UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 10-24549-Civ-King/Bandstra

TEMPLE B'NAI ZION, INC.,
Plaintiff,

vs.

CITY OF SUNNY ISLES BEACH, FLORIDA,
and NORMAN S. EDELCUP, individually,
Defendants.
_____/

DEFENDANTS' MOTION TO DISMISS COMPLAINT

Defendants, the City of Sunny Isles Beach and the City's Mayor Norman Edelcup, hereby move to dismiss the Complaint against them under Rules 12(b)(1), 12(b)(6) and 12(b)(7), Fed. R.Civ.P. According to Plaintiff's topsy-turvy allegations, Defendants are hostile toward the Temple because of their desire to preserve it. Meanwhile, Plaintiff, which twice has attempted to **demolish** the beloved landmark, objects to the City's decision to preserve certain key aspects of the Temple's exterior and have filed this lawsuit as a result. For present purposes, the issue is not the merits of the dispute regarding the historical preservation of a Temple in Sunny Isles Beach, but whether Plaintiff has met the necessary procedural and pleading prerequisites to even allow the litigation of the dispute to proceed. Because Plaintiff has not done so, the Complaint should be dismissed. Moreover, the claims against Mayor Edelcup should be dismissed because the Mayor is entitled to absolute immunity and qualified immunity.

I. The Complaint

The ten-count Complaint ("Complaint") is brought on behalf of Temple B'Nai Zion, a corporation which is allegedly the fee owner of a property originally bought for a Lutheran church in 1957 (Complaint ¶35). The house of worship has been used as a Jewish synagogue since 1977 (*id.* ¶14). Plaintiff has, in fact, leased the synagogue to a separate congregation, Beit

Rambaum, under a written lease, the terms of which are not stated in the Complaint (*id.* ¶77).[1] There is no allegation that this congregation, the occupant and actual user of the house of worship, is unhappy with the City's historic designation, nor that the designation in any way interferes with the ongoing use of the property for worship and other activities.

Following the recommendation of an independent historic designation expert (*id.* ¶¶84-85), the decision of the City's independent Historic Preservation Board after a public hearing on June 22, 2010 (*id.* ¶¶101-105), and after a second public hearing before the Commission on September 2, 2010 (*id.* ¶106), the City Commission by a four to one vote designated the main sanctuary, portico and tower of Temple B'Nai Zion as a historic site under the City's historic preservation ordinance (*id.* ¶119 and Ex. B). The designation excluded two buildings on the site from historic designation (Complaint ¶93 and Ex. A), including a social hall, thus applying only to half of the Temple property (*id.*). Mindful of Plaintiff's stated desire to expand, the City Commission in the historic designation resolution expressly invited the filing of expansion plans and noted that "the City Commission will not object to expansion plans that maintain the structural integrity of the historic items" (Complaint ¶121). In its Complaint, Plaintiff does not allege that the requirements of the City's historic landmark ordinance, which were found to be present by the Historic Preservation Board, were not met (*id.* ¶203).

Following the City Commission's rejection of its appeal of the historic designation, Plaintiff did not pursue its available Florida law remedy of challenging the designation under the certiorari procedure, nor has it filed any expansion plans with the City either prior to or subsequent to the historic designation (*id.* ¶¶121-22). Alleging various types of personal and malicious motives, and claiming that the City's historic designation "inhibits" the redevelopment

[1] Those terms are of record per a Notice of Filing (DE 11) filed herewith, and addressed below.

of the property, and "decreases its market value," thereby reducing the potential profit the Plaintiff corporation might reap from sale of the land (Complaint ¶125), Plaintiff now seeks to invalidate the historic designation and to recover nominal, compensatory and punitive damages and attorney's fees from the City and from Mayor Edelcup, individually.

