UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PETRA PRESBYTERIAN CHURCH,	)	
	)	
Plaintiff,	)	No. 03 C 1936
	)	
v.	)	Judge Blanche M. Manning
	)	
VILLAGE OF NORTHBROOK,	)	Magistrate Judge Nan R. Nolan
	)	
Defendant.	)	

THE VILLAGE OF NORTHBROOK'S COMBINED RESPONSE TO PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

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Defendant, Village of Northbrook, ("Village"), by its attorneys, submits this Combined Response Memorandum in opposition to Plaintiff's seven Motions for Summary Judgment. In support, the Village states as follow:

Without leave of the Court, Plaintiff unilaterally chose to serve seven separate Motions for Summary Judgment, with a combined total of 84 pages. These filings were unnecessary, as Plaintiff's Motions are both repetitive and confused. Instead of responding separately to each Motion, the Village files this Combined Response Memorandum.

INTRODUCTION

Plaintiff's seven motions roughly correspond to the three categories of claims identified in the Amended Complaint and discussed at page 8 of the Village's Memorandum in Support of its Motion for Summary Judgment ("Village's Opening Br.").

These categories are: **(1) an attack on the Village's current Zoning Code** (Plaintiff's Motion re: Counts XII and VI); **(2) an attack on the Village's 1988 Zoning Code, coupled with state law "vested rights" and "legal non-conforming use" arguments** (Plaintiff's Motion re: Counts I and VII; Plaintiff's Motion re: Counts II, VII and VIII; Plaintiff's Motion re: Counts III and VII; Plaintiff's Motion re: Counts IV and VII); and **(3) an attack on the Village's alleged "denial" of Plaintiff's 2000/2001 re-zoning application** (Plaintiff's Motion re: Counts IX; Plaintiff's Motion re: Count XI).

Plaintiff, however, confusingly mixes and matches its theories and claims. For example, as set forth in the Second Amended Complaint, Counts XII (federal RLUIPA) and VI (state RFRA) were unequivocally directed toward the Village's **current** Zoning Code. Unlike the other Counts of the Complaint (*see*, *e.g.*, Count I, ¶ 24), these two Counts did not make reference to the "[zoning] code before May 3, 2003." Now, however, in its Motion re: Counts XII and VI,

Plaintiff characterizes these two Counts as challenges to the **1988 Zoning Code**. In addition, Plaintiff's Motion re: Counts XII and VI is peppered with references to Plaintiff's Equal Protection and First Amendment theories, which are not at all the basis for Counts XII and VI. These extraneous references have made Plaintiff's Motions a tangled morass of claims and theories.

As another example, in Count IX of the Second Amended Complaint Plaintiff asserted that it was challenging "the Village's refusal to rezone 3005 MacArthur to allow [Plaintiff] to worship there" and alleged that the "refusal to rezone" is a "refusal to extend an individual exemption to a case of religious hardship" -- whatever that means. Second Amended Complaint, ¶ 61. Now, however, Plaintiff's Motion regarding Count IX is wholly confused as to whether Plaintiff is discussing the current Zoning Code, the 1988 Zoning Code, or the Village's alleged "refusal to rezone" the Property. In light of this confusing brew, the Village will do its best to sort out Plaintiff's claims and theories as they have been presented in the Second Amended Complaint and the Motions.

ARGUMENT

I. Plaintiff's Challenge to the Village's Current Zoning Code.

Based upon the Second Amended Complaint, the Village understood Counts XII and VI as challenges to the Village's **current** Zoning Code. *See*, *e.g.*, Second Amended Complaint, ¶ 79. Therefore, in its Opening Brief, the Village explained why the **current** Zoning Code does not violate the "substantial burden" provision of either RLUIPA or Illinois RFRA. *See* Village's Opening Br., pp. 10-11. Now, however, Plaintiff's Motion re: Counts XII and VI asserts that the **1988 Zoning Code** "substantially burdened" Plaintiff "at the time Petra contracted for [in December 2000] and purchased [in October 2001] the property." *See* Plaintiff's Motion re:

Counts XII and VI, p. 3. These dates are well prior to the Village's enactment of the April 2003 Amendments, which form the basis for the current Zoning Code. Indeed, Plaintiff does not even mention the current Zoning Code until page 13 of its Motion.

