spaces" already established but because doing so would eliminate its "grandfather," status it applied for a rezoning to a non-residential classification in May 2005 and December 2005. The church was constructed before the City amended its Zoning Ordinance. Further, it was determined that the rezoning to commercial was compatible with the future land use designation for this site.

The Pleasant Grove Missionary Baptist Church, a predominantly African-American church, was also an existing church prior to November 2004 and wished to establish a day care facility on its property for preschoolers. Therefore, it applied for a rezoning to office-institutional in 2006. The primary use of the site as a church was not altered and no new buildings were required for the proposed use. Further, it was concluded that the day care would have "little impact on the existing primary use" as the day care would operate primarily in the morning on weekdays. Each of these churches was constructed before the City amended its Zoning Ordinance.

Wesleyan Fellowship Church submitted a site plan and received approval for a building permit in September 2002. The City had already approved development plans before the Zoning Ordinance was changed in November 2004. After encountering difficulties in the permitting process, the City Council finally

approved the detailed plan in January 2006. Further, this property went through a building permit approval process, not a rezoning.

The City approved North Metro Church's development plans for a new church in September 2000, March 2001, and April 2003. The first phase of the church, which included a 23,000 square foot multipurpose building, had been completed by September 23, 2004, prior to when the ordinance was amended. In September 2004, it sought approval to begin the second phase at this time. In September 2006, the City approved phases four and five of the project.

The defining differences between these four properties and Covenant's is (1) the churches applied for and received development approval before the Zoning Ordinance was changed, or (2) they were existing churches prior to November 2004 and the modifications to the existing uses were minimal. Covenant cannot point to a single church that sought approval to build a new structure in a residential area and was granted a rezoning after the passage of the November 10, 2004 amendment. In fact, there are no religious institutions that applied for and were granted development approval after the November 2004 amendment. (Vol. 4, doc. 72, Roth Dep., p. 105).

IX. THE CITY HAS NOT UNREASONABLY LIMITED RELIGIOUS ASSEMBLIES

In denying Covenant's claim under the unreasonable limitation prong of the nondiscrimination provision (§ 2000cc(b)(3)(B)), the district court found a

complete lack of evidentiary support for such a claim. (Vol. 5, doc. 92, p. 29). Covenant's argument on appeal is no more persuasive.

To prove an unreasonable limitations claim, a plaintiff must show that the ordinance, as applied or as implemented, has the effect of depriving religious institutions of reasonable opportunities to practice their religion, including the use of structures, within the jurisdiction. See Rocky Mountain Christian Church, 613 F.3d 1229, 1238 (2010); Grace Church, 2010 WL 3777286, *8. Covenant presented no such evidence to the district court. Again, no evidence exists in the record.

In support of its claim of unreasonable limitation, Covenant references the statistic that residentially zoned land makes up about half of the City. Further, Covenant claims, without citation to the record, that it is difficult to find a suitable location for a church in commercial or industrial areas and that Anderson has been unable to find suitable property that is substantially similar to the subject property as a price a non-profit can afford. (Appellants' brief, p. 58).

As a result of the amended Zoning Ordinance, 47.6% of the City's land area consists of zoning districts in which places of assembly are permitted uses. Covenant's conclusory allegation that the ordinance has taken churches out of their "native environment" fails to demonstrate that the City's choice as to where to locate places of assembly is unreasonable. As demonstrated earlier, the traditional

concept of a small church serving the immediate neighborhood community is incongruent with the realities of the modern day church, where congregants travel from other areas and churches no longer serve the sole purpose of providing a weekly worship service. See Rathkopf's Law of Zoning and Planning; Roth Dep. pp. 23, 107-08.

Furthermore, as discussed above in the section of this brief concerning "substantial burden," the only evidence in the record before the district court was that there are numerous parcels on which a church can locate. By his own admission, Anderson did not investigate any of these parcels because God led him to the subject property.

Under these undisputed facts, there is no reason for this Court to overrule the district court's ruling that the City's ordinance unreasonably limits religious assemblies, institutions, or structures.

X. THE COURT ERRED IN FINDING THAT THE CITY'S ORDINANCE VIOLATED THE EQUAL TERMS PROVISION OF RLUIPA

A. The Zoning Ordinance does not treat religious institutions less favorably than nonreligious institutions

RLUIPA's Equal Terms provision states that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a non religious assembly or institution." 42 U.S.C. § 2000(b)(1).

