N0. 06-1319

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THE LIGHTHOUSE INSTITUTE FOR EVANGELISM, INC.
and
REVEREND KEVIN BROWN

Plaintiffs/Appellants

v.

THE CITY OF LONG BRANCH

Defendant/Appellee

BRIEF OF APPELLEE CITY OF LONG BRANCH

On appeal from the order of December 27, 2005 of the United States District Court for the District of New Jersey, at No. 00-Civ-003366, the Honorable William H. Walls, U.S.D.J.

Audrey J. Copeland, Esquire
Howard B. Mankoff, Esquire
Marshall, Dennehey, Warner,
Coleman And Goggin
620 Freedom Center, Suite 300
King of Prussia, PA 19406
610-354-8274
Attorneys for Appellee
The City of Long Branch

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

UNITED STATES CONSTITUTION, STATUTES AND RULES

Constitution:

Statutes:

Rules:

CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to F.R.A.P. 26.1 and Third Circuit LAR 26.1, Appellee the City of Long Branch discloses that it has no parent company, no publicly listed company owns more than 10% of its stock, no publicly held corporation not a party to this litigation has a financial interest in the outcome, and, this is not a bankruptcy case.

COUNTERSTATEMENT OF THE ISSUES INVOLVED

1. Whether the District Court erred in holding that the City of Long Branch Zoning Ordinance no. 20-6.13 and the Redevelopment Plan [collectively, the "zoning regulations or ordinances"], did not violate the Mission's rights under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc, et seq., where the Mission failed to prove either, that its religious exercise was substantially burdened or that said land use regulations treated religious organizations on less than equal terms with nonreligious ones?

(Answered in the negative below)

2. Whether the District Court erred by holding that although it did not need to reach this issue, the City nevertheless had satisfied the strict scrutiny test by proving that the zoning regulations served a compelling governmental interest and were the least restrictive alternative?

(Answered in the negative below)

3. Whether the District Court erred by holding that the City of Long Branch Zoning Ordinance no. 20-6.13 and the Redevelopment Plan, did not violate the Free Exercise Clause?

(answered in the negative below)

COUNTERSTATEMENT OF THE CASE AND FACTS

This case is before this Honorable Court for a second time, currently upon Plaintiffs', the Lighthouse Institute for Evangelism, Inc. and Reverend Kevin Brown's [hereinafter "the Mission's]," appeal from the District Court's December 27, 2005 order granting summary judgment as to Plaintiff's Second Amended Complaint filed on July 26, 2002. The Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 406 F. Supp. 2d 507 (D.N.J. 2005). The Mission's appeal is limited to its claims pursuant to RLUIPA. 42 U.S.C. §2000cc, et seq. and the Free Exercise Clause, all of the other claims having been dismissed by the Court or since dropped by the Mission.

A. Events concerning Zoning Ordinance 20-6.13 (since superseded)

1. The Mission.

The Mission alleges that it is a not-for-profit religious organization, which it describes as "a Christian church that seeks to minister to the poor and disadvantaged in downtown Long Branch, New Jersey" (Plaintiffs' Brief, p. 5). The Church describes its purpose as 'providing Bible studies, public prayer meetings, evangelistic outreach and community services to the people of Long Branch" (Id., p. 6). Reverend Brown testified that the Mission could operate at

another location and that there is no compelling reason to be at 162 Broadway (App. pp. 604, 505).

It is undisputed that the Mission has never operated as a church, at either 159 Broadway or its present location at 162 Broadway. The Mission was originally a secular soup kitchen at 159 Broadway. No formal church services have been advertised, there is no schedule for services , concerts or youth meetings, no mailing list, no church groups, no Sunday School, no list of members and no evidence of a congregation. The undisputed record shows that the church at 162 Broadway exists as a retail store with an illegal upstairs apartment upstairs, where there is an internet website soliciting individuals for money to become ordained.

2. The City of Long Branch

The City of Long Branch is a political subdivision of the State of New Jersey located in Monmouth County. The parties agree that the City has a population of approximately 35,000. Lighthouse, 406 F. Supp. 2d at 507. The record is unrebutted that the City presently boasts 33 churches, synagogues and other religious institutions (App. p. 563). Religious organizations are permitted in 90% of the City and these areas can accommodate as a permitted use, the religious use requested by the Mission (App. pp. 564, 56812).

3. 162 Broadway and the Mission

The Mission alleged in its Second Amended Complaint that on March 1, 1992 it began renting space at 159 Broadway, Long Branch, New Jersey. The address at 159 Broadway is located in the City's C-1 Commercial District. Pursuant to Section no. 20-6.13 of the City's Zoning Ordinance[hereinafter "The Zoning Ordinance"], a church is one of many uses not expressly permitted within that zone but does not distinguish between secular and non-secular forms of assembly. The Zoning Ordinance (App. pp. 81-83) has since been superseded by the Redevelopment Plan which the City codified in 1996 and a Redevelopment Plan, adopted as amended by the City in 2002 (App. p. 84).

. On or about October 20, 1993, before purchasing 162 Broadway, an abandoned property across the street from 159 Broadway, Reverend Brown applied for a mini-grant from the City's Office of Community and Economic Development. In response to the request, Carl Blumenthal of the Department of Community Development rejected the application and advised the plaintiffs by handwritten note that:

> Your proposed use of said building may not be legal.
> Check with zoning/planning officer Carl Turner.
>
> (App. p. 497).

On November 8, 1994, the Mission purchased the property at 162 Broadway which is also located in the C-1 Commercial District, and allegedly planned to

make improvements, through funding by AT&T's charitable group known as "The Pioneers" and through the support of the City of Long Branch and Mayor Adam Schneider. The parties to the real estate contract crossed out the provision addressing building and zoning laws (App. p. 502).

The AT&T Pioneers, which provided funding to select tax-exempt organizations agreed to assist the Mission in February 1994, by providing the value of volunteer work and some monetary funds to pay for the costs of materials used by its volunteer members (App. p. 494). Specifically, this funding was contingent upon Reverend Brown getting the permits and the funding to pay for the heavy construction, in order for the Pioneers to start the job (App. pp. 492, 493). Due to the Mission's inaction, in or around August or September of 1995, AT&T Pioneers advised Reverend Brown that they could not hold their resources anymore, that there were other needy organizations, and that they would be pulling funding (App. p. 505).

The Mission alleges that it is and was a not-for-profit religious organization with the constitutional and statutory right to an exemption from real estate taxes. The Mission further alleged that at the closing of the purchase of 162 Broadway, plaintiff Reverend Brown inquired of their attorney about the process of obtaining a tax exemption. No such application for a tax exemption was ever filed with the City (App. pp. 463, 522). The Mission alleges that it provided their then-attorney

defendant Peter J. Falvo, Esquire with an outline of its intended use of the newly-acquired property. No Development Application for the property was ever submitted to the City until August 1, 1995.

The 1995 Development Application concerning 162 Broadway, sought a use variance for: (a) soup kitchen; (b) mission; (c) job skills training program; (d) counseling center; (e) Bible classes; and (f) life skills classes. The variance was sought because the Mission's proposed use for the subject matter property was not permitted in the C-1 zone by the Zoning Ordinance (App. p. 522).

By letter dated August 21, 1995, the City Zoning Board/Planning Board Secretary advised the Mission that its application was incomplete because: (1) it was not completely filled out; (2) the plans had no title block, date, seal or signature; (3) the surveys were not sealed; and (4) the required fees were not paid (App. p. 508). The Mission did nothing further in connection with its 1995 application in response by the City Zoning Board.

Starting in early 1997, the Mission requested and the City granted numerous Zoning Permits for 162 Broadway. On March 26, 1997 the Mission applied for a Zoning Permit to utilize 162 Broadway as offices for the Lighthouse Mission (App. p. 509). The permit was issued to plaintiffs with the condition that "no church services/soup kitchen/classes/residential uses [would] be allowed with this permit." The zoning permit further stated that: "[a]pplicant understands and agrees that if

these uses are anticipated for this site that he will obtain all required approvals prior to beginning operation of said uses at this site.

Plaintiff Kevin Brown submitted an application in 1999 to utilize the second floor of 162 Broadway as a "pastoral residence." The City Zoning Officer denied this request by letter dated September 24, 1999 because individuals are not permitted to reside in the C-1 zone. Reverend Brown did not seek a use variance nor did he appeal to the City Zoning Board. However, Reverend Brown, disregarding the Zoning Permit denial and without filing an application for a use variance, plaintiff simply began to reside at 162 Broadway. By letter of September 24, 1999, the City Zoning Officer ordered plaintiff Brown to vacate the premises or be fined.

During the summer and fall of 1999, the City of Long Branch issued a series of summons to Reverend Brown for living in the subject matter building (App. p. 524). The City of Long Branch sent a letter to Reverend Brown in September of 1999 ordering him to vacate the subject matter building as his living quarters (App. p. 524). The Mission alleges that at the end of 1999, it relieved defendant LaVergne as counsel and sought new counsel due to "counsel's inattention to completion of the Mission's Application" (App. p. 11).