Based upon its Motions, it is unclear whether Plaintiff has given up its challenge to the current Zoning Code. However, assuming that Plaintiff is still interested in pressing its claim for injunctive relief based upon alleged flaws in the current Zoning Code, it is wholly irrelevant whether or not the **1988 Zoning Code** imposed a "substantial burden" under RLUIPA or RFRA. *See Petra Presbyterian Church v. Village of Northbrook*, 2003 WL 22048089, *6 (N.D. Ill.) ("When an ordinance is amended, the portion of a lawsuit seeking injunctive relief based upon the old ordinances becomes moot."); *Petra Presbyterian Church v. Village of Northbrook*, 2004 WL 442630, *2 (N.D. Ill.) ("As for Petra's first contention, Judge Nolan was correct in that a claim for injunctive relief based on an ordinance is mooted by the amendment of that ordinance. Judge Nolan thus correctly analyzed Petra's motion for a preliminary injunction under the 2003 Ordinance, not the 1988 Ordinance.").

As Plaintiff's attorneys well know -- because they represented the Appellants in *C.L.U.B.* -- the Seventh Circuit has applied this general rule regarding mootness and injunctive relief specifically to RLUIPA claims. In *Civil Liberties for Urban Believers v. City of Chicago (C.L.U.B.)*, 342 F.3d 752 (7th Cir. 2003), the Seventh Circuit held that RLUIPA allows a municipality to take action (such as amending its zoning code) so as to cure an alleged RLUIPA violation. According to the Seventh Circuit, so long as **amended** code is in compliance with RLUIPA, the RLUIPA claim is **moot** and the plaintiff is entitled to **neither injunctive relief nor damages**. *Id*., at 762. Plaintiff's failure to acknowledge this on-point and controlling authority is simply inexcusable and Plaintiff's discussion of the alleged RLUIPA violations attributable to the

1988 Zoning Code, *see* Plaintiff's Motion re: Counts XII and VI, pp. 3-13, is wholly extraneous and irrelevant.

With respect to the **current** Zoning Code, Plaintiff merely argues that the 2003 Amendments to the Zoning Code "made no effort to lift the substantial burden" imposed by the 1988 Zoning Code. *See* Plaintiff's Motion re: Counts XII and VI, pp. 14. Plaintiff, however, provides no substantive legal discussion whether or not the **current** Zoning Code imposes a "substantial burden." Plaintiffs' arguments regarding the current Zoning Code are, therefore, effectively waived.

Further, as Magistrate Judge Nolan found at the preliminary injunction stage, and as the Village has explained, the current Zoning Code does not impose a "substantial burden" because, *inter alia*, religious assembly organizations can now locate in 16 different zoning districts, which comprise over 70% of the land in the City. *See Petra Presbyterian Church v. Village of Northbrook*, 2003 WL 22048089 at * 11. As Judge Nolan and the Court have recognized, Plaintiff's inability to engage in religious assembly at a specific site in an Industrial district does not impose a "substantial burden" under RLUIPA. *See also* Village's Opening Br., pp. 10-11.

Finally, with respect to Illinois RFRA (Count VI), Plaintiff merely states that it "seeks partial summary judgment under RFRA § 15 on the same basis as RLUIPA." *See* Plaintiff's Motion re: Counts XII and VI, p. 2. Given that dearth of analysis, the Village is entitled to summary judgment for the same reasons that it prevails on Plaintiff's RLUIPA claim.

