No. 08-2819

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RIVER OF LIFE KINGDOM MINISTRIES, Plaintiff–Appellant, vs. VILLAGE OF HAZEL CREST, ILLINOIS, Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 08 C 950 The Honorable Joan Gottschall, Judge Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLEE VILLAGE OF HAZEL CREST, ILLINOIS

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ORAL ARGUMENT REQUESTED

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Appellate Court No: 08-2819

Short Caption: River of Life Kingdom Ministries (appellants) vs. Village of Hazel Crest

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JURISDICTIONAL STATEMENT

The Jurisdictional Statement of Appellant is complete and correct in accordance with FRAP 28(a).

ISSUES PRESENTED FOR REVIEW

1. Whether the Church has any likelihood of success on the merits of its claim under the "Equal Terms" provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc(b)(1) as a result of the Village's amendatory ordinance, which eliminates, inter alia, "meeting halls" as allowable uses within the B-2 Zoning District.

2. Whether the Church has any likelihood of success on the merits of its RLUIPA "Substantial Burden" claim or its First Amendment Free Exercise Claim in light of the undisputed evidence that over 90% of the Village of Hazel Crest is zoned in a manner which would accommodate religious land uses.

3. Whether the District Court abused its discretion in determining that the Church has not made the "clearest equitable showing" necessary under this Court's jurisprudence to justify the issuance of a mandatory preliminary injunction.

STATEMENT OF THE CASE

On February 15, 2008, Plaintiff-Appellant River of Life Kingdom Ministries ("Church") filed a complaint seeking a temporary restraining order as well as preliminary and permanent injunctive relief against the Village of Hazel Crest ("Village"). On February 27, 2008, the District Court denied the Church's motion for a temporary restraining order.

On March 13, 2008, the District Court conducted an evidentiary hearing on the Church's Motion for Preliminary Injunction.

On April 8, 2008, following notice and public hearing, the Village adopted Ordinance No. 07-2008, "An Ordinance Amending the Hazel Crest Zoning Ordinance by Amending the Permitted and Special Uses in the B-2 Zoning District" (the "Amendment"). Pursuant to the Amendment, the corporate authorities eliminated various noncommercial and incompatible land uses from the allowable uses in the B-2 Zoning District.

Following additional briefing by the parties, the District Court entered an Order on July 14, 2008, denying Plaintiff's Motion for Preliminary Injunction. R. Doc. 46. The Order was supported by a 27 page Memorandum Opinion. R. Doc. 47.

STATEMENT OF FACTS

The Village of Hazel Crest and the Ready Availability of Land Zoned for Religious Uses[1]

The Village of Hazel Crest is a Chicago south suburb with a population of about 15,000. Tr. 47. The Village's eastern boundary is the METRA Commuter Rail Tracks (formerly the Illinois Central). The other boundaries are 167th Street on the north, 183rd Street on the south, and Kedzie/Pulaski on the west. Hazel Crest is a largely residential, low-density bedroom community. Tr. 47.

The Village has a zoning ordinance. Tr. 48. Ex. 3; Ex. 6. Churches are allowable as special uses in many of the zoning districts. Churches are allowed as special uses in the R-1 Residential District (Section 7-3); the R-2 Residential District (Section 7-4); and the R-3 Residential District (Section 7-5). Under Illinois law, special uses are presumptively allowable as a matter of right, provided the particular use does not create any adverse impacts on nearby property. City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, 196 Ill.2d 1, 255 Ill.Dec. 434 (2001) ("[S]pecial uses, as such, are considered compatible with other uses in the zoning district in which they are included [and] may not be denied on the ground that the use is not in harmony with the surrounding neighborhood.").

Over 90% of the land in Hazel Crest is zoned in a manner which would allow churches and other religious land uses. Tr. 47. Only a few small areas of the

[1] The facts are derived from the Preliminary Injunction hearing transcript (R. Doc. 60), which we will refer to as "Tr.__." The documentary references come from the Village's hearing Exhibits which are separately bound ("Ex.__").

Village are zoned for commercial activity (which the Village calls its "B-Business Districts) in a manner which would preclude the location of churches. Tr. 50. There is commercial zoning at the northwest corner of 183rd and Kedzie, commercial zoning at the southeast corner of 175th and Kedzie, and a commercial area (which we discuss below) along the METRA tracks in the vicinity of the Subject Property. Tr. 50-1.

There are approximately eight churches in Hazel Crest. Tr. 49. Four of those churches are within a few blocks of the Subject Property. Tr. 49.[2]

Hazel Crest Proper, the Village's TIF
Revitalization Plan, and the Subject Property

The Subject Property is located in the oldest part of Hazel Crest, an area called "Hazel Crest Proper" ("HCP"). Tr. 53. In the 1990's, HCP went into decline. Storefronts became vacant, housing became rundown. Tr. 54. As a result, the Village commissioned a comprehensive study and developed the "Hazel Crest Proper Revitalization Action Plan." Ex. 5, Appendix. The goal of the HCP Revitalization Plan is to "provide an attractive commercial area that enhances the regional image of Hazel Crest and satisfies the convenience, shopping, dining and service needs of both nearby residents, employees and commuters using the Hazel Crest METRA Station." Ex. 5.

To that end, in January 2001, the corporate authorities of the Village adopted a series of ordinances establishing the Hazel Crest Proper Tax Increment Financing

[2] The land-use configurations are shown on **Appendix A,** the Village's current land use map. The Subject Property is in the far northeast corner.