On April 4, 2000, the Mission received formal notification that a foreclosure would be commenced on the property located at 162 Broadway unless the

redemption of the tax sale certificate be completed within thirty-five (35) days of receipt of the notice (App. p. 513)**.**

On April 26, 2000, the Mission submitted an application for a Zoning Permit to use 162 Broadway as a Church. The Zoning Officer denied the application on April 27, 2000, in that the proposed use was not specifically permitted in the C-1 zone without a use variance, pursuant to Sections 345-30, 345-14 and 345-42 of the City of Long Branch Zoning Ordinance. Specifically, the Zoning Officer stated:

> Your proposed use is not a permitted use in the zone. Your proposal would require prior approvals from the Zoning Board of Adjustment, including but not limited to, a use variance, site plan approval and a parking variance. Any waiver of fees for same application must come from the City Council.
>
> Relief may be sought by making application to the Zoning Board of Adjustment. Appeals of this decision must be filed within 20 days. Variance applications are available at the Planning Office.

(App. p. 514**).**

The Mission took no further steps with regard to its 2000 application. It did not seek a variance or appeal the decision. On June 8, 2000, the Mission filed a Complaint against the defendants in the Superior Court of New Jersey, Monmouth County (App. p. 515)**.** The matter was thereafter removed to the District Court of New Jersey and docketed at Civil Action No. 00-3366. The Mission submitted a

Statement of Damages on behalf of the plaintiff Lighthouse Mission for $11,000,000. and on behalf of plaintiff Reverend Kevin Brown for $77,777,777 (App. p. 551).

4. The City of Long Branch Broadway Redevelopment Plan

On October 22, 2002, the City enacted Ordinance 47-02, the Redevelopment Ordinance which approved the City of Long Branch Broadway Redevelopment Program and officially designated the Building, 162 Broadway, Block 283, Lot 9 as part of the Redevelopment Program (App. p. 84)[1]. In conjunction with the Redevelopment Ordinance and the Redevelopment Program, Long Branch also adopted the Long Branch Redevelopment Plan Design Guidelines Handbook 7 Broadway. As a consequence of the Redevelopment Plan enacted in October 2002, the prior forms of former zone C-1 and the Zoning Board of Adjustment, to which appeals of zoning decisions were to be made, no longer exist (App. p. 93). Under the Design Guidelines, 162 Broadway is now located in a Regional Entertainment Commercial zone, a high end entertainment area where the primary permitted uses are theaters, cinemas, culinary schools, dance studios, music instruction, theater workshops, fashion design schools, and art studios and workshops (App. pp. 94-97). Secondary uses are restaurants, bars, clubs,

[1] The Mission did not appeal or file an action in lieu of prerogative writ within 45 days of the City's May 11, 2004 decision as required by N.J.S.A. 10:4-15(a) and N.J. Ct. R. 4:69-6(a).

entertainment related businesses, and specialty retail. Houses of worship are not permitted under the Design Guidelines. The prohibition of houses of worship extends to pastoral residence. Among the objectives set forth in the Redevelopment Plan as an entirety, are to strengthen retail trade and city revenue, increase employment opportunities, improve public facilities in commercial areas, improve the City's image, attract more retail and service enterprises, achieve shared parking and encourage mixed commercial and residential use (App. p. 88). In order to implement the Redevelopment Plan, property acquisition is necessary and among those properties to be acquired is 162 Broad Street (App. p. 99). The Redevelopment Ordinance also required a new application process set forth in Long Branch's Oceanfront-Broadway Redevelopment Program RFQ/RFP.

In order to apply to use the Building as church, Plaintiffs were required to file an application in accordance with the RFQ/RFP, and also, seek a waiver of the prohibition on church use at 162 Broadway (App. pp. 91, 93). According to the RFQ/RFP booklet, the RFQ/RFP is a two-part process (see App. pp. 91, 92). The RFP, is a very detailed process requiring things such as a Conceptual Site Plan, an Acquisition Plan, a Financial Plan etc. Prior to being selected to proceed to the RFP, a prospective developer must first satisfy the much less comprehensive RFQ. The RFQ application must contain: (1) a Development Team Description identifying the development team members, leader, and their respective roles; and

(2) a description of the Team Experience, relating the team's previous experience with development objectives for the sector, and detailing previous projects relevant to the objectives of the sector.

During the fall of 2002, both parties moved for summary judgment and the Mission also sought a preliminary injunction. By order and opinion of April 7, 2003, the District Court dismissed all of the Mission's as applied challenges for either lack of exhaustion or ripeness, and denying the Mission's Motion for Preliminary Injunction. The District Court noted hat "Plaintiffs will not likely be able to prove, even after further factual development, that the Ordinance inherently violates their rights under RLUIPA." The Mission then appealed to this Court. By order and unpublished opinion of May 28, 2004, this Court affirmed the District Court's denial of the Mission's Motion for Preliminary Injunction "..[b]ecause we agree that the Mission did not satisfy its burden of demonstrating a likelihood of success on the merits." The Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 100 Fed. Appx. 70, 74 (3d Cir. 2004).

On November 11, 2003, The Mission (as the Long Branch Center of Faith) submitted its RFQ application (RFQ) seeking a waiver of the prohibition of church use at 162 Broadway, seeking the designation of Plaintiffs as the developer for 162 Broadway for a use which was a use not permitted in the zone in which the property was located, and describing the Development Team and its experience .

The Mission's RFQ was a one page letter which did not include financial information, information as to how to pay for the cost of the project, as to the scope of the project, the size of the congregation, as to the aesthetic and design of the project, as to the financial ability to meet the parking requirements of the zone and failed to meet other substantive criteria, thus was incomplete (see App. p. **226).** By letter dated December 23, 2003 the Special Redevelopment Counsel, advised that the Mission's RFQ Application has been rejected, because:(1) the proposed church use did not comport with the Redevelopment Plan and would disrupt the zone; (2) the failure to comply with the uses in the Redevelopment Plan would be sufficient to disqualify the proposed RFQ; (3) the Redevelopment Plan was adopted without legal challenge from the Mission;, (4) the Plan included design guidelines for the entire area and specifically provides for an entertainment/commercial zone; (5) the inclusion of a storefront church would jeopardize the entire development of the block north and south sides of Broadway from Liberty Street, Memorial Parkway to Second Avenue on the East end; and (6) the information in the RFQ was too sketchy and did not comport with what the City previously received in response to RFQ's.

The letter stated that Long Branch was constrained to find that the proposed church use does not comport with the Redevelopment Plan and would disrupt it. The letter states that this sole fact is sufficient to disqualify the Mission's RFQ.

The letter also states that the inclusion of a store from church would jeopardize the entire development of the block both north and south sides of Broadway from Liberty Street, Memorial Parkway on the west to Second Avenue on the east(see App. p. 226).

On April 19, 2004, the Mission filed an appeal directly to the Long Branch City Council, seeking the approval of it's RFQ, and a waiver (amendment) of the Redevelopment Plan to allow houses of worship in the Regional Entertainment Commercial sub-section of Redevelopment Zone 6, Lower Broadway. Administrative hearings were held before the Long Branch City Counsel The Mission was accorded a full evidentiary hearing on April 27, 2004 and May 11, 2004 by the Mayor of Long Branch and the City Council acting as the Redevelopment Authority (App. pp. 555-609). While two witnesses appeared on behalf of the City, the Mission failed to present any witnesses other than Reverend Brown.