II. Plaintiff's Challenges to the Village's 1988 Zoning Code.

Four of Plaintiff's remaining Motions are unequivocally directed at the 1988 Zoning Code: (i) Plaintiff's Motion re: Counts I and VII; (ii) Plaintiff's Motion re: Counts II, VII and

VIII; (iii) Plaintiff's Motion re: Counts III and VII; and (iv) Plaintiff's Motion re: Counts IV and VII .

A. Plaintiff's Claims for Injunctive Relief Are Moot.

Each of Plaintiff's four Motions consists of:

(i) allegations that the 1988 Zoning Code violated a constitutional or statutory provision (respectively: the Equal Protection Clause of the Fourteenth Amendment; RLUIPA § 2(b)(1); the Free Exercise Clause of the First Amendment; and RLUIPA § 2(b)(3));

(ii) an allusion to the Illinois doctrine of "vested rights" and/or "legal non-conforming use;" and

(iii) a prayer for injunctive relief that would allow Plaintiff to use the Property for religious assembly purposes.

Significantly, the relief sought in these Motions is purely **injunctive**. In none of the Motions does Plaintiff request money damages which, as the Court and Magistrate Judge Nolan recognized, is the only relief even remotely available when, as here, a plaintiff challenges a municipal ordinance that has been amended.[1] But for reasons already articulated by the Court, by Magistrate Judge Nolan, and by the Seventh Circuit, even if the 1988 Zoning Ordinance ran afoul of either RLUIPA § 2(b) or the U.S. Constitution, Plaintiff would not be entitled to the injunctive relief it seeks.

With respect to the alleged violation of RLUIPA § 2(b), we explained above (in the context of RLUIPA § 2(a)) that the Village was entitled to cure any alleged RLUIPA violation and, so long as the April 2003 Amendments complied with RLUIPA, Plaintiff has no claim. As

[1] As discussed in the Village's Opening Brief, even if Plaintiff had articulated claims for **money damages** based upon the alleged defects in the **1988 Zoning Code**, the Village would, for multiple reasons, be entitled to summary judgment on these claims. Village's Opening Br., pp. 15-23 (discussing statute of limitations, lack of injury-in-fact, and merits defenses).

Plaintiff's Motions do not presently assert that the **current** Zoning Ordinance violates RLUIPA § 2(b), Plaintiff's Motions should be denied.[2]

The same is true with respect to the alleged constitutional defects in 1988 Zoning Ordinance. These alleged deficiencies are irrelevant because the April 2003 Amendments moot all injunctive claims regarding the 1988 Zoning Ordinance. *See Petra Presbyterian Church,* 2003 WL 22048089, * 6.

B. The Illinois Doctrines of "Vested Rights" and "Legal Non-Conforming Use" Do Not Lead To Injunctive Relief.

As it did at the preliminary injunction stage, Plaintiff erroneously asserts that Illinois law -- specifically the doctrines of "vested rights" and "prior non-conforming use" -- can override federal concepts of mootness and can produce an injunctive remedy when federal law provides no such relief. *See*, *e.g.*, Plaintiff's Motion Re: Counts I and VII, pp. 13-15.

Specifically, Plaintiff asserts that if it can prove that the 1988 Zoning Ordinance (prior to the April 2003 Amendments) was unlawful, then it is entitled to injunctive relief under Illinois law. This legal assertion is supported by neither federal nor Illinois law. As the Court previously recognized, it is a theory based upon Plaintiff's willful misreading of Illinois law, *see Petra Presbyterian Church*, 2004 WL 442630 at *3; *Petra Presbyterian Church*, 2003 WL 22048089 at * 13-*15, and Plaintiff has supplied no new case law or analysis to alter this correct conclusion.