District and Tax Increment Redevelopment Area Project and Plan. Ex. 4. The ordinances were based on legislative findings that HCP as a whole "has not been subject to growth and development through investment by private enterprise, and would not reasonably be anticipated to be developed without the adoption of the Redevelopment Plan." Ex. 4.

Under tax increment financing, as authorized by 65 ILCS 5/11-74.4-1, et seq., a municipality embarks on a redevelopment plan by investing public dollars in an area for infrastructure, public improvements, land acquisition, etc., in the hope that those expenditures will prime the pump for new economic development and redevelopment of that area. Tr. 54. Once the hoped-for redevelopment occurs, the additional property taxes generated by that new development (the property tax increment) is then used to repay the municipality for the public investment. Patel v. City of Chicago, 383 F.3d 569, 570 (7th Cir. 2004) (discussing tax increment financing); Geisler v. City of Wood River, ___ Ill.App.3d ___, 892 N.E.2d 543 (5th Dist. 2008) (extensively discussing TIF concepts).

The Village has made substantial investments in the area of HCP near the METRA Station in the vicinity of the Subject Property. Tr. 56-60. The Village has invested large sums in public improvements. The Village is in the process of demolishing an old tavern in the area. The Village has already spent over $200,000 and projects to expend over a million dollars to foster economic redevelopment of HCP. Tr. 63. The revitalization of HCP depends on attracting commercial and mixed uses which generate new property taxes.

In March 2007, the Village adopted its Comprehensive Plan. Ex. 5. The Comprehensive Plan further identified the vicinity of the Subject Property as being planned for and designated for "mixed use/commercial/residential development." Ex. 5, pp. 6-4; 9-6 (additional parking needed "to support convenience retail business" in HCP).[3] The Comprehensive Plan (at 4-6) further explains that the goals of the Village for this area. In furtherance of the plan, the Village has a acquired a number of parcels in the area to be used for parking or redevelopment. Tr. 57.

The Subject Property

The Subject Property is located at 16842 South Park Avenue. It is identified as industrial on the Village's existing land use map and mixed use, commercial on the Comprehensive Plan. The Subject Property is zoned in the B-2 Service Business District under the Village's Zoning Ordinance. At the time this lawsuit was filed, the B-2 District included such things as general commercial and retail uses, gas stations, hotels and motels, taverns and cocktail lounges, and offices as permitted uses. Ex. 6. However, Section 8.3B(10) also included "meeting halls" among the permitted uses.

The Subject Property has been used for commercial type purposes for over 40 years. Tr. 64. It was the home for a board-up service. Prior to that, it was the office and truck storage facility for a waste hauling company that did the garbage pick up in the Village. Tr. 64. The Subject Property is squarely in the HCP TIF

[3] The projected development for the area of the Subject Property is shown in **Appendix B**.

District and is envisioned as part of the commercial/mixed use "transit oriented" redevelopment area. Tr. 62.

The Church's Application and Village Board Denial

On August 8, 2007, the 30-60 member Church (Tr. 6; 22) signed a purchase contract to acquire the Subject Property. Ex. 8. The Church knew that the Subject Property was not zoned to allow a church and that zoning relief was required. Accordingly, the Church built a zoning contingency into its contract. Tr. 11.

The Church then applied to the Village for zoning. Although it had no obligation to do so, the Church waived the zoning contingency and closed on its acquisition of the Subject Property well before the Church even presented its case for zoning change to the Village. Tr. 25. (There is some testimony of a lack of due diligence by the Church's attorney. Tr. 11.) Following a public hearing the Village Board ultimately denied the request for zoning change.

The Church's Complaint

The Church filed a 5-Count Complaint. R. Doc. 1. Count I alleged that the zoning denial "constitutes a content-based and viewpoint-based restriction on speech" in violation of the First Amendment. Par. 31.

Count II alleged that the Zoning Ordinance violates the First Amendment's free exercise clause by burdening the Church "while permitting operationally similar nonreligious assemblies." Par. 41. Count III alleged an equal protection and due process violation, claiming that the Ordinance discriminated against religious uses and was unconstitutionally vague.

Counts IV and V alleged violations of the Religious Land Use and Institutionalized Persons Act (RLUIPA) 42 U.S.C. § 2000cc, et seq. Count IV alleged that the decision imposed a "substantial burden on the religious exercise of plaintiff" not in furtherance of a compelling government interest. 42 U.S.C. § 2000cc(a). Count V alleged that the decision violated the equal terms provisions of the RLUIPA by treating the Church "on less than equal terms with nonreligious assemblies or institutions." 42 U.S.C. § 2000cc(b).

The Preliminary Injunction Hearing

Pursuant to an expedited schedule, the Court conducted a hearing on the Church's motion for preliminary injunction on March 13, 2008. The Church's pastor was the sole plaintiff's witness. Village Manager Robert Palmer testified on behalf of the Village. Tr. 47-89.

Palmer testified regarding the residential nature of Hazel Crest and that probably over 90% of Hazel Crest is zoned residential in a manner which allows church uses. Tr. 48. The Village has approved a number of church applications in recent years. Tr. 48. The Village has never turned down a church application in any of the residential zoning districts. Tr. 49.

Palmer next testified as to the limited areas in the Village which are zoned B-2. Those areas include the area in the vicinity of 169th and Park. Tr. 50-2.