The City's witness, Assistant Planning Director of the City, Carl Turner testified that:

> (a) the request for waiver would be inapposite to and have a detrimental effect on the zoning planned for that area, an entertainment/commercial zone with for-profit businesses;
>
> (b) the area was in need of Redevelopment pursuant to N.J.S.A. 12:A-2 and that the property was rezoned as a Redevelopment Zone;
>
> (c) The text of N.J.S.A. 40A:12A-2 re: existence of deterioration of conditions of various installations amenable to redress by public bodies;
>
> (d) the City adopted a Redevelopment Plan in 1996 and a Redevelopment Plan was codified in 2002 for the lower Broadway area in which the applicant seeks to place houses of worship as permitted uses;
>
> (e) the premises has never been used as a house of worship;
>
> (f) the property owner, never completed the application process to the Zoning Board of Adjustment and was never heard prior to the area being rezoned as a Redevelopment Zone;
>
> (g) There are thirty one (31) churches and two rectories presently located within the City limits and houses of worship are permitted throughout the entire City with the exception of the Redevelopment Zone, for the most part with the exception of the West End commercial area, the hospital road station area, the industrial zone and the manufacturing zones;
>
> (h) churches are permitted as conditional uses in approximately ninety percent of the land area within the City;
>
> (i) the Broadway Corridor was deemed an area in need of redevelopment as it met state requirements in that there were numerous City owned properties, obsolete properties, varied

ownership, unused buildings, incompatible uses and undesirable property conditions;

(j) Prior to rezoning the zone had a mix of commercial buildings, go-go bars, paint stores, floor covering stores, the offices and tower of a radio station, an auto parts distributor, a commercial office and restaurant as well as the subject property which had an approval for a commercial use on the ground floor and office use on the second floor;

(k) The subject area, from Liberty Street to Second Avenue is zoned for a high volume, high end recreation and entertainment zone;

(l) the within area probably required the most work, and, the Plan was developed so that each component of the Plan was designated in specific areas to so there would be a symbiotic relationship between types of use and the fringe areas outside of the Redevelopment Zone;

(m) the City encourages the use of liquor licenses in the entertainment/commercial zone of the Broadway Corridor where the church use is sought;

(n) states statutes prohibit houses of worship within 2000 ft. by state statute and municipal ordinances within 1,000 ft of liquor licenses;

(o) allowing a house of worship on the subject block would inhibit development of and destroy the ability of the block to be used for high-end entertainment area;

(p) the subject portion of the Broadway Corridor is divided into three components, and the Component from Liberty Street to second Avenue is for high volume recreation and high end entertainment, thus the church would be incompatible based upon the desired permit uses including alcoholic beverage licenses;

(q) houses of worship in violation of the state statute and City Ordinance were pre-existing non-conforming uses;

(r) uses could be similar or dissimilar as long as they were compatible, and that different types of businesses would enhance the residential uses around the Redevelopment Zone.

(App. pp. 562-579).

The City's witness, Pratap Talwar, the City Planning Consultant testified that:

a. Broadway is the main street in town and revitalization of Broadway as a sustainable business district has always been one of the most important objectives of the Redevelopment Plan, and the City has always maintained Broadway as a viable commercial area;

b. the area was greatly deteriorated and needed revitalization;

c. the area contained several theaters which were historic structures worth preserving and which should be the focus of, and set the tone for, the revitalization;

d. an entertainment district would have restaurants, bars, clubs and retail oriented for traffic that would also use the theaters.

e. the main principal is to provide uses of Broadway that would mutually reinforce uses targeted in the retail ordinance and that entertainment uses are hoped for and that the permitted uses in the Redevelopment Zone are all for profit uses; and

f. the use of a church in the area would destroy the concept of planning for the zone and the zone uses may have a detrimental effect on religious uses, if permitted.

(App. pp. 579-596).

At the conclusion of the May 11, 2004 hearing, the Long Branch City Counsel voted unanimously to reject the Mission's applications. The City Council

unanimously passed a resolution denying an amendment to the Redevelopment Plan, accompanied by the factual findings as paraphrased below (App. pp. 226-232):

> a. The City demonstrated at the hearing before the Mayor and City Council through testimony uncontroverted by any expert, that there is a compelling governmental interest in restricting houses of worship in the Redevelopment Zone which requires special development pursuant to N.J.S.A. 40A:12A-1 et seq.
>
> b. The City demonstrated at the hearing before the Mayor and City Council that religious houses of worship would be totally incompatible with the permitted uses within the zone necessary to its rebirth due to its status of being in need of rehabilitation (Resolution, p. 6)
>
> c. The restrictions of houses of worship within the City is the least restrictive means of furthering a compelling governmental interest as shown by the fact that there are 33 houses of worship and retreats within City limits in areas that are diverse in the City and said religious uses can be occupied in approximately ninety percent (90%) of the physical areas within the City (Resolution, p. 6)

The Resolution stated that the approval of the Mission's RFQ/RFP was denied for two reasons: (1) it is not permitted in the zone; and (2) the RFQ/RFP were not complete so that any determination could be made from the sketchy application as set forth in previous whereas clauses of this Resolution (App. pp. 226-232). The Resolution also provided that should a court determine that use of a church is permissible, the Mission must correct its incomplete and noncompliant RFP and RFQ, and , further show that the applicant is financially able to complete the project, it would aesthetically meet the requirements of the design guidelines

for the zone, it would meet the parking requirements for the zone and that all other requirements for RFP's and RFQ's submitted by all developers in the City's Redevelopment Zones are met by this applicant (Id.).

On July 22, 2004 the Mission filed its Second Amended Complaint. Thereafter the parties filed motions for summary judgment. On December 7, 2005 the District Court heard oral argument on the motions for summary judgment. By order dated December 27, 2005 the District Court granted summary judgment in favor of the City on all claims. Lighthouse, supra, 406 F. Supp. 2d 507 (D. N.J. 2005). The Mission appeals to this Court only the District Court's judgment regarding its RLUIPA. 42 U.S.C. §2000cc, et seq. and the Free Exercise Clause,

STATEMENT OF RELATED CASES AND PROCEEDINGS

Upon information and belief, the City does not believe hat there are any related cases or proceedings.

STANDARD AND SCOPE OF REVIEW

This Court, which exercises plenary review over the District Court's grant of summary judgment, will apply the same standard required below. Stratton v. E.I. DuPont DeNemours & Co., 363 F.3d 250, 253 (3d Cir. 2004). Consequently, summary judgment is appropriately granted if there are no genuine issues of material fact presented and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). All factual doubts are resolved in favor of the nonmoving party. Conoshenti v. Public Serv. Elec. & Gas Co., 364 F.3d 135, 140 (3d Cir. 2004). The non-moving party must demonstrate that there is a genuine issue of material fact by presenting sufficient evidence from which a rational jury could return a verdict for the non-moving party. See United States v. 107.9 Acre Parcel of Land in Warren Township, 898 F.2d 396, 398 (3d. Cir. 1990). Although the initial burden is on the summary judgment movant to show the absence of a genuine issue of material fact, 'the burden on the moving party may be discharged by "showing" - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case' when the nonmoving party bears the ultimate burden of proof." Conoshenti, supra at 140 (quoting Singletary v. Pennsylvania Dept. of Corrections, 266 F.3d 186, 192 n.2 (3d Cir. 2001)). Significantly, the non-moving party must present actual evidence that creates a

genuine issue of material fact and cannot rely on mere allegations. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

An appellate court may affirm a result reached by the district court for reasons that differ from the conclusions of the district court if the record supports the judgment. Storey v. Burns Int'l Sec. Servs., 390 F.3d 760, 761 (3d Cir. 2004; Guthrie v. Lady Jane Collieries, Inc., 722 F.2d 1141, 1145 n. 1 (3d Cir.1983); see also Helvering v. Gowran, 302 U.S. 238, 245, 82 L. Ed. 224, 58 S. Ct. 154 (1937) ("In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.")

SUMMARY OF THE ARGUMENT

The Mission does not genuinely seek "equal terms" with nonreligious assemblies, it seeks "special terms" and preferential treatment. Neither RLUIPA or the Free Exercise Clause permit a church to locate wherever it please in defiance of local zoning concerns, solely by playing the religion card. Also, the Mission's rhetoric cannot disguise the fact that the record is devoid any evidence in support of its statutory and constitutional claims. The Mission cannot even consistently define much less prove that it will be able to accomplish its own envisioned use, much less not show that it was treated discriminatorily by the zoning regulations.

Despite prompting by this Court in the first appeal, the Mission has failed to produce anything of evidentiary value to show that either Zoning Ordinance 20-6.13 or the Redevelopment Plan, treats religious and nonreligious institutions unequally or discriminatorily or creates a substantial burden upon its exercise of religion, as required by RLUIPA §2000cc(a)(b) or the Free Exercise Clause. The Mission presented no evidence of comparable nonreligious assemblies or institutions, much less that these assemblies were given more favorable treatment. The Mission has presented no evidence that the City has selectively enforced the facially neutral Zoning Ordinance 20-6.13 or the Redevelopment Plan, so as to favor secularly motivated conduct but not comparable religiously motivated conduct. Indeed, the Mission never even applied for a variance to Zoning

Ordinance 20-6.13. There is no evidence that the City acted arbitrarily or capriciously with regard to the Mission's applications pursuant to Zoning Ordinance 20-6.13 or the Redevelopment Plan.

Although its burden of proof was not triggered in this regard, the City also demonstrated a compelling governmental interest regarding the zoning regulations. Indeed, in that the area is regulated pursuant to liquor license statute N.J.S.A. §33:1-76 (as well as local ordinance), a church would thwart the redevelopment efforts which includes restaurants and bars supporting the entertainment and shopping uses of the Redevelopment Zone. The City also demonstrated that the subject ordinances were the least restrictive means of accomplishing these ends. In fact since the first appeal, Reverend Brown has testified that there is no compelling reason for his church to be located at 162 Broadway and that a suitable alternative location would be agreeable. The remaining 90% of the City permits churches.