In general, Illinois law tracks federal law and provides that injunctive claims based upon a challenge to a predecessor ordinance are mooted once a new, valid, ordinance is enacted. *See*,

[2] With respect to the **current** Zoning Code, any argument premised upon § 2(b) of RLUIPA cannot succeed because, as Magistrate Judge Nolan already noted, under the current Zoning Code religious assembly uses and non-religious assembly uses are treated equally for RLUIPA purposes and religious assembly uses are not "totally excluded" nor "unreasonably limited" from the Village. S*ee Petra Presbyterian Church,* 2003 WL 22048089, * 11-*12. *See also* SOF.

e.g., *Johnson v. DuPage Airport Authority*, 644 N.E.2d 802, 806 (Ill. App. Ct. 1994); *Szczurek v. City of Park Ridge*, 422 N.E.2d 907, 910-11 (Ill. App. Ct. 1981). The doctrines of "vested rights" and "legal non-conforming use" are not exceptions to this general Illinois rule. Rather, these doctrines merely recognize that when use of a property is in **full conformity** with existing land use laws, the exiting use may be allowed to continue (or, in the case of "vested right," may be developed) in accord with the old land use regulations, notwithstanding a change in the zoning code.

1. Vested Rights.

Under Illinois law, a "vested right" is a court-recognized right to zoning approval and/or a building permit, notwithstanding a change in the law (*e.g.*, a re-zoning of the property) which makes the proposed project unacceptable under the new law. *See generally Furniture L.L.C. v. City of Chicago,* 818 N.E.2d 839 (Ill. App. Ct. 2004); *1350 Lake Shore Associates v. Mazur-Berg*, 791 N.E.2d 60 (Ill. App. Ct. 2003).

To obtain a vested right, the proposed project must be in complete conformity with the pre-amendment zoning classification. If the proposed project requires any discretionary approval (including, significantly, a "special permit," "special use permit" or "conditional use permit"), the developer/applicant is not entitled to a vested right. *Northern Trust Co. v. County of Lake*, 818 N.E.2d 389, 397-99 (Ill. App. Ct. 2004) (where conditional approval is required, it is not "probable" that the project will be approved and there can be no vested right). Under the 1988 Zoning Code, Plaintiff was required to obtain **both** a re-zoning and a Special Permit. Under these circumstances, any expenditures made by Plaintiff (including its purchase of the Property) were not in good faith reliance on the probability of zoning approval and cannot secure a vested right to develop the property as a religious assembly use. *Id*., at 398-99.

Ignoring Illinois law, Plaintiff asserts that its purchase of the Property was a substantial expenditure in good faith reliance on the probability that it would receive zoning approval because "federal zoning law made its church a permitted use." Plaintiff's Motion re: Counts II, VII and VIII, p. 5. This unsupported legal assertion is a non-sequitor.

To begin with, for the purpose of the doctrine of "vested rights" state law (indeed, municipal law), not federal law determines whether a proposed use is a permitted use under a particular zoning code. No Illinois case holds otherwise. At the time of the expenditures, October 2001, a religious assembly use was decidedly **not** a permitted use in an I-1 zoning district. "Federal law" cannot change that fact.

Second, to the extent Plaintiff's argument "is that the 1988 Code's prohibition of religious uses in the I-1 district was 'null and void' and that Petra 'was authorized to use its property as a church'" *Petra Presbyterian Church*, 2003 WL 22048089 at * 13, Magistrate Judge Nolan rejected this argument at the preliminary injunction stage, finding that "Petra does not cite a single case in support of this assertion." *Id*., at *13. This remains true today.

As Magistrate Judge Nolan correctly said "the mere fact that Petra filed this lawsuit challenging the [1988] zoning code does not demonstrate a probability of obtaining rezoning or building permits, or Petra's good faith reliance on any such probability. At best, it demonstrates an unresolved question as to permitted uses in the I-1 district as [under the 1988 zoning code] . . . and the vested rights doctrine does not apply where there is an unresolved question over what may be built under the land-use regulations." *Id*., at *14. This Court agreed, rejecting Plaintiff's objections to the Report and Recommendation. *Petra Presbyterian Church*, 2004 WL 442630 at *3.