Palmer next testified as to the Village's limited revenue sources and "very few opportunities" for enhancing the Village tax base in terms of community growth. Hazel Crest is landlocked. Tr. 51-2.

Palmer next described HCP. Tr. 53-5. HCP is a dense part of town with the oldest housing stock. It is "an area that has shown serious decline." Tr. 54. In 2000, the Village Board became concerned with deterioration in HCP and as a result looked at what resources the Village could bring to assist in the redevelopment of the area. The Village created the Tax Increment Financing District. Tr. 54. Palmer identified the various Village exhibits relating to the creation of the TIF District.[4] Tr. 55-60. The Village's redevelopment goal is to have an "infusion into the infrastructure of the area, to assemble land to improve the total appearance of the area, to try to attract business and future development in the area." Tr. 55. Emphasizing the unique asset of the METRA commuter station, the Village's goal for HCP in the vicinity of the Subject Property is to create an atmosphere "that's going to really appeal to commuters, mixed use development, housing, shopping, convenience stores such as cleaners, banks, drugstores, those type of things that commuters readily seek." Tr. 56. Palmer further testified about the Village's plan to expand parking and to expend significant sums in aid of developing this area as a "transit oriented district." Tr. 58.

Under the Village's Comprehensive Plan, the Subject Property is proposed for commercial/mixed use redevelopment. Tr. 62; Ex. 5, internal Ex. H.[5] The Village has committed over a million dollars to the HCP TIF redevelopment. Tr. 63.

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[4] One such exhibit is found on (in black-and-white form) the Church's Appendix, Tab D, and in its color form as our **Appendix C.** The Subject Property is within the TIF as targeted redevelopment area 14B.

[5] The projected mixed-use proposal for the Subject Property is shown on **Appendix C.**

Palmer then opinionated that the proposed use of the Subject Property would be inconsistent with and contrary to the Village's comprehensive economic development plans. Tr. 69. Development in this area for tax-exempt uses such as churches would take away from the tax base and impairs the Village's TIF District.

Because of a statutory restriction, restaurants serving alcohol or pubs could not locate within 100 feet of a church. The Village desires too encourage restaurants and pubs to locate in this area. Tr. 71. A church use, where people are present only on Sunday mornings and Wednesday evenings, cuts against the entire idea of transit-oriented development where the Village is looking for relatively dense mixed-use development near the train tracks. Tr. 70-1.

On cross-examination and in response to questions from the Court, Palmer testified that the Village welcomes churches. The Village is only opposed to locating churches in the HCP TIF District because they are inconsistent with what the Village is trying to achieve. The District Court recognized this point as being "obvious "—"when you reach a certain critical mass of retail you get more retail. If you can't get to the critical mass you don't have it." Tr. 91-2.

Palmer also emphasized that the TIF plan is an effort to enhance the quality of life in the Village by creating a commercial area around the commuter station. The Village is involved in a number of other activities, such as senior citizen lunches, transportation, and the like. But it is simply not appropriate for those types of tax-exempt public service uses to be located in the HCP TIF District.

Following the hearing, the District Court concluded that this case presents primarily an Equal Terms issue. The Court directed briefing. Tr. 97-100.

The Ordinance Amendment

On April 8, 2008, the Village adopted Ordinance No. 07-2008, "An Ordinance Amending the Hazel Crest Zoning Ordinance by Amending the Permitted and Special Uses in the B-2 Zoning District" (the "Amendment").[6] The corporate authorities of the Village found that several of the permitted and special uses were not compatible with the Village's Tax Increment Financing Plan and Comprehensive Plan. Accordingly, Section 8.3 of the Zoning Ordinance was amended to eliminate several of the previously allowable uses. Ex. 6. The permitted uses which were eliminated are art galleries, automobile service stations, funeral parlors, noncommercial gymnasiums, laboratories, newspaper offices, resale stores, signs, and—most importantly for this case—"meeting halls." The permitted uses under the Amendment are all commercial or related mixed uses which one would expect to find in a transit oriented commercial mixed-use area.

The Village brought the Amendment to the attention of the District Court and submitted that the Amendment, and in particular the elimination of "meeting halls" as permitted uses eliminated any basis whatsoever for the Church's Equal Terms claim.

[6] The Ordinance and Village Board proceedings (R. Doc. 28) are attached as **Appendix D**.

The District Court's Decision

The District Court issued its Memorandum Opinion denying the Motion for Preliminary Injunction on July 14, 2008. R. Doc. 47. In summary, the District Court found:

- That plaintiff had shown only a "slight likelihood of success on the merits.
- That plaintiff had no adequate remedy at law.
- That plaintiff would suffer irreparable harm, but did not make a clear showing of such injury.
- That the public interest was "equally balanced between granting and denying the injunction."

Mem. Op. at 27.

The Court then moved to the balance of harms between the Village and plaintiff. Having found that the "irreparable harm the Village would suffer from interference with the goals of the TIF outweighs that of the Church's inability to occupy the premises," Mem. Op. 26-7, and because "the Church has only a slight chance of success on the merits," the balance of harm did not strongly tip in favor of the Church's position. Noting the extraordinary burden a plaintiff makes when moving for a mandatory preliminary injunction, the Court found "that the Church has not met its burden on this element." Mem. Op. at 27. The Motion was denied.