II. Facts Not Alleged in Complaint that May Be Considered by the Court

Since this motion raises issues under Rule 12(b)(1) and 12(b)(7), the Court is not limited to the allegations of the Complaint. *Elend v. Basham,* 471 F.3d 1199, 1208 (11th Cir. 2006). Further, even on a 12(b)(6) motion to dismiss, the Court may properly consider central and undisputed items referenced in (but not attached to) the Complaint when provided by a defendant. *Day v. Taylor,* 400 F.3d 1272, 1276 (11th Cir. 2005). In this case, Defendants rely on two items, both included in a separate Notice of Filing (DE 11). The first is a transcript of the September 2, 2010 hearing before the City Commission rejecting the appeal by Plaintiff of the Historic Board's designation of parts of the Temple as historic, which is selectively quoted in pages 37 through 45 of the Complaint. This transcript contains ample neutral basis for the City Commission's decision in expert and other testimony. It also demonstrates strong community support for the designation by the vast majority of public speakers at the public hearing (most of whom were Jewish). Moreover, the transcript establishes, contrary to the Complaint's allegations, that the Temple was already properly oriented to allow for ongoing orthodox worship (DE 11 at 83, 95, 133), and contains record evidence that expansion plans had never been submitted by the Temple to the City as of the hearing date (*id.* at 102, 110-111, 168).

The second item included in the Notice of Filing is a lease (sublease) for the Temple property to the Harambam congregation, (referenced in Complaint ¶77). This sublease, although not provided to the City during the process, was dated December 9, 2009, prior to both public

hearings on historic designation. Plaintiff has not included the sublease as an attachment to the Complaint filed with this Court. The sublease has many provisions relevant to this dispute, and which call into question, among other things, the standing of the nominal plaintiff in this action. While Plaintiff alleges in paragraph 14 of the Complaint that it is the "fee simple owner" that "operates" a house of worship in the City of Sunny Isles Beach (Complaint ¶¶1-6), the sublease presents a very different picture. Plaintiff is neither the Landlord nor Tenant for the Temple property under the sublease. Instead, the sublease is between Mishkan Shlomo, a Florida corporation with a New York address, and Beit Rambam, Inc., representing the Harambam congregation, the actual user of the property.

The sublease gives the Tenant, Beit Rambam, use of the synagogue and social hall (excluding two small rooms) for five years, renewable for an additional ten years at the Tenant's sole option. The sublease expressly requires that the premises shall operate by the Harambam congregation "as a Jewish orthodox synagogue in strict accordance with Sephardic orthodox Jewish customs" (Sublease ¶37(A)), in sharp contradiction to the allegations of the Complaint that it cannot be so operated. The sublease goes farther, even requiring that the exterior of the Temple be "maintained in the same condition order and repair" as when leased (*id.* ¶12), while providing that the Tenant (not the Landlord) was required to pay for certain interior renovations scheduled for completion by mid-2010 (*id.* ¶¶24, 37C). As argued below, the sublease casts grave doubt on Plaintiff's ability to pursue this action, certainly in the absence of the real operator of the Temple, Beit Rambam, which has agreed in writing to use the Temple building "AS IS" (*id.* ¶12) for the next four to fourteen years.

III. SUMMARY OF WHY THE COMPLAINT MUST BE DISMISSED

For many reasons, the pending Complaint must be dismissed:

A. Ripeness, Exhaustion and Standing

- The Plaintiff's claims against the City are not ripe as no application for expansion has been made to the City and thus no "final decision" as to the property has yet been made. As was addressed in the public hearing before the City Commission (DE 11, Transcript at 36-37), under the ordinance (Exhibit A hereto), the City's Historic Preservation Board has discretion to allow changes to the Temple exterior based on application by the owner. Further, the City in its designation order itself (Complaint ¶121) and at the public hearing (DE 11, Transcript at 168) has invited a request harmonizing the preservation of precious historical elements with any desire to expand. Plaintiff's argument that it might be a "problem" to do so (Complaint ¶122) is rank speculation at this point, as the Temple has not even made the effort. Further, the sublease with the Harambam congregation on its face is inconsistent with any change to the Temple exterior, a fact which adds a further element of speculation to Plaintiff's claims of a desired "expansion" in this case. Plaintiff has not explained how it can justifiably demolish a structure which has been leased to a third party. In any case, the law is clear that this case may not proceed, at a minimum, until after Plaintiff has exhausted the City's process for submitting its alleged expansion plans to the City for approval.

- Plaintiff, which did not exhaust its state law remedies by making the certiorari challenge allowed under Florida law as of right, cannot raise its state claims in this Court; all claims which Plaintiff could have brought, but did not bring, in state certiorari proceedings, are waived and are not cognizable before this Court under res judicata and exhaustion principles. Further, since Plaintiff raised its federal statutory claims as a defense to designation before the City Commission (DE 1, Transcript at 97-100). and did not pursue those issues in certiorari proceedings, it is precluded from doing so now.