2. Legal Non-Conforming Use.

Likewise, Plaintiff's arguments regarding its right to injunctive relief as a legal non-conforming use, *see*, *e.g.*, Plaintiff's Motion re: Counts II, VII and VIII, p. 6, add nothing to arguments that were made and rejected at the preliminary injunction stage. *See Petra Presbyterian Church*, 2004 WL 442630 at *4 ("For the exact same reasons, this court finds that Petra also failed to show that it established a nonconforming legal use of the property before the 2003 Ordinance was passed."). Plaintiff does not even bother to cite a case in the "legal non-conforming use" section of its Motions.

As the Court correctly observed, "a use that was not lawful at its inception does not constitute a legal nonconforming use and therefore cannot be protected from elimination for violation of present zoning ordinances." Id., *4 (citing *City of Marengo v. Pollack*, 782 N.E.2d 913, 917 (Ill. App. Ct. 2002)). *See also Wright v. County of DuPage*, 736 N.E.2d 650, 659 (Ill. App. Ct. 2000).

Of course, Plaintiff was never lawfully entitled to operate a religious assembly use at the Property -- it lacked approval under both the Zoning Code and the Building Code. Plaintiff may have had an unstated "belief" that the 1988 Zoning Code was legally flawed (although this notion is belied by Plaintiff's actions, *i.e.*, applying for a re-zoning and Special Permit in 2000, and abiding by the Zoning Code's prohibition on religious assembly until May 4, 2003), but Plaintiff's decision to hold worship services in violation of these Codes does not, by any means, make it a "lawful" use. Indeed, the State Court injunction demonstrates that Plaintiff's expansion of its use, from office to assembly, in May 2003 was decidedly unlawful. *See* Agreed SOF, ¶¶ 94, 97-99.

In sum Plaintiff's Motions contain nothing new on the topics of "vested rights" and "legal non-conforming use" (indeed, Plaintiff studiously avoids any discussion of the Court's preliminary injunction rulings), and the outcome of the Village's present summary judgment motion should be the same as it was at the preliminary injunction stage.

III. Plaintiff's Challenge to the Village's Action on Plaintiff's 2000/2001 Application.

A. Plaintiff's Motion Re: Count IX

As discussed above in the Introduction, Plaintiff's Motion re: Count IX is a jumble of allegations and theories brought under the umbrella of the Free Exercise Clause. Plaintiff argues that *something* -- the 1988 Zoning Code, the Village's 2001 action on Plaintiff's application, and/or the current Zoning Code -- violates the Free Exercise Clause, but is never clear as to which municipal act it challenges.

First, for reasons in Section II above, any **facial attack on 1988 Zoning Code** has been made moot by the April 2003 Amendments. So if Plaintiff's argument is that:

> [A]t the time **Petra first contracted for the property**, religious organizations were not permitted as a matter of right in any of Northbrook's 24 zones. Northbrook's zoning code allowed religious organizations only by special permit in the IB zone [and] . . . Rezoning by amendment of the map is determined by the Board of Trustees in their complete discretion with no standards to follow. (emphasis added)

see Plaintiff's Motion re: Count IX, p. 5, that claim moot. It is also time barred because Plaintiff knew about the essential elements and requirements of the 1988 Zoning Code -- including the need for a re-zoning to IB -- when it contracted to purchase the Property in December 2000, but it did not file suit until March 2003. *See* Village's Opening Br., pp. 15-18.

Second, Plaintiff cannot challenge the Village's **alleged failure to approve Plaintiff's 2000/2001 re-zoning and Special Permit application** because Plaintiff withdrew its application before the Village formally acted upon it. General principles of ripeness prevent the Court from

issuing an advisory opinion on municipal action that never took place. *See* Village's Opening Brief, pp. 12-13.

Third, to the extent Plaintiff now asserts that Count IX contains a claim that the **current Zoning Ordinance** violates the Free Exercise Clause (a claim not fairly identified in Plaintiff's Second Amended Complaint), this argument was correctly rejected at the preliminary injunction stage, *see Petra Presbyterian Church*, 2003 WL 22048089 at * 9-*10, and Plaintiff has provided no new case law or arguments that should cause the Court to alter its decision.