SUMMARY OF THE ARGUMENT

The District Court appropriately denied the Church's Motion for Preliminary Injunction for a number of reasons. First, the Church has no likelihood of success on the merits on either its Free Exercise or its RLUIPA Substantial Burden claim, because the evidence is undisputed that over 90% of the Village of zoned in a manner which would allow religious land uses.

Second, the Church's Equal Terms RLUIPA claim is not viable, particularly in light of the ordinance amendment which eliminated "meeting halls" as allowable land uses in the B-2 zoning district.

The District Court also appropriately weighed the preliminary injunction balancing factors. In particular, the Court correctly recognized that allowing tax-exempt, incompatible land uses in the Village's transit-oriented Hazel Crest Proper TIF District would cause irreparable harm to the Village's carefully thought out, long-term planning goals.

Finally, the District Court correctly concluded that the Church failed to make the extraordinary showing required by a party seeking a mandatory preliminary injunction.

ARGUMENT

I. Standard of Review and Introduction

A. Standard of Review

In reviewing a denial of a motion for preliminary injunction, this Court reviews "the District Court's findings of fact for clear error, its balancing of the factors for a preliminary injunction under the abuse of discretion standard, and its legal conclusions de novo." Linnemeir v. Board of Trustees of Purdue Univ., 260 F.3d 757, 769 (7th Cir. 2001). The Court must determine whether the party seeking the preliminary injunction has demonstrated "(1) it has a reasonable likelihood of success on the merits; (2) no adequate remedy at law exists; (3) it will suffer irreparable harm if it is denied; (4) the irreparable harm the party will suffer without injunctive relief is greater than the harm the opposing party will suffer if the preliminary injunction is granted; and (5) the preliminary injunction will not harm the public interest." St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 625 (7th Cir. 2007).

B. Introduction

The District Court's finding that the Church has only a "slight" likelihood of success on the merits is generous. A review of the record in this case—particularly in light of the Amendment—demonstrates that the Church has no likelihood of success on the merits. For that reason alone, the District Court's decision should be affirmed.

Beyond that, the record demonstrates that the District Court's balancing of the relevant factors was fully supported by the record and was certainly not an abuse of discretion. Given the finding of slight likelihood of success with merits, the Church failed to make the required showing that the balance of relative harms strongly tipped in its favor. Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 387 (7th Cir. 1984).

Finally, this is a case where the plaintiff seeks a mandatory preliminary injunction, one which will alter rather than maintain the status quo. This Court has repeatedly held that "mandatory injunctions are rarely issued and interlocutory mandatory injunctions are even more rarely issued, and neither except upon the clearest equitable grounds." W. A. Mack, Inc. v. General Motors Corp., 260 F.2d 886, 890 (7th Cir. 1958); Graham v. Medical Mutual of Ohio, 130 F.3d 293, 295 (7th Cir. 1997) (collecting cases). Because of the extraordinary nature of a mandatory preliminary injunction, the Church "must meet the more rigorous standard of demonstrating a 'clear' or 'substantial' likelihood of success on the merits." Doninger v. Niehoff, 527 F.3d 41, 47 (2nd Cir. 2008); Mastrovincenzo v. City of New York, 435 F.3d 78, 89 (2nd Cir. 2006) (district court may enter a mandatory preliminary injunction against a government "only if it determines that, in addition to demonstrating irreparable harm, the moving party has shown a 'clear' or 'substantial' likelihood of success on the merits."). As we demonstrate below, the Church's presentation falls far short of carrying this weighty burden.

II. The Church has No Likelihood of Success on Its RLUIPA Claims

Because the District Court focused primarily on the RLUIPA claims, the Village will first address the RLUIPA issues. The Church has no likelihood of success on the merits of either RLUIPA claim. The related constitutional claims should also fall.

A. Because Churches Are Allowable Land Uses in Over 90% of the Village, The Church Has No Likelihood of Success on Its Substantial Burden Claim

The record is undisputed that churches are allowable land uses throughout the vast majority of Hazel Crest. There are many churches throughout Hazel Crest, several of which are close to the Subject Property. The Church knew that churches were not allowable land uses in the B-2 District. The Church took a calculated risk by waiving its zoning contingency and attempting to locate in one of the very few areas of the Village reserved for commercial development, where churches are not allowed.

As a matter of law, the Village's refusal to amend its Zoning Ordinance to allow churches to operate in this small commercial enclave does not "impose a substantial burden on the religious exercise" of the Church, so as to impose potential RLUIPA liability. In the alternative, any such burden is pursuant to "a compelling governmental interest," for purposes of Section (a)(1).

RLUIPA is not intended to operate as "an outright exemption from land-use regulations." Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 762 (2003). This Court's decision in Petra Presbyterian Church v. Village of

Northbrook, 489 F.3d 846 (7th Cir. 2007) demonstrates that the Church has no likelihood of success on the merits of its Substantial Burden claim. As in the present case, the Petra plaintiff was churches which bought a warehouse building in an industrial zone and challenged the refusal of the village to amend allow churches in industrial zoning districts.

This Court held that the ban on churches in industrial zones "cannot in itself constitute a substantial burden on religion because, then, every zoning ordinance that didn't permit churches everywhere would be a prima facie violation of RLUIPA." 489 F.3d at 850-51. The Court then held (at 851) that when "there is plenty of land on which religious organizations can build churches (or, as is common nowadays, convert to churches buildings previously intended for some other use) in a community, the fact that they are not permitted to build everywhere does not create a substantial burden." In order to show that the exclusion of churches from the industrial zone imposed a substantial burden, the Church "would have to show that a paucity of other land available for churches made the exclusion from the industrial zone a substantial burden to it." The church in Petra made no attempt to demonstrate this paucity.