- Plaintiff lacks standing to raise its Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") claims as it is not a "religious institution" but a landlord, and the actual congregation with a lease covering the Temple property, Beit Rambaum, Inc., has not joined this lawsuit, and is not alleged to be harmed by the historic designation.

B. Substantive Issues Requiring Dismissal

- Plaintiff's federal statutory claims under RIULPA (Counts 1 through 4) fail as the preservation of historic elements in an existing use is not a "substantial burden," or "intentional discrimination" against a religious use, nor is there any allegation that the City has treated a religious institution on "less than equal terms" than it has treated similarly situated private assemblies.

- Plaintiff's federal constitutional claims (Counts 5 through 7) fail, given the weakness of the allegations, the readily apparent legitimate basis for the City's actions, and the abundance of authority that buildings used for religious purposes are subject to the same land use rules and regulations as any other buildings.

- Plaintiff's parallel state law claims (Counts 8 and 9), and its remarkable contention that the City's historic designation ordinance, so similar to hundreds of others passed and upheld throughout the country, is void for vagueness (Count 10), all fail on the merits.

- The Mayor of Sunny Isles Beach, Norman Edelcup, is absolutely immune from suit under the claims brought (counts 5, 6, and 7) and, should the Court need to reach it, qualifiedly immune as well.

Each of these legal bases is now addressed in more detail.

IV. THE COMPLAINT MUST BE DISMISSED FOR LACK OF RIPENESS

A federal claim relating to a local land use decision is not, under Article III and prudential standing requirements, ripe for review until the agency charged with implementing the regulation "has arrived at a *final*, definitive position regarding how it will apply the regulation[] at issue to the particular land in question." *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172, 191(1985) (taking context). A dispute is not "ripe" and creates no subject matter jurisdiction for the federal courts unless "the claim is sufficiently mature and the issues sufficiently defined and concrete to permit effective decision making by the court." *Georgia Advocacy Office Inc. v. Camp,* 172 F.3d 1294, 1298 (11th Cir. 1999)(dismissing claim as unripe). The "final decision" ripeness requirement as applied to land use decisions applies to all federal challenges to local land use decisions, whatever the basis. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1224-25 (11th Cir. 2004)(no constitutional challenge to Town's special permit procedure could be entertained until plaintiff applied for special permit and was rejected); *Konikov v. Orange County, Fla.*, 410 F.3d 1317, 1322 (11th Cir. 2005)(as-applied zoning challenge under RLUIPA was ripe because County had "finally applied" the challenged ordinance "to the property at issue"[2]), *citing Eide v. Sarasota County,* 908 F.2d 716, 725 (11th Cir. 1990).

This "final decision" rule prevents litigation of this case with particular force, where the City has all but pleaded with Plaintiff to submit plans for the "expansion" it claims to want so much. In this case, Plaintiff has not submitted any expansion plans, even though it admits in its own allegations that the City, in the very historic designation resolution at issue, Complaint

[2] In the *Konikov* case, the zoning ordinance challenged had been finally applied to the property in question, a fine had been levied against the plaintiff for violation of the challenged zoning ordinance, 410 F.3d at 1322, and there was no issue of further remedies or processes which could be pursued with Orange County which might have changed that result.

Exhibit B, "invit[ed] the Temple to submit plans for expansion that are consistent with the designation of the Temple as a historic site" (Complaint ¶121). It is undisputed that even this all-but-engraved invitation has not inspired Plaintiff to submit any expansion plans to the City (*id.*). The City thus has never received nor considered land use plans from Plaintiff addressing the historic designation[3] nor rendered any other "final decision" as to what Plaintiff alleges is the key issue, the City's supposed thwarting of its expansion plans. These facts, of course, fall far short of what is required by ripeness jurisprudence.