On this point, Plaintiff cites the U.S. Supreme Court cases of *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), and *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 449 U.S. 872 (1990), for the proposition that is burdened by the Village's use of a "system individualized exemptions" and, therefore, strict scrutiny of the Village's ordinance is required. This argument was soundly rejected by the Seventh Circuit in *C.L.U.B.,* where the Seventh Circuit held the mere use of a "system individualized exemptions," including a zoning code that allows for re-zonings and Special Use Permits, did not trigger strict scrutiny. *Id*., 342 F.3d at 764. Strict scrutiny would only apply if the use of the system was shown to be **unavailable to religious applicants** or **discriminatory in practice**. *Id*.

Under the current Zoning Ordinance, Religious Organizations are by no means excluded from the Village's "system of individualized review." Religious Organizations and Membership Organizations alike can obtain re-zoning and/or a Special Permit to operate in certain districts. Finally, Plaintiff has no offered proof that the Village's system has been applied in a discriminatory manner. Indeed, with respect to the re-zoning and Special Permit system

employed by the Village from 1998 to 2003, the opposite is true – Religious Organizations were extremely successful in obtaining zoning approval.[3]

As no heightened scrutiny is required and the Village's system of zoning classification system easily passes the rational basis test, *see* Agreed SOF ¶ 118 and Village's SOF ¶ 18, the Village, not Plaintiff, is entitled to judgment on Plaintiff's Free Exercise claim. *See, e.g., C.L.U.B.*, 342 F.3d at 766-67 (City of Chicago's zoning scheme, which is similar to the Village's, was found to be supported by a rational basis).

B. Plaintiff's Motion Re: Count XI

1. Plaintiffs Failed to Exhaust its Remedies.

In the Second Amended Compliant, Count XI was presented as a claim regarding the Village's alleged "refusal to rezone" the Property. *See* Second Amended Complaint, ¶ 77 (incorporating ¶ 67 from Count X). However, as presented in Plaintiff's Motion re: Count XI, that Count XI challenges the current I-1 zoning of the Property and seeks approval of Plaintiff's proposed use. This change in legal theory is significant because Plaintiff cannot challenge the current zoning without first obtaining a formal decision regarding its application for zoning relief, which Plaintiff has never done.

In general, state law zoning challenges are reviewed in the context of a series of factors known as the *LaSalle/Sinclar* factors. *See*, *e.g.*, *1350 Lake Shore Associates v. Casalino*, 816

[3] Of course, Plaintiff withdrew its 2000/2001 zoning application before the Village had a chance to vote upon it, and Plaintiff has never sought zoning relief under the April 2003 Amendments. As Plaintiff itself never completed the individualized review process, it cannot bring an "as applied" challenge based upon its own experiences. However, even if the Village would have denied Plaintiff zoning relief, a single denial would not demonstrate that the Village employed a **system** that discriminates against Religious Organization in favor of secular assembly uses. A single rejection, if rationally based, does not make for a discriminatory system. *Cf. Rector, Wardens and Members of the Vestry of St. Bartholomew's Church v. City of New York,* 914 F.2d 348, 354-55 (2nd Dist. 1990) (facts demonstrated that religious institutions were more likely than other institutions to be landmarked, but New York City's historic preservation ordinance employed neutral criteria, and the landmarking of churches was a reflection on their historic importance, "not evidence of an intent to discriminate against, or impinge on, religious belief in the designation of landmark sites.").

N.E.2d 675, 684 (Ill. App. Ct. 2004); *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F.Supp.2d 961, 994 (N.D. Ill. 2003); *Laramore v. Illinois Sports Facilities Authority*, 1996 WL 153672 (N.D. Ill. April 1, 1996) (Andersen, J.)