Our facts are almost identical. Like the church in Petra, this Church bought land knowing that it was in one of the very few areas in the Village where churches were not permitted. The vast majority of the Village is zoned to allow churches. The Church put on no evidence that there was a scarcity of land available elsewhere

in the Village for a religious land use. Accordingly, the Church has no likelihood of success on the merits as to the Substantial Burden claim.

Even if this Court were to find a substantial burden, the Village has adequately demonstrated that the restriction is in furtherance of a compelling governmental interest. Unlike the generalized expressions made by the Village of Northbrook in Petra, the record in this case shows that Hazel Crest has made extensive and intensive efforts to reserve this small area of the community as a commercial taxpaying corridor to stem decline and create a strong tax base. Even a substantial burden on religious exercise is justified by the compelling public interest in maintaining a sound tax base. Hernandez v. C.I.R., 490 U.S. 680, 699-700 (1989); City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc., 302 Ill.App.3d 564, 571-2, 236 Ill.Dec. 208 (1st Dist. 1998), rev'd in part on other grounds, 196 Ill.2d 1, 255 Ill.Dec. 434 (2001); Greater Bible Way Temple of Jackson v. City of Jackson, 478 Mich. 373, 403-4, 733 N.W.2d 734 (2007).

Accordingly, the Church has no likelihood of success on the merits of its Substantial Burden RLUIPA claim.

B. In Light of the Amendment's Elimination of "Meeting Halls" and the Like from the B-2 Zoning District, the Church has No Likelihood of Success on Its Equal Terms Claim

RLUIPA Section 2(b)(1) provides that no local 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." An Equal Terms violation is made out "whenever religious land uses are treated

worse than comparable nonreligious ones, whether or not the discrimination imposes a substantial burden on the religious uses." Digrugilliers v. Consolidated City of Indianapolis, 506 F.3d 612, 616 (7th Cir. 2007); Vision Church v. Village of Long Grove, 468 F.3d 975, 1002-3 (7th Cir. 2007). The District Court focused on the Eleventh Circuit analytical approach starting with Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004). Mem. Op. at 15.

Under the Eleventh Circuit's analysis, the starting point of an Equal Terms analysis is definitional; i.e., "we must first evaluate whether an entity qualifies as an 'assembly or institution,' as that term is used in RLUIPA, before considering whether the governmental authority treats a religious assembly or institution differently than a nonreligious assembly or institution." Midrash, 366 F.3d at 1230. Because RLUIPA does not define "assembly" or "institution," the Court invoked regular dictionary definitions. An assembly is a "'company of persons collected together in one place [usually] and usually for some common purpose (as deliberation and legislation, worship, or social entertainment) …" an "institution" is "an established society or corporation: an establishment or foundation esp. of a public character.'" Id.

The Eleventh Circuit expanded upon this analysis in Konikov v. Orange County, Florida, 410 F.3d 1317, 1324-5 (11th Cir. 2005). The threshold question that must be answered in determining an Equal Terms violation "is whether the land use regulation or its enforcement treats religious assemblies and institutions on less than equal terms with nonreligious assemblies and institutions." Konikov

took Midrash a step further by specifically examining the individual allowable uses in the particular zoning district "to determine whether they qualify as 'assemblies' or 'institutions' for purposes of comparison under RLUIPA's equal terms provision." This approach is similar to this Court's Degrugilliers requirement that religious land uses be assessed against "comparable nonreligious ones." Konikov rejected plaintiff's contention that uses such as "model homes" or "home occupations" could be considered as assemblies or institutions; if they could not be so considered, then there is no Equal Terms violation. 410 F.3d at 1326. Even comparing a church to a day-care center was dubious, but the Court did not need to decide that issue. Id.

A straightforward, common sense application of these principles demonstrates that by virtue of the Amendment, the Church has no likelihood of success on the merits of its Equal Terms claim. As the District Court observed (Tr. 98-100), the old B-2 ordinance presented an Equal Terms problem because Section 8.3B(10) of the zoning ordinance allowed "meeting halls" as a matter of right, while prohibiting churches in the B-2 District. Thus, viewing the bare terms of the ordinance before the Amendment, one could argue that because (hypothetically) the Hazel Crest Democratic Club, the Lions Club, Elks Lodge, or similar secular assemblies could operate in B-2 as "meeting halls," while churches could not, this selective exclusion of religious land uses constituted prohibited Equal Terms discrimination.

The Village recognized this problem and eliminated it by adopting what might be called a Petra curative amendment. Petra, at 489 F.3d at 849, and General

Auto Service Station v. City of Chicago, 526 F.3d 991, 1004-5 (7th Cir. 2008) emphatically recognize that nothing in the Constitution "forbids a state that has prevented a use of property by means of an invalid (even an unconstitutional) enactment to continue to prevent that use by means of a valid one. From the proposition that the Village should not have discriminated in the industrial zone in favor of secular membership organizations, it does not follow that when it eliminated the discrimination by banning all membership from the zone, this entitled the victim of the discrimination to claim by way of remedy discrimination in *its* favor." 489 F.3d at 849.