The primary criticism leveled at the District Court's decision is based upon the District Court's interpretation of §2000cc(b) as including a substantial burden requirement. However, the District Court's decision can be affirmed on the basis of its other determinations, which represents a correct statement of the applicable law.

ARGUMENT

I. The District Court properly granted summary judgment because the Mission could not raise a genuine issue of material fact as to its assertion that Zoning Ordinance 20-6.13 or the Redevelopment Plan violate the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §2000cc, et seq.

The Mission alleges that Zoning Ordinance 20-6.13 and the Redevelopment Plan violate the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §2000, et seq. (RLUIPA). These claims are based on rhetoric alone, for the Mission is unable to raise any genuine issue of material fact as to the elements of a RLUIPA action much less prove them.

The District Court determined that the Mission could not prove a claim under either the §2000cc(a) substantial burden or, (b) discrimination and exclusion, sections of RLUIPA. The primary criticism leveled at the District Court's decision is based upon the District Court's interpretation of §2000cc(b) as including a substantial burden requirement. Even if this criticism is correct, however, it is immaterial to this appeal in that the District Court based its decision on §2000cc(b) upon the Plaintiff's inability to demonstrate the elements of a discrimination and exclusion claim, by showing that the Mission was treated on less than equal terms than a non-secular assembly. The District Court's subsequent discussion of substantial burden was mere surplusage, thus the District Court's decision can be

affirmed on the basis of its initial decision, which represents a correct statement of the applicable law.

The RLUIPA, 42 U.S.C. §2000cc, et. seq, provides in relevant part:

§ 2000cc. Protection of land use as religious exercise

(a) Substantial burdens.

(1) General rule. No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

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

(2) Scope of application. This subsection applies in any case in which--

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

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

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion.

(1) Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

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

(3) Exclusions and limits. No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

42 U.S.C.S. § 2000cc

A. The Mission failed to show a violation of the Nondiscrimination/Equal Terms Provision of RLUIPA, §2000cc(b).

The Mission's appeal focuses on §2000cc(b), the Equal Terms provision of RLUIPA, so it will be addressed first.

1. Elements of proof required by §2000cc(b).

Under its "Equal Terms" provision the RLUIPA prohibits governmental imposition or imposition in a manner that: (1) " treats a religious assembly or institution on less than equal terms with nonreligious assembly or institution;" (2)" discriminates against any assembly or institution on the basis of religion or religious denomination;" or (3) "(A) totally excludes religious assemblies from a jurisdiction'" or "(B) unreasonably limits religious assemblies, institutions, or

structures within a jurisdiction." 42 U.S.C. §2000cc, et seq. An Equal Terms violation has been said to have four elements:

> (1) the plaintiff must be a religious assembly or institution, (2) subject to a land use regulation, that (3) treats the religious assembly on less than equal terms, with (4) a nonreligious assembly or institution.

Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 2006 U.S. App. LEXIS 13500 (11th Cir. 2006)(citing 42 U.S.C. § 2000cc(b)(1))

Under the statute, it is the plaintiff who bears the initial burden of "produc[ing] prima facie evidence to support a claim alleging a[n Equal Terms] violation." Id. ;42 U.S.C. § 2000cc-2(b). This section provides:

> (b) Burden of persuasion. If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2 [42 USCS § 2000cc], the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.
>
> 42 USCS § 2000cc-2

Thus, only if the plaintiff meets its initial burden, does "the government . . . bear the burden of persuasion on any element of the claim." Id. ;42 U.S.C. § 2000cc-2(b).

2. The Mission failed to produce evidence supporting its assertions that the land use regulation treats it on less than equal terms with a nonreligious assembly or institution.

Here the Mission failed to meet its burden as plaintiff to produce evidence supporting its assertions that the land use regulation treats it on less than equal terms with a nonreligious assembly or institution. In connection with the first appeal this case this Court has held that "the [subject] Ordinance is properly considered as a neutral law of general applicability because churches are only one of numerous uses which are not specifically permitted uses and the purpose of the Ordinance is not aimed at speech, but rather at promoting the revitalization of the City's downtown area." Lighthouse, 100 Fed. Appx. at 75. In that the Zoning Ordinance here was considered by this Court in the first appeal to be facially neutral, there cannot be an Equal Terms statutory violation. Lighthouse, supra, Primera Iglesia Bautista Hispana, supra, at 27-28. Although the Redevelopment Plan did not exist at the time of this Court's ruling in Lighthouse, review of its text shows it to be likewise facially neutral. As this Court stated: "[o]ther than the conclusory allegations in its complaint, as reiterated in the declaration of Kevin Brown, the Mission did not proffer any evidence to show that the Ordinance was either not neutral or not generally applicable." Lighthouse, 100 Fed. Appx. at 75. No additional evidence in favor of the Mission has been proffered as of this appeal. In fact the Mission's Brief is almost devoid of citations to the factual record.

Among the fundamental deficiencies of the Mission's case is its failure to present any evidence identifying comparable nonreligious assemblies or institutions permitted under the subject land use regulations. The Mission has not even produced evidence to show that it is an assembly; indeed it never applied for a permit as an assembly. Citing Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004), the Mission argues that a plaintiff bringing an Equal Terms claim need not show that religious and non-religious uses are similarly situated. To the contrary, this Court has already determined in the first appeal in Lighthouse, supra, that evidence of similarly situated uses must be presented in order to prove a claim under §2000cc(b). In Lighthouse, this Court held that the Mission failed as a matter of law to establish a prima facie violation of RLUIPA's Equal Terms provision because "the Mission . . . failed to produce evidence to support its contention that the secular assemblies it identified were actually similarly situated such that a meaningful comparison could be made." 100 Fed. Appx. at 77[2]; see Primera Iglesia Bautista Hispana, supra, at 34, 35. Where a

[2] The Mission has also never presented evidence concerning the nature of the "exercise" of its religion and it's assertions are contradictory: sometimes the Mission argues that the church will serve hundreds of parishioners with "24/7" services and activities and at others, describes its mission as serving the "poor and downtrodden" of downtown. Nothing of evidentiary value suggests that the Mission exists as a church, or could undertake the activities it envisions. The church is a retail store with an illegal upstairs apartment upstairs, where there is an internet website soliciting individuals for money to become ordained. It was originally a secular soup kitchen at 159 Broadway, not a church, and 162

plaintiff bringing an as-applied Equal Terms challenge cannot present evidence that a similarly situated nonreligious comparator received differential treatment under the challenged regulation, there can be no cognizable evidence of less than equal treatment, and the plaintiff has failed to meet its initial burden of proof. 42 U.S.C. § 2000cc-2(b). Even if the term "similarly situated," is not apropos to an Equal Terms analysis, however, it is plain that evidence of comparable or analogous nonreligious uses are necessary in order to draw a meaningful comparison in treatment.

The District Court held that, as before, the Mission failed to satisfy §2000cc(b) because it did not show that it was similarly situated to permitted nonsecular assemblies. The District Court relied in part upon this Court's analysis in the first appeal, which provided that "because the Mission did not show that it would be prohibited from operating in the district if it applied under the "assembly hall" category, it could not show that the Ordinance, on its face, treated it on less than equal terms than a nonreligious assembly." Further:

> It is significant that the sparse record before the District Court contained no evidence establishing that "Long Branch only allows assemblies of the secular sort," as the Mission contends in this appeal. The record before us reveals only the denial of the Mission's application which made no attempt to associate its proposed use with the assembly hall category.

Broadway has never been used as a church. No formal church service has been advertised, there is no schedule for services, no mailing list, no church groups, no Sunday School, no list of members and no evidence of a congregation.

Lighthouse, 100 Fed. Appx. at 77.

The record has remained virtually unchanged since this the first appeal, and the Mission never producing any additional evidence regarding the issue of whether the City only allows non-religious assemblies.

The District Court also held that the presence of a church in the Redevelopment Zone area is not similarly situated with nonsecular assemblies because of state laws and the local ordinance prohibiting the sale of alcohol within a certain distance of a church. 406 F. Supp. 2d at 518. This holding is supported by the unrebutted record. New Jersey state ordinance N.J.S.A. §33:1-76 provides that a liquor license cannot be issued for the sale of alcoholic beverages within 200 feet of any church or public schoolhouse. There is also an Ordinance in the City of Long Branch which prohibits the sale of alcohol within 1000 feet of a church . Moreover, the Mission cannot become "similar" to non-religious assemblies/institutions by agreeing to waive the applicability of these liquor ordinances. As the City argued, and the District Court agreed there is no evidence that it can or will or that either ordinance could be permanently waived because N.J.S.A. § 33:1-76 itself prevents any waiver in perpetuity, expressly limiting the period of waiver to the renewal of the liquor license. New businesses also present another problem in that the Mission, once established, would become the controlling entity regarding liquor licenses for every new business within the Arts

and Entertainment Zone, and it is unlikely that any business would open under this condition. These arguments are likewise true of the original C-1 Commercial District in the now-superseded Zoning Ordinance. Moreover, such remedies as an amendment to the Redevelopment Plan would multiply this problem by however many churches then choose to move to the area, some of which may not agree to a waiver at all.