As discussed below, the Village prevails when these factors are applied to the I-1 zoning classification. However, Plaintiff's state law claim fails for another reason: under Illinois law, a property owner cannot bring a zoning challenge until it has exhausted all local remedies. *See generally Northwestern University v. City of Evanston,* 383 N.E.2d 964 (Ill. 1978); *Bright v. City of Evanston*, 139 N.E.2d 270 (Ill. 1957). Specifically, before a property owner can challenge a zoning classification that prohibits development (here, the I-1 Industrial classification), it must seek (and be denied) re-zoning to a classification that would allow the use in question. *See Brodner v. City of Elgin*, 420 N.E.2d 1176, 1178-79 (Ill. App. Ct. 1981) (applying the *Bright* rule, landowners whose property was re-zoned to "Office" as part of an area-wide re-zoning were required to seek an individualized re-zoning of their particular parcels before challenging the "Office" classification). Because Plaintiff never followed through on its 2000/2001 application and never sought any zoning relief under the April 2003 Amendments, it has not exhausted its remedies and its state law claims in Count XI should be denied.

2. The Village Prevails Under the LaSalle/Sinclair Factors.

Even if Plaintiff's failure to exhaust requirement is disregarded, the Village still prevails. Under Illinois law, to succeed on a zoning challenge, the land owner "must show, by clear and convincing evidence, that the application of the ordinance is arbitrary and unreasonable, and bears no substantial relation to public health, safety, or welfare." *1350 Lake Shore Associates,* 816 N.E.2d at 685.

The *LaSalle/Sinclair* factors are used to help evaluate the reasonableness of the zoning classification. Under the first *LaSalle/Sinclair* factor, the relevant question is whether the zoning of the property in question is consistent with "the existing uses and zoning of nearby property." *1350 Lake Shore Associates*, 816 N.E.2d at 684; *Vineyard Christian*, 250 F.Supp.2d at 994-95. This factor is considered "of paramount importance." *1350 Lake Shore Associates,* 816 N.E.2d at 685.

Here, the **zoning** of the area surrounding the Property is predominantly I-1 Industrial (indeed the Property is part of the Sky Harbor Industrial Park). *See* Joint Appendix, Exhibit 12 (Village Zoning Map). Further, the **uses** surrounding the Property are predominantly industrial in character. *See* Agreed SOF ¶ 41. These two facts alone demonstrate that Property's I-1 Industrial classification is sound. Further, to the extent there are a few non-conforming uses in Sky Harbor (including a several Membership Organization, which are now legal non-conforming uses), these non-conforming uses are a distinct minority and do not negate the essential character of Sky Harbor. *See 1350 Lake Shore Associates,* 816 N.E.2d at 688; *W.J. Littlejohn v. City of North Chicago*, 631 N.E.2d 358, 364-65 (Ill. App. Ct. 1994) (presence of some non-conforming residential uses in B-2 (General Business) zoning district did not justify invalidation of B-2 zoning and approval of church, which required R-1 zoning). Indeed, the April 2003 Amendment removed these assembly uses as permitted I-1 uses so that the essential industrial character of Sky Harbor would be preserved.

The second *LaSalle/Sinclair* factor asks whether the existing zoning "diminishes property values." This factor is of minimal importance because "in almost all rezoning cases, the subject property would be worth more if the restriction was not imposed." *1350 Lake Shore Associates,*

816 N.E.2d at 688. Here, however, there has been no testimony that the Property would have a *higher* dollar value if it were zoned to allow religious assembly.

The third and fourth *LaSalle/Sinclar* factors are considered together. "These factors require a court to consider the hardship the restriction imposes on an owner in light of the extent to which the existing zoning promotes general health, safety and welfare." *1350 Lake Shore Associates,* 816 N.E.2d at 689. However, all zoning decisions entail a balancing of interests and it is not the Court's job to "act as a super-legislator to weigh for itself the benefits and burdens associated" with a particular planning or zoning decision. *Laramore*, 1996 WL 153672 at * 23.