The City believes that there may be a very good factual reason why Plaintiff has not applied for expansion; by contract a separate congregation has the right to use the property, as it is now, for the next decade. While the record does not detail the position of the Tenant congregation on potential expansion of the Temple, the uncertainties in that regard are further reasons that this Court cannot exercise jurisdiction over this case until expansion plans have been prepared *with the agreement of all legally appropriate parties* (including both Landlord and Tenant) and "finally" addressed by the City. If the Tenant has the right to veto any change in the Temple exterior and chooses to exercise it – one plausible scenario – Plaintiff's efforts to litigate this case would not even amount to an Article III "case or controversy." E.g., *Bowen v. First Family Financial Services Inc*, 233 F.3d 1331, 1349 (11th Cir. 2000) (no standing under Article III to litigate "hypothetical" or "conjectural" injuries).

Plaintiff, without even addressing the issue of the Tenant congregation's rights, attempts to skirt the ripeness issue by alleging"[t]he main sanctuary cannot be expanded in the manner

[3] The Complaint at paragraph 59 alleges that Plaintiff met with City staff regarding the "Kobi Karp" plans (an allegation that must be accepted as true), but testimony at the September 2 public hearing demonstrated that no plans of any type relating to the Temple's expansion were submitted to the City for consideration (DE 11, Transcript at 102, 110-11). Plaintiff does not allege the contrary.

desired by the Temple without altering the exterior of the main sanctuary, which, under the terms of the Ordinance, is expressly prohibited." (Complaint ¶ 122). The fact is that the "expansion desired by the Temple," if it exists at all, has never been documented and submitted to the City (DE 11, Transcript at 102, 110-11); at this point what even Plaintiff desires, leaving aside the issue of what the Tenant congregation desires, is not known to the City or the Court. In any case, Plaintiff's allegation about what "cannot" be done does nothing to save Plaintiff's claim from dismissal for lack of ripeness. Under the rule of the Eleventh Circuit case of *Midrash Sephardi*, 366 F.3d at 1224-25, holding a challenge to a town's special permit procedure not ripe where procedure had not been invoked by the plaintiff, Plaintiff's prediction of futility absent even one attempt to make the effort must be rejected as "mere speculation about contingent future events." *Id.* at 1224. In this case, only half of Plaintiff's property is subject to historic preservation and a review of the property in question confirms that there are multiple ways to expand the interior of the sanctuary while preserving the precious exterior elements. Plaintiff's speculation as to what the City might do or might not do will not satisfy the ripeness requirement.

Many cases have upheld the application of the ripeness bar to the land use challenges of religious institutions. *See Metropolitan Baptist Church v. D.C. Dep't of Consumer & Reg. Affairs*, 718 A.2d 119, 130 (D.C. App. 1998)(claim as to church's ability to use property not ripe when no final administrative decision had been made); *Roman Catholic Bishop v. City of Springfield*, 2011 WL 31288 at *5 (D. Mass. Jan. 4, 2011) (free exercise challenge not ripe for review where plaintiff failed to file application for exemption from requirements of landmark ordinance); *MacDonald Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 (1986) ("local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other" and

specifically addressing landmark regulations); *Church of St. Paul & St. Andrew v. Barwick*, 496 N.E.2d 183, 190 (N.Y.1986) (claim not ripe because "the effect [of the landmarks law] cannot be determined until plaintiff has sought and the Commission has granted or denied a certificate of appropriateness"); *Congregation Anshei Roosevelt v. Planning & Zoning Bd. of Borough of Roosevelt*, 338 Fed. Appx. 214, 218-19 (3d Cir. 2009) (RLUIPA claim not ripe where plaintiff failed to file application for a variance and so "the Board has not issued a definitive position as to the extent [plaintiff] can operate on the synagogue property"); *Grace Community Church v. Lenox*, 544 F.3d 609, 616 (6th Cir. 2008) (RLUIPA claim not ripe where church failed to complete the factual record, explain its position to the commission, or appeal to the board); *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 350 (2d Cir. 2005) (RLUIPA claim not ripe where plaintiff failed to file for a variance with Zoning Board of Appeals); *Taylor Investments, Ltd. v. Upper Darby Twp.*, 983 F.2d 1285 (3d Cir.1993) (RLUIPA claim not ripe where plaintiffs' use permit was revoked and plaintiffs did not appeal revocation or seek a variance before filing suit).[4] All these precedents command dismissal here.