The District Court further observed that the Mission's new intended use as a "house of worship" which stages religious plays, a commercial store specializing in religious material and a soup kitchen" has no similarly situated counterpart in the Redevelopment Plan's permitted uses. Id. Indeed, the Mission's use is the sume of its parts, not its individual activities. Despite its unsupported assertions, the Mission is not a theater and has provided no evidence to establish the same use, much less evidence to establish that any of its envisioned schemes will occur. This stands in marked contrast to cases such as Jehovah's Witnesses Assembly Halls of New Jersey City, Inc. v. City of Jersey City, 597 F. Supp. 972 (D.N.J.) where the evidence showed that the Jehovah's Witnesses' use of the theater would be virtually identical to a nonreligious use because it would include circuit assemblies of several thousand persons which included musical presentations, live drama, slide shows and movies, all which would be would be held on weekends throughout the year. Moreover, screening "the Ten Commandments" for parishioners is

comparable to the permitted uses in the Entertainment Zone, even if the Mission could show that it has the screen, the movie and the parishioners. The Mission has not presented any evidence to show that its proposed functions are in any way compatible with a high volume, high-end entertainment and recreation center or that its "poor and downtrodden" constituency would patronize the theaters, restaurants, arts institutions, specialty retail shops or otherwise contribute to the revitalization goals of the Redevelopment Plan, in any number, or at all. The City did not inhibit the church, it simply does not exist in the form the Mission claims. This irrefutable depiction of the church distinguishes it from allegedly similar assemblies and virtually every case that it cites in support of its claims.

Further, the specifically permitted uses set forth in old Zoning Ordinance 20-6.13 and the new Redevelopment Zone scheme have a theme commensurate with the City's interest in establishing commerce and high end entertainment in a central zone. Equivalent nonreligious assembly uses are subject to the same requirements. Consequently, the Mission failed to identify any forms of differential treatment. Moreover, how could it? The Mission never applied for a variance to Zoning Ordinance 20-6.13. The Mission also failed to submit a conforming application as an RFQ and omitted the required financial information such as the ability to pay for the costs of the project and meet other substantive criteria. Finally, although

the Mission sought to amend the Redevelopment Plan it never legally challenged the ordinance adopting the Plan.

The Mission also failed to show a violation of the Equal Terms provision by virtue of the fact that there are a number of churches currently located within what is the original C-1 District. No unequal treatment can be shown on this basis. The superseding scheme in the Redevelopment Plan provides even less fodder, for a " similar use" argument. Indeed in the Redevelopment Plan amendment hearing before the City Council, the Assistant City Planner testified that any other religious entities presently existed in the subject area were pre-existing non-conforming uses.

Midrash, supra is of no aid to the Mission and instead points up the dearth of evidence in the Mission's case. In Midrash, the plaintiff synagogue congregations, whose zoning variance and special use permits had been denied, challenged town zoning ordinances under RLUIPA. The Eleventh Circuit held that inasmuch as the challenged ordinance permitted private clubs and lodges, but excluded religious assemblies, it violated RLUIPA's equal terms provision, and reversed the summary judgment entered on behalf of the town. Crucial to the decision in Midrash, was the ordinance language which defined the term "private club" as including assemblies. Specifically, a "private club," was defined in the ordinance as " a building and facilities or premises, owned and operated by a corporation,

association, person or persons for social, educational or recreational purposes, but not primarily for profit and not primarily to render a service which is customarily carried on as a business." 366 at 1231. Another town ordinance specifically grouped churches and synagogues with "places of assembly." The Court concluded that the ordinance which permitted private clubs and other secular assemblies but not churches or synagogues, violated §(b)(1) of RLUIPA, and, was not neutral or generally applicable. Unlike here, by specifically "grouping" churches and synagogues with "assemblies," the very language of the Midrash ordinance internally conceded that the entities were "similarly situated."

Here, in contrast to Midrash, no definition for the term "assembly hall" is provided in Zoning Ordinance 20-6.13 or the plan, nor does either "group" or otherwise define churches and other religious institutions as "assemblies." Indeed as this Court noted, the Mission applied for a use variance as a "Church," not an assembly, thus did not classify itself as an assembly at the time application was made. Also unlike Midrash, the Mission has failed to produce any evidence that the City allowed only assemblies of the secular sort in the respective zoning districts, or of discriminatory treatment. Again, in the first appeal, this Court specifically noted the "dearth of evidence" in the record before the District Court,

as to whether the secular uses identified by the Lighthouse Institute were "similarly situated."[3]

Here the Mission failed to present evidence to sustain its burden of proving that it was treated on less than "equal terms" with non-religious organizations. The Mission provided no evidence to show that it was equivalent to any of the permitted uses in the Redevelopment Zone or the former C-1 Commercial District. The Mission failed to produce any evidence to show that either zoning regulation draws a distinction between religious and secular assembly halls on its face or treat religious and nonreligious institutions unequally or discriminatorily.

The District Court's grant of summary judgment as to the Plaintiff's claims brought pursuant to §2000cc(b) can be affirmed on the basis of its finding that the Mission failed to establish that it was comparable to permitted nonreligious assemblies, a pre-requisite to establishing a claim for discrimination. 406 F. 2d at

---

[3] In contrast, in Midrash, the Eleventh Circuit relied upon an extensive District Court Record in making its determination. For example, the Court observed that the plaintiffs presented evidence that synagogue members regularly patronized area shops, that congregations purchased food and supplies and that they contributed to the stated purpose of the town to promote retail activity and synergy in the business district. The record in Midrash also showed that the town did not show that private clubs did not promote the goals of the ordinance.

518. [4] The District Court's additional analysis of §2000cc(b) as also containing a "substantial burden" requirement is mere surplusage to its primary determination. Consequently, in the event that this Court determines that such an interpretation is in error, it can still affirm the District Court's primary result, which is based upon an accurate assessment of the law and the unrebutted facts of record.

B. Even if, arguendo, a strict scrutiny analysis applies, the City demonstrated a compelling governmental interest in implementing the zoning regulations which was the least restrictive method of accomplishing this goal.

The unrebutted record shows that the City had a compelling governmental interest in developing a dynamic commercial center and both zoning regulations are the least restrictive means of assuring this goal. A land use restriction, though substantially burdensome, is nevertheless lawful under 42 U.S.C. 2000cc(a)(1)(A)(B) so long as the governmental entity proves that it furthers a "compelling governmental interest" and it is the least restrictive means of furthering that interest.

Although the District Court recognized that it need not address the "compelling interest," requirement, it did so anyway. The District Court determined that the City's interest in creating an artistic and dynamic commercial

[4] Amicus United States argues that only that portion of the District Court's decision imposing a substantial burden requirement under §2000cc(b) should be reversed and does not challenge the remainder of the District Court's decision.

center in place of a deteriorating downtown, was a legitimate compelling governmental interest in limiting a church within this zone, and, that the Redevelopment Plan was the least restrictive means of doing so. 406 F. Supp. 2d at 516. Indeed the City presented unrebutted evidence that the revitalization of the downtown district would be accomplished by developing a central artistic and entertainment area, surrounded and supported by restaurants, cafes, bars and specialty retail stores geared toward the area. The unrebutted record also showed that the planned revitalization of the block would be not only inhibited, but directly impeded by the presence of a church in this zone.

The record shows that the City's Redevelopment Plan which was implemented pursuant to § 40A:12A-5 to serve a compelling governmental interest is vastly distinguishable from zoning ordinances which affect only a few blocks, or, from other common situations such as where a residential neighborhood attempt to bar churches. The City determined that the subject area was in need of redevelopment for a number of criteria set forth in § 40A:12A-5. The City-wide quality of life is at issue: the Broadway Corridor has a 100 year history of deterioration and the area in need of redevelopment consisted of vacant land, closed up businesses, adult entertainment uses that could not survive, a scarce population and a high crime area. Carl Turner's testimony establishes that the Broadway Corridor was deemed to be an area in need of development in that it

specifically met the state criteria for redevelopment: city ownership, obsolete unused buildings, incompatible uses and conditions of the property (App. p. 565). Mr. Talwar affirmed that the present zoning for the Broadway corridor has a compelling government interest, as Broadway is the main street and its revitalization has always been one of the most important objectives of the redevelopment zone (App. p. 580, 581). The object of the Plan is to revitalize the City and to build a vibrant active retail arts and entertainment food and beverage area with live/work space and affordable housing, to make it safe by reducing crime, and to bring people downtown (App. pp. 226-232). Mr. Turner's testimony and the Design Guidelines demonstrate that various sectors are designated in specific areas to create a symbiotic relationship between the types of uses in the entire Zone and the abutting fringe areas (App. p. 567). Permitted uses include performance art venues, such as cinemas, theaters; educational institutions related to the arts (art studios, dance studios, culinary schools, fashion design schools, music instruction, theater workshops), restaurants (including those with live music and sidewalk cafes to encourage spillover) and the categories of specialty and regionally oriented retail, 24 hour street and night oriented uses and youth oriented retail (App. pp. 610-669). Non-permitted uses include adult entertainment, auto service and repair shops, banks, gaming galleries, service retail on ground floor,

business services, utilities/telephone, professional services, residential, warehousing and storage businesses and any use not specifically permitted Id..