The alleged hardship to Plaintiff is its inability to use the Property for assembly purposes. However, Plaintiff's alleged hardship is discounted where, as here, it purchased the Property knowing that the Property was not zoned for Plaintiff's intended use. Village's SOF, ¶ 4. *See City of North Chicago*, 631 N.E.2d at 365 ("a party challenging the validity of a zoning ordinance cannot be heard to argue that it is suffering an unreasonable hardship where that hardship has been occasioned by the party's expenditure of monies in disregard of an existing ordinance.").

Further, Plaintiff can continue to use the Property for office purposes as well as other functions allowed under the I-1 classification. *See* Agreed SOF ¶ 126. Or, Plaintiff can sell the Property to locate elsewhere in the Village, as many Religious Assembly uses have successfully done. *See* Agreed SOF ¶¶ 24-25.

Against this alleged hardship, there is substantial gain to the public in maintaining the character of the Sky Harbor Industrial Park. First, municipalities unquestionably have an interest in maintaining property for industrial and manufacturing purposes. *See* Agreed SOF ¶ 118 and Village's SOF ¶¶ 17-18. Second, setting aside a specific land area for these industrial uses

(which are often not allowed or welcome in any other areas of the municipality) is sound planning policy. *Id*. Keeping non-industrial uses out of these industrial sanctuaries is also sound policy because it reduces potential land use conflicts (including injuries to or complaints by the non-industrial user) that may injure non-industrial users and/or drive away industrial users. *Id*. *See also* Village's SOF, ¶ 3.

The fifth *LaSalle/Sinclair* factor asks whether the property is suitable as currently zoned. *1350 Lake Shore Associates,* 816 N.E.2d at 691-92. It is. The Property had long been used as a warehouse/office before it was purchased by Plaintiff and there is no evidence that it cannot continue to be used consistent with the I-1 classification. The sixth factor asks whether the property is vacant, *i.e.*, whether the current zoning classification is so restrictive so as to render the property useless in any improved form. *Id*. at 692. The Property is improved and useable under the current zoning classification.

The seventh factor asks about the community need for the proposed use. *1350 Lake Shore Associates,* 816 N.E.2d at 692. Obviously, Plaintiff believes there is a need for a church of its particular denomination, but Plaintiff's own expert has recognized that Korean-Americans in the northern suburbs have multiple worship options as a result of competition among Korean churches. *See* Agreed SOF, ¶ 145. This is not a situation where an imperative use, *e.g.*, a hospital or school in an underserved area, has been excluded.

The last factor to be considered is "the care with which the community has undertaken to plan its land use development." *1350 Lake Shore Associates,* 816 N.E.2d at 693. This care need not be manifested in a comprehensive plan. Rather, this factor asks whether the municipality has given careful thought and consideration to the zoning provision being challenged. *Id*. Here, the facts demonstrate that the Village, including its Director of Community Development (Thomas

Poupard), its Plan Commission, and its Village Board, all gave careful and serious consideration to the April 2003 Amendment and that the decision to exclude all assembly uses from the I-1 Industrial zoning district was well thought out and based upon sound planning principles. *See* Agreed SOF ¶¶ 111, 114-18 and Village's SOF, ¶¶ 2, 17-18.

"Where it appears, from all the facts, that room exists for a difference of opinion concerning the reasonableness of a zoning classification, the legislative judgment must be conclusive." *Laramore*, 1996 WL 153672 at * 22 (citations omitted). Here, **all** of the *LaSalle/Sinclair* factors demonstrate the propriety of current I-1 zoning. The Village's judgment must be respected, and the Village, not Plaintiff, is entitled to judgment on Count XI.

CONCLUSION

The Court should deny each of Plaintiff's seven Motions for Summary Judgment and enter summary judgment in favor of the Village.

Dated: October 24, 2005

Respectfully submitted,

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