The Amendment has eliminated any Equal Terms problem by making it clear that allowable uses in B-2 are limited to commercial and compatible tax-generating land uses. "Meeting halls" are no longer allowed in B-2. None of the allowable B-2 uses can reasonably be considered as a place where a company of persons gather together in one place for some common purpose.

Contrary to the Church's argument (at 30-31), a hotel or motel cannot reasonably be viewed an "assembly" comparable to a church. People check in the motel, go to their own rooms, sleep, then check out. They have no common purpose or affiliation with the other customers floating in and out of the motel.

The notion that a commercial gym like the East Bank Club, a restaurant, or a tavern, can reasonably be considered as an assembly or institution is—to say the least—overreaching. People go to the gym or to the restaurant by themselves or with a couple of companions. The people in the restaurant or gym are not gathering

together as a unified group for some common purpose. Everybody is engaged in his or her own activity. Restaurants, taverns and health clubs do not "fall within the natural perimeter of 'assembly or institution.'" Midrash, 366 F.3d at 1231; Konikov, 410 F.3d at 1326 (emphasis added).

As a result of the Amendment, none of the allowable uses in the B-2 District constitutes an "assembly" or "institution" for purposes of a RLUIPA Equal Terms claim. Because there are no comparable nonreligious assemblies in the B-2 District, the Church's RLUIPA claim fails (or at least has become moot) under Petra. As a result of the ordinance amendment in Petra, "membership organizations such as community centers, youth centers, fraternal associations, and political clubs" were no longer permitted in the industrial zone. Northbrook's prohibition of these comparable nonreligious uses resulted in the termination of Petra's Equal Terms claim.

Parallel considerations apply here. Because meeting halls are no longer permitted in B-2, the Church has no likelihood of success on its Equal Terms claim under the Eleventh Circuit's approach. If this Court so finds, that disposes of the Equal Terms claim.

There is a split between the Eleventh and Third Circuits in terms of the Equal Terms analysis. Application of the Third Circuit's approach more compellingly underscores the validity of the Village Ordinance and its efforts to preserve economic redevelopment in the HCP TIF District. In Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253 (3rd Cir. 2007), the Third

Circuit (at 268-9) considered the Eleventh Circuit's Equal Terms formulation to be unfairly harsh on municipalities. Lighthouse (at 268) rejected "the conclusion that Congress intended to force local governments to give any and all religious entities a free pass to locate wherever any secular institution or assembly is allowed." Lighthouse concluded "instead, that a religious plaintiff under the Equal Terms Provision must identify a better-treated secular comparator that is similarly situated in regard to the *objectives* of the challenged regulation."

The Lighthouse court then examined the downtown redevelopment goals of the city. They are quite similar to Hazel Crest's plans to redevelop HCP Proper as a focused commercial area. Allowing churches in a downtown entertainment district would interfere with the goals and objectives of the entertainment district. Like Illinois, New Jersey has a statute prohibiting liquor from being sold or liquor licenses being issued to premises that are located within a specified number of feet from a religious institution such as a church. See, 235 ILCS 5/6-11; 510 F.3d at 271-2. Allowing churches to locate at will in the Long Branch downtown district would interfere with the municipal goals of encouraging a downtown area where restaurants and bars are encouraged as part of an economic redevelopment strategy.[7]

The Lighthouse court held (at 270-71) that "churches are not similarly situated to the other allowed assemblies with respect to the aims of the Plan where, by operation of a state statute, churches would fetter Long Branch's ability to allow

[7] The Amendment to B-2 specifically encourages restaurants, taverns, cocktail lounges and live entertainment taverns to locate in the HCP TIF District.

establishments with liquor licenses into the Broadway Corridor. It would be very difficult for Long Branch to create the kind of entertainment area envisaged by the Plan—one full of restaurants, bars, and clubs—if sizeable areas of the Broadway Corridor were not available for the issuance of liquor licenses." The city was entitled to summary judgment on the Equal Terms claim because the church presented no evidence that the redevelopment plan "treats a religious assembly on less than equal terms with a secular assembly that would cause an equivalent negative impact on Long Branch's regulatory goals."

This Court need not decide which approach is preferred. Under either the Eleventh Circuit or the Third Circuit formulation the Church has no likelihood of success on the merits. Because there are no permitted uses in B-2 which would reasonably qualify as "assemblies" or "institutions", there can be no Equal Terms violation under the Eleventh Circuit approach. Because there is no evidence that there is actually a "better treated secular comparator that is similarly situated" to the Church in regard "to the objectives" of the HCP TIF District Redevelopment Plan, there is no viable Equal Terms claim under the Third Circuit's approach.

Although the Third Circuit's approach is arguably more favorable to municipal authority, it is more restrictive than that of the Eleventh Circuit with respect to whether a municipality may overcome a prima facie Equal Terms violation by showing that the classification survives strict scrutiny because it is the least restrictive means of achieving a compelling state interest. The Eleventh Circuit says that such opportunity is available to a municipality. Midrash, 366 F.3d

at 1233. Lighthouse disagrees, saying that if a land use regulation "treats religious assemblies or institutions on less than equal terms with nonreligious assemblies or institutions that are no less harmful to the government objectives in enacting the regulation, that regulation—without more—fails under RLUIPA." 510 F.3d at 269. This Court need not address that issue at this stage of the litigation. The evidence is clear that the Church has no likelihood of success on the merits because there is not a prima facie Equal Terms violation.