Perhaps most significantly, the unrebutted evidence adduced at the hearing before the City Council also established that placement of a church in the subject area would damage and/or preclude the commercial development of the Redevelopment Zone because of the New Jersey liquor license statute N.J.S.A. §33:1-76 and local ordinance. Also, the purpose of the waiver of the local ordinance that establishments with liquor license be 1000 feet apart, is to encourage the use of alcohol in the contained area of the Redevelopment Zone to attract people to the entertainment and commerce area of Broadway to stimulate economic growth.

Mr. Turner testified that allowing a house of worship at the 162 Broadway would "destroy" development of the block because it is designated as a high volume, high-end recreation and entertainment district (App. pp. 567, 568). He further explained that a church would have a detrimental effect on the Zone identifying a local ordinance which prohibits any liquor license from being issued within a thousand feet of a religious organization (App. p. 565). Again, N.J.S.A. 33:1-76, a state statue, similarly prohibits sales and licenses within 200 feet of a church.

The Mission has not presented any evidence to show that its proposed functions are in any way compatible with a high volume, high-end entertainment and recreation center or that its constituency would patronize the theaters, restaurants, arts institutions, specialty retail shops or otherwise contribute to the revitalization goals of the Redevelopment Plan, in any number, or at all. This case is also distinguishable from Midrash, supra, on this basis. While the Mission asserts that Mr. Talwar has somehow conceded that the Mission would fit in with the permitted uses of the district, the hypothetical questions asked of Mr. Talwar were pure fantasy and his answer taken out of context. The Mission likewise takes out of context the responses of the City (App. p. 101) to the Mission's Interrogatories (App. p. 99), which it purports shows that the City stated that it does not contend that the ordinances are rationally related to a legitimate governmental objective. If any doubt was created by this interrogatory response, it has been more than satisfied though the testimony of Mr. Turner and Mr. Talwar at the City Council hearing.

The Mission cites cases which purportedly provide that that economic interests, blight, aesthetics and revenue generation are not "compelling interests." Such cases are distinguishable on their facts. These cases also do not involves amendments to a Redevelopment Plan, which would be permit a flood of non-

permitted uses into the zone, and disrupt the re-vitalization of the city as a whole, as here.

Here the City has also shown that its compelling interest is accomplished by the least restrictive means in that it is host to 33 religious institutions and churches which are accommodated within 90% of the City's borders, an area of 26 square miles. In connection with the first appeal, the District Court ruled that the Long Branch Zoning scheme did not violate the Mission's rights under 42 U.S.C. §2000cc(b)(3) because the jurisdiction included all of Long Branch and "it is undisputed" that it is a permitted use in other areas of the City. This is also borne out by the unrebutted testimony of Assistant City Planning Director Carl Turner at the City Council hearing that that churches are conditional uses in other zones, which are essentially identical to a permitted uses and simply requires the satisfaction of lot size, set backs and parking requirements (if any) for that zone. (App. p. 571). In fact, a branch of Amicus Seventh Day Adventists presently exists in the City of Long Branch.

Reverend Brown has also acknowledged that another suitable site for the Mission could be found. At the Resolution Hearing on the Mission's application to amend the Plan, Reverend Brown made these concessions, as follows:

> MR. DESTEFANO: And you have, one additional question, if you don't mind, given the fact that according to Mr. Turner 90 % of the city is amenable to houses of worship and that there are 33 currently existing, can

you tell me why, what compelling evidence is there that that specific location is the only location that it is, you know, useful for your purposes?

REVEREND BROWN: Good question. I do not make that it's the only location. The city has not approached me with an alternative.

(App. pp. 603, 604)(emphasis added).

When asked a second time if there was any compelling reason why the Mission must be in that particular location, Reverend Brown responded:

MR. DESTEFANO: But, then the answer is there is no compelling reason why it has to be that particular location?

REVEREND BROWN: Nothing is etched in stone. I want to see it admirably resolved. I want to exist in a location that's welcomed. I'm not looking to force myself into any situation. It's unfortunate we had to see it come this far.

MR. BROWN: Reverend Brown, what you're asking, councilman is asking, is that you would not have a compelling objection to another location. You're stating…

REVEREND BROWN: If somebody wanted to bring me someplace and show me and tell me how we go from where we are to where we could be, I would listen, most definitely, with an open mind. What the final decision would be would be based on members of my board of directors, and including counsel, and what the terms of that move would be. But, I'm willing to listen to any resolve.

(App. p. 606)(emphasis added).

Reverend Brown gave similar testimony in his deposition, when he acknowledged that a relocation the location of the Mission a few blocks distant would not greatly affect his constituency (App. p, 462). While the Mission

continues to argue that the 162 Broadway location is necessary to serve its constituency, the binding admissions of Reverend Brown show the contrary. Indeed Reverend Brown's concessions show that discrimination would be mitigated by the existence of alternative locations, thus any lingering concerns voiced in Judge Gibson's concurrence in the first appeal, have been vitiated by Reverend Brown's previously unavailable testimony. Moreover, as a practical matter, the Mission's constituency, which it describes as "the poor and downtrodden in downtown," will no longer exist in the area as the redevelopment occurs, and would be located in other areas of the City.

The Mission also provided no independent evidence that that it could not continue its mission to feed the needy at an alternative location. In Episcopal Student Found. v. City of Ann Arbor, 341 F. Supp. 2d 691, 705 (D. Mich. 2004), the Michigan District Court observed that there was no indication that the plaintiff religious organization could not continue to feed the hungry at alternate locations, and thus fulfill its religious mission. This case is even more compelling in that Reverend Brown conceded that an alternate location would be suitable and in that the Mission has presented no evidence to show that worship at 162 Broadway is a part of its religious belief.

In Daytona Rescue Mission v. City of Daytona Beach, 885 F. Supp. 1554, 1560 (D. Fla. 1995) the Court held that there was no substantial burden on

religious exercise where plaintiffs failed to show that code prevented religious organization from running a homeless shelter and food program anywhere that city. Notably the Court also found that the City had a compelling interest in regulating homeless shelters and food banks and that the challenged code furthered that interest.

Although the District Court's decision on "compelling interest" was not necessary to the City's success on summary judgment, is nevertheless supported by the law and the unrebutted record.

C. The zoning regulations did not impose a substantial burden upon the Mission's exercise of its religion.

The District Court also held that there was no substantial burden imposed by the terms of Zoning Ordinance 20-6.13 or the Redevelopment Plan which require Plaintiffs to locate in an area outside of the narrowly drawn Redevelopment Zone. The Mission appears to abandon its §2000cc(a) "substantial burden" claim on appeal. Nevertheless the City will address the substantial burden issue in that it is apropos to the Free Exercise claim.

In order to substantially burden the right of religious exercise, land use regulations must have a chilling effect. Grace v. United Methodist Church v. City of Cheyenne, 235 F. Supp. 2d. 1186, 1194 (D. Wyo. 2002). Reasonable "run of the mill" zoning considerations requiring religious institutions to apply for zoning variances do not constitute substantial burdens on religious exercise, and instead

allow the zoning commission to consider factors such as size, congruity with existing uses, and availability of parking. Midrash, 366 F.3d at 1227. RLUIPA does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations. Hale O Kaula Church v. Maui Planning Comm'n, 229 F. Supp. 2d 1056, 1071 (D. Haw. 2002)(citing San Jose Christian College v. City of Morgan Hill, 2002 U.S. Dist. LEXIS 4517, 2002 WL 971779 at *2 (N.D. Cal. Mar. 5, 2002)). There is no "per se" substantial burden as it " would render meaningless the word "substantial," because the slightest obstacle to religious exercise incidental to the regulation of land use--however minor the burden it were to impose--could then constitute a burden sufficient to trigger RLUIPA's requirement that the regulation advance a compelling governmental interest by the least restrictive means." Civil Liberties for Urban Believers (C.L.U.B.) v. City of Chicago, 342 F.3d 752, 760-761 (7th Cir. 2003). Zoning regulations which only incidentally affect or inconvenience a religious organization are not a "substantial burden." See Lying v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988)(interpreting the RFRA).

In finding no "substantial burden," the District Court determined that the undisputed record established that there were numerous alternative venues available to the Mission in 90% of the remaining City of Long Branch. 406 F.