The Eleventh Circuit has interpreted the equal terms provision to require "equal treatment of secular and religious assemblies," not special treatment. Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295, 1307 (2006); Midrash, 366 F.3d at 1231-32. In determining whether a regulation is facially neutral, a court must first determine whether an entity qualifies as an "assembly" or "institution." Midrash, 366 F.3d at 1230. If so, the next step is to determine whether the regulation treats a religious assembly or institution differently from a nonreligious assembly or institution. Id.

An assembly is "a company of persons collected together in one place usually and usually for some common purpose (as deliberation and legislation, worship, or social entertainment" and an institution is "an established society or corporation: an establishment or foundation esp. of a public character." Midrash, 366 F.3d at 1230 (quoting WEBSTER'S 3rd NEW INT'L UNABRIDGED DICTIONARY (1993)). In applying this definition, the district court concluded that private parks and playgrounds and neighborhood recreation centers are assemblies or institutions for purposes of RLUIPA. To reach this conclusion, the court relied on Midrash and Chabad of Nova, Inc. v. City of Cooper City, 533 F.Supp.2d 1220 (S.D. Fla. 2008). Private parks, playgrounds and neighborhood recreation centers or

swimming pools in the City's ordinance[9] are distinctly different from the offending uses in these two cases.

Unlike Midrash, where the court found that the ordinance violated RLUIPA by allowing private clubs and lodges in a district while excluding churches, the City treats all places of assembly alike and excludes them from the same districts. Likewise, the ordinance in Chabad prohibited churches in districts that allowed day care centers, indoor recreation, personal improvement services (aerobic studios, art, music, dance and drama schools), and places where people can gather for meetings and/or other business related to trade associations or unions. Chabad, 533 F.Supp. 2d at 1221-22.

Private parks, playgrounds and neighborhood recreation centers or swimming pools are much more like the model homes in Konikov v. Orange County, 410 F.3d 1317 (11th Cir. 2002). Konikov, 410 F.3d at 1326 (model homes are not assemblies because prospective buyers neither convene simultaneously nor do they share a common purpose). Those who visit private parks or recreation areas cannot be said to have "assembled" there for a common purpose, as the reasons for visiting may include exercise, relaxation, or solitude.

While discussing another use (multi-family dwellings), this Court stated they were not places of assembly under RLUIPA because these are uses "conducted

[9] On appeal, Covenant does not challenge the district court's decision not to find any of the other permitted uses in R-2 assemblies or institutions.

entirely within a dwelling or accessory building and carried on by an occupant thereof, which use is clearly incidental and secondary to the use of the dwelling for dwelling purposes." Konikov, 410 F.3d at 1326. Likewise, private parks, playgrounds and neighborhood recreation centers or swimming pools are incidental and secondary to the use of the houses in the neighborhoods in which they are located.

B. The City's Ordinance Passes Strict Scrutiny

Even if Covenant could establish a violation of the equal terms provision, the district court erred in concluding that the City did not have a compelling governmental interest and that the City's ordinance is not narrowly tailored to address this interest. Midrash, 366 F.3d at 1232.

"The R-2 district is intended to be used for low density single-family detached housing and residentially compatible uses requiring large amounts of open space." (Zoning ordinance section 708.02(A)). As a matter of law, "[m]aintaining the integrity of existing residential neighborhoods is a valid public interest." Jervey v. City of Marietta 274 Ga. 754, 755, 559 S.E.2d 457 (2002). See also DeKalb County v. Chamblee Dunwoody Hotel Partnership, 248 Ga. 186, 190, 281 S.E.2d 525 (1981) (it was legitimate public policy reason that the planned development would adversely affect the bordering residential neighborhood); Gradous v. Board of Com'rs of Richmond County, 256 Ga. 469, 349 S.E.2d 707

(1986) (public policy served by rezoning denial because higher density development would increase congestion); King v. City of Bainbridge, 276 Ga. 484, 577 S.E.2d 772 (2003) (concerns over preserving land for low density, single-family dwellings, protection of property values, guarding against traffic congestion, maintaining aesthetics, regulating population density, and preventing waste and sewage problems are all sufficient to justify zoning ordinance). Additionally, maintaining character of single-family residential neighborhood is a compelling governmental reason under strict scrutiny analysis. Greater Bible Way Temple of Jackson v. City of Jackson, 733 N.W.2d 734, 753, 478 Mich. 373 (2007).