III. The Church has No Likelihood of Success on the Merits on its Constitutional Claims

Because the Village's Zoning Ordinance and its decision to deny the Church's proposed amendment do not violate either the Substantial Burden or the Equal Terms provisions of RLUIPA, the Church's constitutional claims likewise have no likelihood of success on the merits. The Equal Terms provision was intended to codify the Free Exercise clause. Petra, 489 F.3d at 849 ("[t]he 'less than equal terms' provision of RLUIPA codifies" the Free Exercise clause).[8] Petra demonstrates that because of the ready availability of land everywhere else in the Village for a church, there is no RLUIPA substantial burden violation. Likewise, the absence of this

[8] The Lighthouse Court disagrees with this equation and requires more: "[W]hen a religious plaintiff makes a free exercise challenge to a zoning regulation, it must explain in what way the inability to locate in the specific area affects its religious exercise." Lighthouse, 510 F.3d at 274, joining the Tenth, Sixth and Fifth Circuits. Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643 (10th Cir. 2006); Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio, 699 F.2d 303 (6th Cir. 1983); Islamic Center of Mississippi, Inc. v. City of Starkville, Mississippi, 840 F.2d 293 (5th Cir. 1988). To the extent this Court concurs with this analysis, it further undermines the validity of the Church's free exercise claim.

substantial burden forecloses a constitutional free exercise claim. Vision Church v. Village of Long Grove, 468 F.3d 975, 999 (7th Cir. 2006).

Vision Church forecloses the Church's other constitutional claims. Because the Zoning Ordinance does not classify on the basis of race, alienage or national origin, the Court applies "only rational basis scrutiny" to the Church's equal protection claim. Id. The distinctions drawn by the Village in setting aside a small area for particularized transit-oriented redevelopment represent "legitimate municipal land planning goals." 468 F.3d at 1001. If a municipality "may chart out a quiet place where yards are wide, people few and motor vehicles restricted," Id., citing Congregation Kol Ami v. Abington Township, 309 F.3d 120, 135 (3rd Cir. 2002), then it may certainly do the opposite and carve out a small zone reserved for intensive tax-generating development. It is rational "to make distinctions between different uses and to exclude some uses within certain zones. Indeed, zoning is by its very design discriminatory, and that, alone, does not render it invalid." Congregation Kol Ami, 309 F.3d at 136. It is rational for Hazel Crest to set aside one small area for commercial redevelopment. Therefore, the equal protection and corollary due process claims fail.

Finally, the First Amendment claim fails. There is no evidence that the Village's zoning decision placed any "substantial pressure" on the Church members to modify their behaviors or violate their beliefs. Vision Church, 468 F.3d at 997. The Church adherents are free to worship as they choose, either elsewhere in Hazel Crest or at their current facility in Chicago Heights.

In summary, the Church has no likelihood of success on the merits. For whatever reason, the Church made a speculative business decision to purchase property in one of the very few areas of Hazel Crest where churches are not allowed. A modicum of due diligence would have informed the Church that the Village has designated the HCP TIF District for redevelopment with commercial and related tax-generating transit-oriented uses. The Amendment has cured any potential Equal Terms problems by eliminating "meeting halls" as allowable uses.

Therefore, because the Church has demonstrated no likelihood of success on the merits on any of its claims, the decision of the District Court should be affirmed on this basis alone, without the necessity for delving into the other preliminary injunction factors.

IV. Church has Failed to Clearly Show any Irreparable Injury

Contrary to the Church's argument (at 17-19), the Church did not clearly demonstrate irreparable injury. The District Court concluded that the Church did not make a clear showing of irreparable harm that outweighed the Village interest. Mem. Op. at 25.

That conclusion of the District Court was neither against the manifest weight of the evidence nor an abuse of discretion. In fact, under a more realistic analysis, the Court is suffering no irreparable injury at all. The record is undisputed that the Church is still operating at its present location in Chicago Heights. The congregation is still worshiping there. A preliminary injunction would effectively be a judicial rezoning and building permit—it would require the Village to process

building construction and renovation plans so the Church could convert the existing industrial building to a church. The construction delay pending the outcome of this case, is not an irreparable injury.

Contrary to the Church's contention (at 17) the District Court did not err in failing to accord "the presumption of irreparable harm that is normally applied in cases involving First Amendment violations." The District Court did "not consider the First Amendment argument" in making its decision. Mem. Op. at 19. The District Court (Mem. Op. 21-22) found that the more expansive rights potentially available to churches under RLUIPA go beyond those available under the free exercise clause. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 766 (inability to "locate on a specific plot of … land" does not implicate free exercise issues).

The Church has not cited any Appellate level authority for the proposition that a potential RLUIPA violation, even if demonstrated at the preliminary injunction level with substantial likelihood of success, constitutes ipso facto irreparable injury under Elrod v. Burns, 427 U.S. 347, 373 (1976). The District Court correctly (Mem. Op. at 20-22) rejected that argument as being inconsistent with this Court's RLUIPA jurisprudence. Even in the First Amendment context, irreparable harm is not presumed in the absence of "a rule or regulation that directly limits speech." Doninger v. Niehoff, 527 F.3d 41, 47 (2nd Cir. 2008); Bronx Household of Faith v. Board of Education of the City of New York, 331 F.3d 342, 349

(2nd Cir. 2003). In the present case, because there was colorable First Amendment Free Speech violation, there is no occasion to presume irreparable injury.