[4] For additional authority in related contexts, *see Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981) (landowner must go beyond submitting a plan for development and actually seek such a variance to ripen his claim). "In most cases, no 'final decision' has been reached until an aggrieved landowner has applied for at least one variance to a contested zoning ordinance." *Reahard v. Lee County*, 30 F.3d 1412, 1415 (11th Cir. 1994). *See also Agins v. City of Tiburon*, 447 U.S. 255 (1980) (case not ripe because no plan to develop was submitted), *abrogated on other grounds, Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1540 (11th Cir. 1991) (dismissing due process takings claims as not ripe where plaintiffs do not allege that they have sought variances or pursued alternative, less ambitious development plans), *cert. denied*, 502 U.S. 810 (1991); *Villas of Lake Jackson, Ltd. v. Leon County*, 796 F. Supp. 1477 (N.D. Fla. 1992) (rejecting claim where plaintiff did not request alternative development consistent with existing zoning); *Restigouche, Inc. v. Town of Jupiter*, 845 F. Supp. 1540 (S.D. Fla. 1993), *aff'd*, 59 F.3d 1208 (11th Cir. 1995) (dismissing claim as not ripe where owner had never applied to use property for anything other than prohibited use).

Plainly, the law requires that this case be dismissed without prejudice until Plaintiff and other interested parties have submitted expansion plans and the City has "finally" addressed that application. Until then, this Court cannot and should not exercise jurisdiction over this case.

V. PLAINTIFF HAS NO STANDING TO BRING THE CLAIMS IT ATTEMPTS TO ASSERT

For many reasons, this case cannot proceed as plead by Plaintiff. First, even under the Complaint (¶77), and much more so when the actual sublease is reviewed, there is no allegation that the actual user of the Temple property is burdened in any way in its use of the Temple for orthodox worship. Plaintiff's claims to the contrary, to put it charitably, are manufactured and highly misleading. Plaintiff necessarily lacks standing to bring claims which properly belong to the actual user of the Temple property. Given its lease, Plaintiff is not "entitled to an adjudication of the particular claims asserted." *Elend v. Basham*, 471 F.3d 1199, 1206 (11th Cir. 2006), *quoting Allen v. Wright*, 468 U.S. 737, 752 (1984). The requirements for standing in a similar context were addressed in *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1304 (11th Cir. 2006), in which standing was found where the complaint alleged injury in fact traceable to the defendant's conduct that could be redressed by a favorable ruling. Here, the Complaint contains no allegations of harm or "injury in fact" to Plaintiff's limited interest in the property, nor to its rental income stream (which purely financial interests could not be the predicate for most of the claims it attempts to bring). Constitutional and prudential standing requirements are simply absent here.

Further, under Rule 19, Fed. R. Civ. P., the tenant as the actual user of the Temple is a necessary party to this dispute, e.g., *Lockhart Mgmt. Inc. v. National Union Fire Ins. Co.*, 183 F.R.D. 455 (D.V.I. 1998)(tenant indispensable party to dispute over use of insurance proceeds to rebuild property). The claims relating to "burdens" on use of the property, seeking injunctive

and declaratory relief as well as damages, cannot proceed in the absence of the actual user of the property. If the actual user of the property chooses not to pursue these claims, they cannot be pursued at all.

VI. THE EFFECT OF PLAINTIFF'S FAILURE TO EXHAUST STATE COURT REMEDIES

Compounding the overwhelming deficiencies concerning ripeness and standing are Plaintiff's failures to invoke necessary state law remedies. As Florida law clearly confirms, Plaintiff had available remedies for review of the City Commission's decision, chose not to use them, and thus cannot use this litigation as a substitute for the proper procedures it chose to disregard.

The City of Sunny Isles Beach ordinance on historical designation, a true copy of which is Exhibit A hereto, provides in Section 171-4 that "appeals from decisions of the City Commission may be made to the courts as provided in the Florida Rules of Appellate Procedure." The reference is to Fla. R. App. P. 9.030(3)(c)(2), and Florida circuit (trial) courts' "certiorari" jurisdiction under Florida law. Certiorari allows review for violations, among other things, of whether there is a violation of the "essential requirements of law" and whether the municipal record contained "substantial evidence" to support the City's conclusion. E.g., *Broward County v. G.B.V. Int'l*, 787 So. 2d 838, 844 (Fla. 2001).