Allowing uses that are incidental to residential uses is consistent with the purpose of the R-2 zoning and is analogous to the day care homes in the ordinance at issue in Konikov. Konivov, 410 F.3d at 1326-27. The City's decision not to classify private parks, play grounds and neighborhood recreational areas or pools as "places of assembly," is narrowly tailored to serve the City's compelling interest. See id. See also, International Church of the Foursquare Gospel v. City of Chicago Heights, 955 F. Supp. 878, 880-881 (N.D. Ill. 1996) (financial health of city is compelling interest and decision to prevent church from locating on a particular site for economic reasons is narrowly tailored); Greater Bible, 733 N.W.2d at 753-54 (denying rezoning was least restrictive means).

Therefore, this Court should reverse the district court's determination that the City's ordinance violated the equal terms provision of RLUIPA.

XI. NOMINAL DAMAGES ARE NOT APPROPRIATE BECAUSE COVENANT DID NOT SUFFER FROM APPLICATION OF THE PRE-SEVERED ORDINANCE

The only infirmity the district court ultimately found was a facial violation of RLUIPA. Under the circumstances, the court was not authorized to award nominal damages. Nominal damages are intended to compensate a plaintiff for a constitutional violation when it cannot prove an actual damages. Chapin Furniture Outlet Inc. v. Town of Chapin, 252 Fed. Appx. 566 (4th Cir. 2007) (citing Carey v. Piphus, 435 U.S. 247, 254 (1978), Farrar v. Hobby, 506 U.S. 103, 112 (1992)). See also Maverick Media Group, Inc. v. Hillsborough County, Fla., 528 F.3d 817, 820 n.3 (11th Cir. 2008).

In reaching its conclusion, the district court found no as-applied violation. In this circumstance, damages, nominal or actual, are not appropriate. Id.; Valley Outdoor Inc. v. Riverside, 337 F.3d 1111, 1115 (9th Cir. 2003), cert. den. sub nom Regency Outdoor Advertising, Inc. v. Riverside County, Cal., 540 U.S. 111 (2004); Prime Media, Inc. v. City of Brentwood, 398 F.3d 814, 824 (6th Cir. 2005). Therefore, this Court should overrule the district court's award of nominal damages.

CONCLUSION

For the reasons set forth herein, the Court should affirm the district court's rulings except as to the finding of a violation of the equal terms provision of RLUIPA and the award of nominal damages. The City respectfully submits that these latter rulings are not supported by the law.

Respectfully submitted,

FREEMAN MATHIS & GARY, LLP

/s/ Dana K. Maine
Dana K. Maine
Georgia Bar No. 466580

Counsel for Defendant-Appellee

100 Galleria Parkway
Suite 1600
Atlanta, Georgia 30339-5948
(770) 818-0000 (telephone)
(770) 937-9960 (facsimile)

CERTIFICATE OF COMPLIANCE

I certify that this BRIEF OF APPELLEE complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This BRIEF OF APPELLEE contains 14,458 words and was prepared using Times New Roman 14-point typeface.

This 8th day of October, 2010.

/s/ Dana K. Maine
Dana K. Maine
Georgia Bar No. 466580

FREEMAN MATHIS & GARY, LLP
100 Galleria Parkway, Suite 1600
Atlanta, Georgia 30339-5948
(770) 818-0000 (telephone)
(770) 937-9960 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing BRIEF OF APPELLEE upon all parties by First-Class Mail, addressed as follows:

Brandon L. Bowen, Esq.
Jenkins & Olson, P.C.
15 South Public Square
Cartersville, Georgia 30120

I also hereby certify, pursuant to Rule 25(a)(2)(A) and (d)(2) of the Federal Rules of Appellate Procedure, that I have this day uploaded the foregoing to the Court's website:

Thomas Kahn, Clerk
United States Court of Appeals
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

This 8th day of October, 2010.

/s/ Dana K. Maine
Dana K. Maine
Georgia Bar No. 466580

FREEMAN MATHIS & GARY, LLP
100 Galleria Parkway
Suite 1600
Atlanta, Georgia 30339-5948
(770) 818-0000 (telephone)
(770) 937-9960 (facsimile)