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UNITED STATES DISTRICT COURT

DISTRICT OF WYOMING

GRACE UNITED METHODIST CHURCH, Plaintiff,	)	
vs.	)	Case No. 02CV-035B
CITY OF CHEYENNE; CITY OF CHEYENNE BOARD OF ADJUSTMENT; DOROTHY WILSON, City of Cheyenne Development Director; and CHEYENNE CITY COUNCIL, Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

This memorandum is submitted by the City of Cheyenne, the City of Cheyenne Board of Adjustment, Dorothy Wilson, City of Cheyenne Development Director, and the Cheyenne City Council ("the City"), in support of their Motion to Dismiss, filed under Rule 12(b)(6), Fed. R. Civ. P.

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STANDARD FOR GRANTING MOTION TO DISMISS

A court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Rule 12(b)(6), Fed. R. Civ. P.

The trial court must accept as true the Plaintiff's well-pleaded factual allegations and construe them in a light most favorable to plaintiff. *Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226 (10th Cir. 1999). A 12(b)(6) motion should not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *Id.*; *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 133 F.3d 1381, 1384 (10th Cir. 1997), quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Trial Court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted. *Sutton*, at 1236, quoting *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991). Conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

INTRODUCTION

I. The Causes of Action.

In its Complaint, Grace United Methodist Church ("the Church") asserts that the City of Cheyenne's zoning ordinance has imposed a substantial burden on its exercise of religious freedom, in violation of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, et seq. (Complaint ¶¶ 16 through 22).

The Church also alleges that the zoning ordinance violates the First and Fourteenth Amendments, particularly the Church's rights to free exercise of religion, freedom of speech, freedom of assembly, and freedom of association. (Complaint ¶¶ 23 through 25). Finally, the Church alleges that its equal protection and due process rights have been violated. (Complaint ¶¶ 28 through 29).

II. Relevant Facts.

The Church is located in a neighborhood zoned low-density residential, in Cheyenne, Wyoming. The Church has evidenced an interest in operating a religious school or day care center on its property. (Complaint ¶¶ 6, 7).

The City of Cheyenne has adopted a comprehensive zoning ordinance which regulates land use within the city. The Cheyenne

Board of Adjustment is authorized to hear appeals from adverse zoning decisions. (Complaint ¶ 4).

The zoning ordinance permits the construction of churches in residential areas. (Complaint ¶ 8). Day care centers over a certain size are not permitted in residential areas, unless a variance is granted. (Complaint ¶ 8). Day care centers are a permitted use in several areas of the City. (Complaint ¶ 8).

Dorothy Wilson, as the City's Development Director, is authorized to approve or disapprove proposed uses of property within the City. (Complaint ¶¶ 3, 8, 9). Wilson disapproved the use of the Church property as a day care center because the zoning ordinance did not permit such a use. (Complaint ¶ 9).

The Church appealed Defendant Wilson's decision to the Cheyenne Board of Adjustment. The Board of Adjustment determined that the proposed day care facility could not be operated by the Church in a residential area. (Complaint ¶ 11).

ARGUMENT

I. The Complaint should be dismissed, because it fails to state a claim under the First and Fourteenth Amendments.

The Church alleges that the City's zoning ordinance violates its rights of free exercise of religion, as defined in the First Amendment:

> Congress shall make no law respecting an establishment of religion or prohibiting free exercise thereof . . . .[1]

These allegations must fail because the zoning ordinance does not burden the Church members' freedom to worship, merely because the Church cannot operate a commercial business in a residential neighborhood.

The test of whether legislation adversely impacts the free exercise of religion is to ask whether there is a substantial burden on religious practices or beliefs. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). A law will not present a substantial burden on religion if it is a neutral law of general applicability and has no impact on religious belief or practice. *Id.*

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[1] *In Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940) the free exercise clause was applied to the states.

A. The zoning ordinance does not create a substantial burden on the free exercise of religion because it is neutral.

A law is not neutral if its object is to infringe upon or restrict religious practices. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. at 533 (1993). This case differs significantly from cases in which the U.S. Supreme Court has found a substantial burden on the free exercise of religion. See, e.g., *State v. Yoder*, 406 U.S. 205 (1972) (Mandatory school attendance requirement burdens First Amendment rights of Amish parents), and *Sherbert v. Verner*, 374 U.S. 398 (1963) (Disqualification of Seventh Day Adventist who refused to work on Saturday for unemployment benefits was an unconstitutional burden on free exercise of religion).

The City's zoning ordinance is neutral because its object is to regulate land use and development and protect the health, safety and welfare of all City residents. There is nothing in the ordinance which restricts or infringes on the religious practices of members of the Church. The ordinance was not enacted with the purpose of suppressing the celebration of religion. *C.L.U.B. v. City of Chicago*, 157 F. Supp. 2d 903, 914 (N.D. Ill. 2001).