V. The District Court Correctly Recognized the Irreparable Injury to the Village Resulting From the Grant of a Mandatory Preliminary Injunction

The Church devotes very little analysis to the efforts the Village has made to revitalize HCP. Instead, it scoffs at the Village's efforts and tries to diminish them as "purely financial" (Brief at 26).

The District Court (Mem. Op. at 26-7) correctly rejected the Church's attempt to belittle the Village's significant public interest in community revitalization. The District Court was certainly within its discretion to give meaningful weight to the Village's undisputed record of long-term commitment to making this area a community, commercial, and (yes) taxpaying hub. The District was also fully justified in concluding that these efforts would be irreparably injured by allowing non-taxpaying, non-traffic generating entities to locate within the hub.

The Court correctly found that "the record shows that the impact of the Church in the TIF could be more than financial; it could affect the ability of the Village to attract the kinds of business it wants to attract to the 'transit-oriented zoned,' and to create the environment it needs to insure a critical mass of retail in the Hazel Crest Proper District (which is already challenging)." Tr. at 26. The Court correctly found that inconsistent land uses in HCP represent a "significant" potential for "extreme harm to the Village's goals." Tr. 26. The Court correctly found that the "irreparable harm the Village would suffer from interference with

the goals of the TIF outweighs that of the Church's inability to occupy the premises" pending the outcome of the litigation Tr. 27.

The Church fails to offer any argument which would challenge the District Court's corollary conclusion rejecting the Church's attempt to dismiss the Village's efforts because they are "purely financial." The Court properly rejected the Church's argument that the Village's interests are "as minor as the Church suggests…. Insuring that the Village can fulfill its economic development goals [is] in the public interest." Mem. Op. 27. This conclusion is comfortably consistent with a large body of case law demonstrating that municipal efforts to revitalize depressed areas of the community are vitally in the public interest. Kelo v. City of New London, Connecticut, 545 U.S. 469 (2005); Goldstein v. Pataki, 516 F.3d 50 (2nd Cir. 2008) (both recognizing the importance of blight elimination as public purposes).

The Church speaks proudly of its business plan for the Subject Property. The Village is also proud of its business plan for HCP, a plan that has been in effect for almost a decade, long before the Church gambled on purchasing the Subject Property. The Church knew or should have known of the Village's substantial public investment in HCP TIF redevelopment. The Church certainly knew that its proposed use was incompatible with the Village's business plan. In light of this record, the District Court certainly did not err in according appropriate weight to this public interest.

VI. Conclusion—the District Court Correctly Denied the Church's Request for Extraordinary Mandatory Injunctive Relief

For the reasons set forth above, the Village submits that as a result of the Amendment and based on the record before the Court, the Church has no likelihood of success on the merits on any of its constitutional or statutory claims. The Village asks this Court to so find.

In the alternative, the Village asks this Court to affirm the District Court's decision that the Church has failed to carry its extremely high burden in order to demonstrate its entitlement to a mandatory injunction forcing the Village to allow the Church to reconstruct the Subject Property and conduct religious services on that property, contrary to the Zoning Ordinance and the HCP TIF Plan. As the District Court noted (at 17), to the extent this Court finds that the Church has any likelihood of success on its Equal Terms claim (the primary focus of the Church's presentation and the District Court's discussion), ultimate resolution of this lawsuit is "an intensely factual determination" dependent on a record which "is fully developed."

The preliminary injunction hearing was conducted on an emergency basis with no discovery. The parties should be given a fair opportunity to develop a full record. The granting of a mandatory injunction to the Church would in effect decide this case in the Church's favor without the benefit of a full record. "Such an invalidation of the Amended Ordinance, which in the eyes of the Village more accurately reflects the commercial redevelopment goals put in place with the Zoning

Ordinance in 2000, will cause confusion and uncertainty for current and potential property owners in the B-2 District." Mem. Op. at 25. This conclusion was correct.

Accordingly, the decision of the District Court should be affirmed.

Respectfully submitted,

VILLAGE OF HAZEL CREST

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APPENDIX

A. Village of Hazel Crest Land Use Map

B. Projected Development of Subject Property

C. Transit-Oriented Redevelopment Plan

D. Ordinance 07-2008

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

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because:

This brief contains 7,771 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(i).

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Dated: September 22, 2007

_____

Attorney for Defendant-Appellee Hazel Crest

CIRCUIT RULE 31(e) CERTIFICATION

The undersigned, counsel of record for Defendant-Appellee, John B. Murphey, furnishes the following in compliance with Circuit Rule 31(e):

I hereby certify that the computer disk filed concurrently herewith is an accurate copy of Defendant-Appellee's Brief converted to a PDF format. The disk is virus-free and includes the entire contents of the brief from cover to cover with the exception of the appendix materials as those documents are not available for reproduction in digital format. The contents of the disk as provided comply in full with Circuit Rule 31(e).

Dated: September 22, 2008

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PROOF OF SERVICE

The undersigned, counsel for the Defendant-Appellee Village of Crest, hereby certifies under penalty of perjury as true that on September 22, 2008, two copies of the Brief and Appendix, as well as a digital version containing the Brief, were delivered by mail to counsel for Plaintiff-Appellant by placing true and correct copies of same into an envelope correctly addressed, properly posted and depositing same in the U.S. Mail at 30 North LaSalle Street, Chicago, Illinois 60602 on or before the hour of 5:00 p.m. on September 22, 2008, as follows:

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