As explicated by the Florida Supreme Court in the leading *G.B.V.* case, the certiorari remedy to challenge quasi-judicial local land use decisions is the functional equivalent of an appeal such as the federal or state administrative procedure act may allow. As the Supreme Court stated in *G.B.V.*, Florida courts of general jurisdiction (circuit courts) have "certiorari" jurisdiction to review "(1) whether procedural due process is afforded, (2) whether the essential requirements of law have been observed, and (3) whether the administrative findings and

judgment are supported by competent substantial evidence." *Id.* at 843. This "**certiorari review is not discretionary but is a matter of right and is akin in many respects to a plenary appeal**." *Id. (*emphasis added). There is no question that Plaintiff, had it so chosen, could have raised any argument on certiorari to the effect that the City's action violated the "essential requirements of law" or that there was no "substantial evidence" supporting the City's finding that the elements of the historic designation ordinance were met. In the hearing, notably, counsel for Plaintiff raised issues of "selective enforcement" and specifically cited RLUIPA as well (DE 11, Transcript at 97-100).

The issues which Plaintiff attempts to raise under federal and state statutes protecting religious institutions were fully cognizable on certiorari. *First Baptist Church of Perrine v. Miami-Dade County,* 768 So. 2d 1114, 1116-18 & n.4 (Fla. 3d DCA 2000)[5](addressing challenge under Religious Freedom Restoration Act and equal protection clause). Florida law further supports that the issue of whether the underlying ordinance was void for vagueness (as raised in Count 10 before this Court) was cognizable in certiorari proceedings. *Chastain v. Civil Service Board,* 327 So. 2d 230, 230-31 (Fla. 4th DCA 1976) (deciding whether "conduct unbecoming" standard was void for vagueness in certiorari filed in public employment discipline case); *Union Trust Co. v. City of St. Petersburg Beach,* 125 So. 2d 582, 586-87 (Fla. 2d DCA 1960) (deciding whether definition in zoning ordinance was unconstitutionally vague). Further, res judicata under Florida law precludes contentions not only that were raised, but that could have been raised in earlier proceedings. *Albrecht v. State*, 444 So. 2d 8, 11-12 (Fla. 1984) (res judicata puts to rest every "justiciable, as well as every actually litigated issue" relating to the

[5] While the merits of the review in *First Baptist* are not pertinent here, the Florida Supreme Court disapproved an aspect of the *First Baptist* analysis in *Warner v. City of Boca Raton,* 887 So.2d 1023, 1036, n.11 (Fla. 2004), discussed below.

same cause of action); *Seminole Entertainment Inc. v. City of Casselberry*, 866 So. 2d 1242 (Fla. 5th DCA 2004) (adult entertainment enterprise precluded by res judicata from raising constitutional arguments raised in administrative proceedings).[6]

Where the certiorari remedy is not employed, the landowner may not use a separate action as a substitute. Where aggrieved parties have tried to do so, they have been barred and their separate lawsuits for declaratory relief dismissed. In *Carol City Utilities Inc. v. Dade County*, 143 So. 2d 828 (Fla. 3d DCA 1962), a party attempted to raise constitutional challenges to administrative action by a lawsuit before the trial court. The suit was dismissed for failure to exhaust the certiorari remedy, with the court finding, "the plaintiff sought to use the declaratory decree statute as a substitute for certiorari in order to review an administrative order. Under such circumstances**, certiorari is the sole remedy available** and there is no question of the exhaustion of administrative remedies." *Id.* at 829 (emphasis added). Similarly, certiorari was held to the only remedy of agency action, and not damages, injunction or declaratory relief actions in other Florida cases. *School Bd. of Leon County v. Mitchell*, 346 So. 2d 562, 565 (Fla. 1st DCA 1977) (sole remedy for challenging agency action in cases where Florida version of APA does not apply was certiorari);[7] *Frix v. Beck*, 104 So. 2d 81 (Fla. 3d DCA 1958) (no separate circuit court action when "appellate review is provided but not pursued" to challenge administrative action). Plaintiff's failure to pursue these remedies bars its attempt to raise the

[6] The Court in *Seminole Entertainment* allowed the plaintiff to pursue one type of claim not raised in the certiorari action under Florida law which allows as an exception to the exhaustion requirement, a *facial constitutional attack* to be raised via declaratory action in Florida circuit court. *Id.* at 1245. This aspect of Florida law does not help Plaintiff here in this federal action, which except for Count 10 is an "as-applied"challenge, where Plaintiff did raise RLUIPA before the City Commission.