The Church has not alleged that the City's zoning ordinance was enacted for the purpose of interfering with or burdening the

ability of its members to express their religious beliefs. Any restrictions on the use of the Church's property are neutral and do not affect the Church's free exercise of religion.

B. The zoning ordinance does not create a substantial burden on the free exercise of religion, because it is of general applicability.

Where land use controls impact all land owners uniformly within a certain area, such controls are considered to be generally applicable and not a burden to religious worship. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. at 543; *International Church of the Foursquare Gospel v. City of Chicago Heights*, 955 F. Supp. 878, 880 (N.D. Ill. 1996). Here, the limitations on property use within the residential neighborhood impact all land owners within the area uniformly.

The burden that the Church alleges to have experienced in its attempt to introduce a commercial activity into a residential area is the same burden any business seeking to establish a commercial operation in an area not zoned for it would face. While operating a day care facility in a building which it already owns might benefit the Church financially, having to locate its operation elsewhere is not a substantial burden on the free exercise of religion. *Love Church v. City of Evanston*, 896 F.2d 1082, 1086 (7th

Cir. 1990); *International Church of Foursquare Gospel v. Chicago Heights*, 955 F. Supp. 878, 880 (N.D. Ill. 1996). In essence, the zoning ordinance does not prevent Church members from practicing their faith merely because they cannot operate a child care facility on church property.

The decision of *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983) is persuasive. In that case, a church bought land in an area which was not zoned for churches. The church asked for a variance to build a facility, which was denied. The church sued and presented the question whether a zoning ordinance which prohibited the construction of church buildings in virtually all residential districts violates the free exercise clause of the U.S. Constitution. In ruling for the city, the Sixth Circuit Court observed that the church had provided no evidence that construction of a church building in a residential area was a ritual, fundamental tenet or cardinal tenet of its members' faith. The zoning regulation did not place a substantial burden on the free exercise of religion, because it did not place pressure on church members to abandon their beliefs and observances, but merely regulated a secular activity. *Id.*, at 307. *See also, C.L.U.B. v. City of Chicago*, 157 F. Supp. 2d at 914.

In this case, the zoning ordinance only prohibits the purely secular act of building anything but a home in a residential district. The frustrations of Church members because they cannot operate a commercial day care center in a residential neighborhood don't rise to the level of a constitutionally protected right.

The Church further alleges in vague terms that the City's zoning ordinance implicates the freedom of speech, assembly and association clauses of the First Amendment. These allegations must be rejected.

The decision of *C.L.U.B. v. City of Chicago*, 157 F. Supp. 2d at 915-916 neatly disposes of the Church's argument:

> However, the operation of a house of worship does not equate with "religious speech," any more than the operation of a shoe store equates with commercial speech.
>
> * * * *
>
> When the object of the law is unrelated to expression, e.g., harmonious land use here, the free speech clause is not implicated, even if the law in question limits the ability to disseminate one's message.

Also, there is nothing in the Complaint to support the allegation that the zoning ordinance has affected the ability of Church members to assemble and associate with one another as they have done since 1956.

In sum, because the City's zoning ordinance is neutral and generally applicable to all parties, it imposes no burden, substantial or otherwise, on the free exercise of religion, or the rights to free speech, to assemble and associate. Consequently, the Church's claims should be dismissed.

II. The Complaint should be dismissed, because it fails to state a claim under the Religious Land Use and Institutionalized Persons Act.

The Religious Land Use and Institutionalized Persons Act ("RLUIPA") was adopted in 2000 to address problems some churches had experienced when municipalities essentially zoned out construction of religious facilities. The impetus behind the adoption of RLUIPA was that the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb et seq. ("RFRA"), was declared unconstitutional as applied to the states in *Boerne v. Flores*, 521 U.S. 507, 537 (1997). In *Boerne*, a Catholic church was denied a building permit to enlarge its facility because the proposed project did not comply with a local historic preservation ordinance. The church unsuccessfully argued that under RFRA the city could not substantially burden the exercise of religion.

One of the purposes of RLUIPA was to assure that local zoning ordinances do not impose "a substantial burden on the religious

exercise of a person. . . . " 42 U.S.C. § 2000cc. "Religious exercise" is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).

In order to succeed under RLUIPA, the Church must demonstrate a substantial burden on religious activities. The authorities contained in Argument I of this Memorandum, which define substantial burden on the exercise of religion, are also relevant to this Argument. Consequently, based on prevailing law, this Court should conclude that the Church's complaint offers only unsupported conclusory allegations and does not demonstrate how the zoning ordinance affects or interferes with the ability of Church members to gather and worship together.