Supp. at 516. The District Court also referenced this Court's similar observation (made even prior to the testimony of city planning assistant Carl Turner) in The Lighthouse Institute v. City of Long Branch, 100 Fed. Appx. 70, 77 (3d. Cir. 2004).[5]

Finally, the District Court alluded to the unrebutted testimony of Reverend Brown himself, both at his deposition and at the City Council hearing, that the Mission could be successfully relocated outside of the Redevelopment Zone. Indeed, since the first appeal and as set forth in detail above, Reverend Brown has repeatedly acknowledged that there is no compelling reason for the Mission to be located at 162 Broadway and that the Mission could effectively function at an alternate location. Both the City Zoning Code and Redevelopment Plan permits the Mission to operate in numerous other areas within the City limits. Moreover, the City expended considerable efforts to locate another site for the Mission. However, even were suitable alternative space not available, such unavailability also does not create a substantial burden within the meaning of RLUIPA. Midrash, 366 F. 3d 1227.

---

[5] "The Mission did not establish a likelihood of success on its 'substantial burdens' RLUIPA claim under part (a), because it had operated for years at the rented location in the district and thus its opportunity for religious exercise was not curtailed by the Ordinance. Further, it is undisputed that the Mission could have operated as a church by right in other districts in the City." 100 Fed. Appx. * at 77.

Additionally, while the Mission complained that it was "substantially burdened," it never even applied for a variance after the April 27, 2000 Zoning Officer's letter and never appealed the City Council's May 11, 2004 decision. In the highly similar San Jose, supra, the challenged ordinance's application requirements, were held to imposed "no restriction whatsoever" on the religious exercise of the plaintiff Christian college which failed to ever submit complete application. Summary Judgment was appropriate in that the City reasonably determined that College had failed to meet the requirements of its zoning ordinance. Here in that the Mission never pursued a variance under Zoning Ordinance 20-6.13, or indeed made a complete filing for a waiver/designation of developer status pursuant to the Redevelopment Plan, RLUIPA's requirements likewise placed no "substantial burden" on the Mission.

In the first appeal, The Lighthouse Institute v. City of Long Branch, 100 Fed. Appx. 70 (3d. Cir. 2004), this Court defined the term "substantial burden on religious exercise" by citing C.L.U.B., supra, 342 F.3d at 761:"…one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise effectively impracticable." Significantly, it is the religious exercise, not the use of the property per se that must be rendered impracticable. Plainly Reverend Brown has conceded that the Mission's exercise of religion would not been rendered impracticable at another location. In fact, the zoning

schemes do not even impose an incidental burden upon the Mission's religious exercise.

The Mission has shown no evidence of substantial burden, much less discrimination or religious animus. There are no such expert reports and no testimony from any witness other than Reverend Brown, whose testimony is pure anecdotal speculations.

The Mission incorrectly interprets RLUIPA to require a zoning scheme which allows houses of worship to exist in 100% of the City districts. This would render RLUIPA meaningless and his Court has already rejected such an argument on the basis that all zoning ordinances would then violate RLUIPA. In C.L.U.B., the Seventh Circuit vehemently rejected the "per se" substantial burden concept, as it " would render meaningless the word "substantial," because the slightest obstacle to religious exercise incidental to the regulation of land use--however minor the burden it were to impose--could then constitute a burden sufficient to trigger RLUIPA's requirement that the regulation advance a compelling governmental interest by the least restrictive means." C.L.U.B., 342 F.3d at 760-762.

Consequently, the Mission was not substantially burdened by Zoning Ordinance 20-6.13 (which no longer exists) or the Redevelopment Plan,

II. The District Court properly granted summary judgment in that Plaintiff failed to show that the subject land use regulations violated the Free Exercise Clause.

The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. Amend. I. The Free Exercise Clause prohibits above all "governmental regulation of religious beliefs as such." Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). Notably, the Supreme Court has held that the government may restrict certain activities associated with the practice of religion pursuant to its general regulatory powers. Rector, Wardens and Members of Vestry of St. Bartholomew's Church v. The City of New York, 914 F. 2d 348 (2d. Cir. 1990)(citing to Smith, supra).

Again this Court previously ruled in connection with the Mission's Free Exercise claims that Zoning Ordinance 20:613 is a general law of neutral application which does not facially discriminate against churches and in favor of nonreligious land use. See also National Advertising Co. v. Denver, 912 F.2d 405, 411 (10th Cir. 1990). Although the claims as to Zoning Ordinance 20:6.13 are now moot, the same reasoning applies with regard to the Redevelopment Plan, which likewise does not specifically prohibit conduct because: it is undertaken for religious purposes; is such that churches are only one of numerous uses which are not specifically permitted; the zoning is such that churches are still permitted in

90% of the City's limits; and, the Plan has as its purpose, the promotion of economic revitalization not the impairment or prohibition of certain speech. Consequently, the Redevelopment Plan is also a neutral law of general application.

Significantly, the right of "Free Exercise" does not exempt the Mission with the obligation to comply with either ordinance, both of which prohibit conduct that a state is free to regulate. Congregation Kol Ami v. Abington Township, 309 F. 3d 120, 139 (3d. Cir. 2002). The Mission was under the same obligation to comply with the restrictions and procedures as other entities seeking a non-permitted use or amendment.

The Mission has also presented no evidence that the City has selectively enforced Zoning Ordinance 20-6.13 or the Redevelopment Plan, so as to favor secularly motivated conduct but not comparable religiously motivated conduct. Tenafly Eruv Association, Inc. v. The Borough of Tenafly, 309 F. 3d 144, 165, 166 (3d. Cir. 2002). In identifying an unconstitutional burden to the free exercise of religion, the central question is whether the affected party has been denied the ability to practice his religion or coerced in the nature of those practices. St. Bartholomew, supra, 914 F. 2d at 355 (citing Lying v. Northwest Cemetery Protective Ass'n, 845 U.S. 439 (1988)). Plainly, neither Zoning Ordinance 20-6.13 nor the Redevelopment Plan deny the Mission the ability to practice its religion or coerce it in the nature of those practices as set forth in the previous section.

Zoning regulations which incidentally affect religious exercise, are neutral laws of general applicability which do not infringe upon the free exercise of religion. See Mount Elliot Cemetery Ass'n v. City of Troy, 171 F. 3d 398, 405 (6th Cir. 1999); Cornerstone Bible Church v. City of Hastings, 948 F. 2d 464 (8th. Cir. 1991); see also Christian Gospel Church , Inc. v. City of San Francisco, 896 F. 2d 1221 (9th Cir. 1990), cert. denied, 498 U.S. 999 (1991)(denial of permit to establish church in residential district did not violate Free Exercise Clause inasmuch as zoning system protected governmental interest);Messiah Baptist Church v. County of Jefferson, 859 F. 2d 820 (10th Cir. 1988), cert. denied, 490 U.S. 1005 (1989)(denial of permit to build church not violation of Free Exercise or Due Process Clauses). At the most, the City's prior and current zoning ordinances only incidentally affect or inconveniences the Mission, which can operate as a church within 90% of the City limits and no evidence shows otherwise. Again, Reverend Brown has conceded that he could move his operation four blocks and still serve the population that he is concerned about. Consequently, if anything, both Zoning Ordinance 20-6.13 and the Redevelopment Plan only inconvenienced the Mission in this regard.

The Mission argues that a strict scrutiny analysis is required in any church zoning case. To the contrary, the Free Exercise Clause can prompt either strict scrutiny or rational basis review depending upon the nature of the challenged law

or government action. Tenafly Eruv, 309 F.3d at 165; Smith, supra. Here rational basis review is required given the neutrality of Zoning Ordinance 20-6.13 and the Redevelopment Plan. If a law is "neutral" and "generally applicable," and burdens religious conduct only incidentally, the Free Exercise Clause offers no protection. Tenafly Eruv (citing Smith, supra). Only if the law is not neutral or is not generally applicable does strict scrutiny apply and require proof that it is narrowly tailored to advance a compelling government interest. Tenafly Eruv, at 165.

A "strict scrutiny" standard of review is also inapplicable, inasmuch as the Mission has dropped its other constitutional claims. In Smith the Supreme Court observed that "the only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action, have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional rights, i.e. "hybrid claims." Smith, 494 U.S. at 881-882.