[7] The Florida APA was adopted in 1975, providing for those agencies (not including counties and municipalities) within its form for a statutory review replacing common law certiorari.

same issues in the context of this case. While the City acknowledges that exhaustion of state law remedies is not required for Plaintiff's constitutional claims under 42 U.S.C. §1983, Plaintiff's remaining claims must be dismissed for failure to exhaust its state law remedies.

VII. ALL OF PLAINTIFF'S RLUIPA CHALLENGES FAIL

RLUIPA must be interpreted narrowly, so as not to create rights beyond what the federal Constitution otherwise would provide, thus avoiding invalidity under the Establishment Clause. For instance, it cannot be applied so as to either promote or advance any religion nor to give a religious group special privileges not enjoyed by similar secular groups. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating earlier federal legislation which potentially exempted church from requirements of generally applicable historic preservation regulation under local law); *Midrash Sephardi*, 366 F.3d at 1236-42 (narrow interpretation of RLUIPA to avoid invalidity), In general, rights of plaintiffs under RLUIPA go no further than their rights under the Free Exercise Clause, and cannot extend beyond that point.

A. Count 1 Fails to Allege a Prima Facie "Equal Terms" RLUIPA Violation

Plaintiff claims in Count 1 that the City violated the "Equal Terms" provision of RLUIPA which provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution **on less than equal terms** with a nonreligious assembly or institution." 42 U.S.C § 2000cc(b)(1). To prevail on an Equal Terms claim, a plaintiff must satisfy the following 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*, 450 F.3d at 1307-14 (no Equal Terms violation absent allegation of better treatment for similarly situated non-religious landowner). An Equal Terms violation requires that a religious

institution has been treated less favorably than a private club or lodge. *Midrash Sephardi,* 366 F.3d 1214 at 1231.

Given the sublease, there is a serious question whether Plaintiff qualifies as a religious assembly or institution at all: being a landlord[8] for a congregation which is not a party to this case is not enough. Again, Plaintiff lacks standing as well as ripeness.

Further, the merits of any Equal Terms challenge fail. Plaintiff does not allege that the land use regulation treats the religious assembly on less than equal terms with a similarly situated nonreligious assembly or institution, i.e., a private club or lodge. Accord *River of Life Kingdom Ministries v. Village of Hazel Crest,* 611 F.3d 367 (7th Cir. 2010) (Posner, J.) (discussing slight variations in tests among the circuits but finding no "Equal Terms" violation when similar private assemblies are not treated differently by the law in question). Because it has failed to meet its initial burden of proof, Count 1 must be dismissed.

In Count 1, Plaintiff identifies a number of properties that it claims the City has not designated as "historic": the Ocean Palm Motel, the Golden Strand Hotel, the Sahara Motel, the Golden Nugget Motel, the Thunderbird Motel, and the Rascal House delicatessen (Complaint ¶134). None of these commercial properties qualifies as an assembly or institution subject to RLUIPA. In each case, prospective customers arrive according to their own schedule. They do not arrive with the intention of meeting the other customers to pursue some common agenda. Consequently, these institutions fail to qualify as assemblies or institutions subject to RLUIPA. *Konikov,* 410 F.3d at 1317, 1326 (11th Cir. 2005)(model homes are not "assemblies" subject to RLUIPA because "prospective buyers neither convene simultaneously, nor do they share a common purpose"). Count 1 should be dismissed.

[8] Plaintiff is not even the Landlord under the sublease, although it may be that the landlord and Plaintiff are affiliated in some manner that remains unclear of record.

B. Count 2 Fails to Allege a Prima Facie Case of RLUIPA "Discrimination"

In Count 2 of its Complaint, Plaintiff asserts a claim under RLUIPA's general anti-discrimination provision, which states that '[n]o government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." 42 U.S.C § 2000cc(b)(2). Because Plaintiff presents no plausible allegations that the Temple's historic preservation designation – which was made by the Historic Preservation Board – was impelled by anti-religious animus, this claim is meritless and should be dismissed.