If RLUIPA is construed as urged by the Church, churches could introduce commercial activity into any residential area under the guise of religious worship. Such actions are not acceptable. As Justice John Paul Stevens observed in his concurrence in *Boerne v. Flores*, 521 U.S. at 537:

> If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory

> entitlement to an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.

If the Church prevails, RLUIPA would unfairly prefer religious organizations by bestowing a benefit upon them which is not available to secular organizations. Clearly, this could not have been the intent of Congress in enacting RLUIPA.

The Church has existed in its current location for 45 years and until it sought to introduce a commercial activity into a residential area the Church has never complained that the zoning ordinance interfered with the exercise of religion.

Accordingly, the Church's claim under RLUIPA should be dismissed.

III. The Complaint should be dismissed, because it fails to state a claim under the Fourteenth Amendment.

The Church has alleged that it was denied due process under the Fourteenth Amendment, which provides that no state "shall deprive any person of life, liberty, or property without due process of law." This claim ignores the fact that the Church was given a full and fair hearing in front of the Board of Adjustment. (Complaint ¶ 11).

In order to prevail on either procedural or substantive due process claims, a plaintiff must first establish that a defendant's actions deprived it of a protectible property interest. *Weathers v. West Yuma County School District R-J-1*, 530 F.2d 1335, 1340-42 (10th Cir. 1976). The Church makes no such allegation.

The Church appeared before the City's Board of Adjustment. (Complaint ¶ 11). This action clearly indicates that it understood the procedures to challenge Dorothy Wilson's decision. The Church did not appeal the Board's decision to state court, even though an appeal is authorized under Wyo. Stat. § 15-1-609. *See, C.L.U.B. v. City of Chicago*, 157 F. Supp. 2d 903, 913 (N.D. Ill. 2001) (Because the due process clause permits municipalities to use political methods to decide zoning cases, "the only procedural rules at stake are those local law provides, and these rules must be vindicated in local courts").

There is also no basis for a substantive due process claim. To prevail on a substantive due process claim, the Church must establish that the City's actions deprived it of a legitimate claim or entitlement to some benefit. *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207 (10th Cir. 2000). The Church has made no such claim.

The Church has not alleged that it has a property interest subject to due process protections, nor does it explain how the City's zoning ordinance has deprived it of a property interest protected by the due process clause.

For these reasons, the Church's due process claim fails.

IV. The Complaint fails to state a claim because the zoning ordinance does not deny the Church equal protection.

The Church claims that it has been denied equal protection under the Fourteenth Amendment, which provides that no state "shall deny to any person within its jurisdiction the equal protection of the laws." This claim must be rejected.

The Equal Protection Clause is satisfied if a law is applied in a uniform manner and operates alike on all persons or property under the same circumstances and conditions. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curium). All persons similarly situated must be treated alike. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

The Complaint makes no showing that the Church has been treated differently than any entity, that the Church is the victim of discriminatory treatment, or that the zoning ordinance has interfered with important religious tenets. *C.L.U.B. v. City of Chicago*, 157 F. Supp. 2d at 909. The City is not prohibiting the

Church from participating in a religious assembly while allowing non-religious assembly.

Therefore, the equal protection clause is not implicated and the Church has failed to state a claim on which relief can be granted.

SUMMARY

Land use regulations in general, and zoning in particular, are intended to limit use of certain property and promote the safety, health and welfare interests of the public. The zoning ordinance adopted by the City of Cheyenne promotes those goals, while not burdening the exercise of religion.

The Church can operate a day care center in several areas in Cheyenne. Instead, the Church has insisted on locating its day care center in a residential area. The Church wants to conduct commercial activity under the guise of religious worship.

Based on the foregoing arguments, the Defendants respectfully request that their Motion to Dismiss be granted because:

- The zoning ordinance does not violate the First or Fourteenth Amendments, because it does not burden the free exercise of religion, freedom of speech, and freedom to assemble and associate.

- The zoning ordinance does not violate RLUIPA, because it does not impose a substantial burden on the religious exercise of the members of the Church.
- The Church has not been denied equal protection, because it is not being treated in a discriminatory manner.
- The Church has not been denied due process, because the zoning ordinance has not affected any property interest.
- The Church seeks a commercial advantage which is unavailable to secular applicants.

Because the Church's complaint presents only conclusory allegations which fall short of the required prima facie showing, the Defendants' Motion to Dismiss should be granted.

Respectfully submitted this 23rd day of April, 2002.

CITY OF CHEYENNE; CITY OF CHEYENNE BOARD OF ADJUSTMENT; DOROTHY WILSON, City of Cheyenne Development Director; and CHEYENNE CITY COUNCIL

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I caused a true and correct copy of the foregoing to be deposited in the United States Mail, postage prepaid, on the 23rd day of April, 2002, addressed to the following:

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