The Mission charges the City implemented land use regulation involving "individualized exemptions " thus requiring scrutiny review. Case law from a variety of circuits demonstrate that there is no automatic strict scrutiny analysis in Free Exercise land use decisions involving individual exemptions. In Grace United Methodist Church, 427 F.3d 775 (10th Cir. 2005) the Tenth Circuit refused

to adopt a per se rule requiring that any land use regulation, which permits any secular exception, satisfy a strict scrutiny test:

> As the district court correctly observed, several "federal courts have held that land use regulations, i.e., zoning ordinances, are neutral and generally applicable notwithstanding that they may have individualized procedures for obtaining special use permits or variances." Grace United Methodist Church, 235 F. Supp. 2d at 1200 (citing cases). Indeed, in the land use context, the Sixth, Seventh, Eighth, and Eleventh Circuits have rejected a per se approach and instead apply a fact-specific inquiry to determine whether the regulation at issue was motivated by discriminatory animus, or whether the facts support an argument that the challenged rule is applied in a discriminatory fashion that disadvantages religious groups or organizations. See, e.g., Civil Liberties For Urban Believers v. City of Chicago, 342 F.3d 752, 764-5 (7th Cir. 2003) (ordinance requiring special use approval to operate churches in commercial and business areas and limiting church operation in manufacturing areas held general law of neutral applicability); Mount Elliott Cemetery Ass'n v. City of Troy, 171 F.3d 398, 405 (6th Cir. 1999) (city's denial of request to rezone certain property for use as Catholic cemetery not burden on free exercise because ordinances were neutral laws of general applicability); First Assembly of God of Naples v. Collier County, 20 F.3d 419, 423-24 (11th Cir. 1994) (city's ordinance prohibiting church-run homeless shelters in certain areas held neutral and of general applicability because motivated by secular concerns (health and safety considerations), applied to everyone, and did not completely prohibit operation of homeless shelters); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472 (8th Cir. 1991) (zoning ordinance excluding churches and other non-profits from city's central business district had no impact on religious belief and was general law applying to all land use in city)… According to these courts, although zoning laws require some individualized assessment for variances, they are motivated by secular purposes and impact equally all land owners in the city seeking variances.
>
> 427 F.3d 775 (emphasis added).

The Mission relies upon Blackhawk v. Pennsylvania, 381 F.3d 202, 209 (3d Cir. 2004); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537-38, 124 L. Ed. 2d 472, 113 S. Ct. 2217 (1993) and FOP Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 364-365 (3d Cir. 1999) in support of its individualized exemption argument. Each of these cases is readily distinguished and none stand for the proposition of automatic strict scrutiny in a religious land use case.

In Blackhawk this Court held that a law must satisfy strict scrutiny if it permits individualized, discretionary exemptions. 381 F.3d at 209. There, the fee requirement in the Game Code created a regime of individualized, discretionary exemptions where the person shows "hardship" or "extraordinary circumstances" and the waiver is consistent with "sound game or wildlife management activities or the intent of [the Game and Wildlife Code]." The plaintiff requested a waiver for religious reasons and financial hardship. However, the Commission concluded that "Blackhawk would not be entitled to an exemption *regardless of his financial circumstances*." thus the plaintiff might qualify for an exemption if his conduct were not religiously motivated. Here, however, the Mission fails to prove or otherwise illuminate any scheme of individualized exemptions in the zoning ordinances, much less ones for conduct which is not religiously motivated.

In Lukumi, at issue there were municipal ordinances regulating the slaughter of animals, one of which prescribed punishments for "whoever . . . unnecessarily . . . kills any animal." Id. at 537. However, the ordinances excluded almost all other animal killings, including killings that occurred in connection with hunting, fishing, meat production, pest extermination, euthanasia, and the use of rabbits to train greyhounds. The Court explained that this ordinance could not be applied to punish the ritual slaughter of animals by members of the Santeria religion when the ordinance was not applied to secular killing, because it required an evaluation of the particular justification for the killing. The ordinances were "underinclusive" because they "fail[ed] to prohibit nonreligious conduct that endanger[ed] these interests in a similar or greater degree than Santeria sacrifice does." Here neither zoning regulation requires any inquiry into the reason for the conduct nor does either regulation devalue religious reasons for use of the land. Neither zoning regulation fails to prohibit nonreligious conduct that endangers the City's interests in the Commercial District or Redevelopment Zone.

In FOP Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 364-365 (3d Cir. 1999) this Court held that an exemption allowing police officers to wear a beard for medical reasons indicated that the police department made a value judgment that secular (medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations

are not. Here again, the City makes no value judgment in favor of nonreligious motivations, by reasons of its implementation of the Zoning Ordinance and Redevelopment Plan. However, even if the ordinances were subject to strict scrutiny review, the City has established that both land use regulations serve a compelling governmental interest and are the least restrictive means of doing so.

This Court has already determined that Zoning Ordinance 20-6.13 is a neutral law of general application and there is no evidence to show that either zoning regulation was designed or applied in a discriminatory fashion. There is no evidence of religious animus nor evidence that any local assessment procedure was carried out in a manner as to discriminate against the Mission, much less how any assessment procedure would be carried out. Indeed the Mission never filed a variance application for Zoning Ordinance 20-6.13 and its RFQ application failed to conform to the requirements of the Redevelopment Plan and omitted crucial relevant financial information. Consequently, the Mission cannot prove a violation of the Free Exercise Clause and the City was entitled to the entry of summary judgment in its favor.

This Court should not overlook the fact that there is no evidence that the City acted arbitrarily or capriciously with regard to implementing or applying the Redevelopment Plan. Under both state and federal law, deference must be given to the City in exercising its zoning function as to the Zoning Ordinance 20-6.13, and

the Redevelopment Plan. see Kol Ami, supra, 309 F. 3d at 137. "Zoning is by its very design discriminatory, and that, alone, does not render it invalid." Kol Ami at 136.

There is no evidence of any such "arbitrary, capricious or unreasonable" circumstances here and the ordinances instead complement and further the fundamental principals of zoning as well as the City's objectives in revitalizing the Broadway Corridor.

CONCLUSION

For the foregoing reasons, Defendant/Appellee the City of Long Branch respectfully requests that this Honorable Court affirm the order and judgment of the District Court in its favor.

RESPECTFULLY SUBMITTED,

MARSHALL, DENNEHEY, WARNER, COLEMAN AND GOGGIN

BY: s/Audrey J. Copeland, Esq.
Audrey J. Copeland, Esquire
Attorney I.D. #44291
Howard M. Mankoff, Esquire
Marshall, Dennehey, Warner, Coleman and Goggin
620 Freedom Business Center, Suite 300
King of Prussia, PA 19406
610-354 8274
alcopeland@mdwcg.com
Attorneys for Defendant/Appellee
The City of Long Branch

CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

BY: s/Audrey J. Copeland, Esq.
AUDREY J. COPELAND, ESQUIRE

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(B)(i)

I hereby certify that this Brief is in compliance with the type volume requirements set forth in F.R.A.P. 32(a)97)(B)(I) as it contains less than 1400 words (calculated by Microsoft Word), has been prepared in 14 point font and is proportionally spaced.

BY: ___s/ Audrey J. Copeland, Esq.___
AUDREY J. COPELAND, ESQUIRE

CERTIFICATE OF VIRUS CHECK COMPLIANCE

As required by 3rd. Cir LAR 31(1)(c), I certify that the PDF Brief submitted on behalf of Appellee City of Long Branch has been scanned for viruses with McAfee VirusScan Enterprise 8.0 which has detected no viruses.

BY: s/ Audrey J. Copeland, Esq.
AUDREY J. COPELAND, ESQUIRE

Date: June 29, 2006

CERTIFICATE OF IDENTICAL BRIEFS

As required by 3rd. Cir LAR 31(1)(c), I certify that the test of the PDF Brief submitted on behalf of Appellee City of Long Branch is identical to the text of the paper copies of said Brief.

BY: s/ Audrey J. Copeland, Esq.
AUDREY J. COPELAND, ESQUIRE

CERTIFICATE OF SERVICE

The undersigned herby certifies that on this date, City of Long Branch's Brief of Appellee was filed electronically with this Court and that ten (10) hard copies of said Brief were transmitted to this Court. I further certify that two (2) copies of the forgoing Brief were served upon on all parties of record BY OVERNIGHT MAIL, POSTAGE, PREPAID, as follows:

Michael Kasanoff, Esq.
157 Broad Street
P.O. Box 8175
Red Bank, NJ 07701

Derek Gaubatz, Esq.
The Becket Fund for religious Liberty
1350 Connecticut Avenue, N.W. Suite 605
Washington, D.C. 20036
Counsel of record for Plaintiff/Appellant

Jessica Dunsay Silver, Esq.
National S. Pollock, Esq.
Wan J. Kim, Esq.
Department of Justice
Ben Franklin Station
P.O. Box. 14403
Washington, D.C. 20044-4403
Counsel of record for United States as Amicus Curiae

David S. Petron, Esq.
Paul J. Zidlicky, Esq.
Jason C.R. Shulman, Esq.
Sidley Austin, LLP
1501 K. Street, N.W.
Washington, D.C. 20005
Counsel of record for Association of Christian Schools International and the General Conference of Seventh-day Adventists as Amicus Curiae

By: s/ Audrey J. Copeland, Esq.
AUDREY J. COPELAND, ESQ.

Date: June 29, 2006

26/804061.v1