Plaintiff claims that the City discriminated against it by selectively enforcing the Historic Designation provisions of the City Code against the Temple (Complaint ¶139). Plaintiff alleges that a number of older buildings, including the St. Mary Magdalen Catholic Church, are more historically significant than the Temple but were not been designated as historic sites because of the property owners' (including the Catholic Church's) objections (*id.* ¶¶34, 66-67, 140). When Plaintiff objected to the proposed designation, the City proceeded "even though it treated the other objecting properties more deferentially" (*id.*¶140). The City's disparate treatment, Plaintiff claims, "resulted from an improper motive, namely, purposeful religious discrimination" (*id.* ¶141).

Federal Rule of Civil Procedure 8(a)(2), requires that a pleading show "that the pleader is entitled to relief;" where, as here, "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief." *Ashcroft v. Iqbal*,129 S. Ct. 1937, 1950 (2009) (citations and quotation marks omitted). Count 2, therefore, must be dismissed.

It is indisputable that the City's historical preservation ordinance (Exhibit A hereto) is facially neutral, and the applicability of the ordinance to the Temple, is not, and cannot be, questioned by Plaintiff. By its nature, historic preservation, while it may add complication or expense to changes to the exterior of a building, is fully compatible with, and honors, the existing and ongoing use of the preserved building, in this case an orthodox synagogue. Further, the initial decision to designate the Temple as a historic site was made by the members of the City's Historic Preservation Board following a June 22, 2010 public hearing (Complaint ¶101). Although the Complaint offers an extended discussion of this public hearing and the events leading up to it (*id.* ¶¶83-105), there is no factual allegation which suggests (even implausibly) that when the Historic Preservation Board voted to protect the Temple as a historic site, it did so out of religious animosity (as opposed to, for example, following the unimpeached recommendation of an independent historic preservation consultant). *See Iqbal*, 129 S. Ct. at 1952 ("Yet respondent's complaint does not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind. His pleadings thus do not meet the standard necessary to comply with Rule 8."). These defects are fatal.

Plaintiff's argument as to the merits of the City's decision to allow the replacement of old motels with ocean view high rises is a moot point in the context of this case; the economic and aesthetic considerations relevant to such an issue have nothing to do with the issues at hand. To be sure, Plaintiff does allege different treatment of a Catholic Church from the Temple; however, even the Complaint shows obvious differences between the two situations. First, many of the reasons for historical preservation cited by the expert consultant Guccione applied only to the Temple (its unique architecture; its switch from Lutheran to Jewish use in accordance with population change in the City; its hosting of a Holocaust survivor reunion) (DE1-5, Consultant

Report at 8-29). Second, even the Complaint acknowledges that it was Plaintiff's own demolition application which triggered the City's actions to prevent the Temple's destruction (Complaint ¶¶82, 83, 88). This application plainly created a need for expedited consideration of preservation which was not present for any other building cited by Plaintiff. There is nothing even remotely anti-religious about efforts to preserve a house of worship when efforts to demolish it are being accelerated.

The most "common sense" and plausible reading of Plaintiff's allegations is that the object of the designation of the temple building was not the infringement or restriction of ongoing religious practices, but instead preservation of a cherished building from imminent destruction. *See Iqbal*, 129 S. Ct. at 1951-52. When one adds the obvious fact, reflected in the Complaint at paragraphs 108, 115 and 116 that all four of the City Commissioners who voted for preservation of the Temple were themselves Jewish, as were most of the public supporters for preservation (DE 11, Trancript at 125-56), the implausibility of the Complaint's allegations is heightened. What Plaintiff claims to be "purposeful religious discrimination" is intra-religious political differences of opinion as to the management of a Temple among its members and former members (Complaint ¶¶16, 58-60, 108-15). The allegation that the City's mayor and three other Jewish commissioners intentionally discriminated against a Jewish Temple in favor of a Catholic Church by honoring the former and not the latter with historical preservation is, to put it kindly, monumentally implausible. "As between the 'obvious alternative explanation . . . and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion." *Iqbal*, 129 S. Ct. at 1951-52. Count 2 should be dismissed.

C. Plaintiff's Other RLUIPA Claims (Counts 3, 4) Also Fail

Plaintiff's two other RLUIPA claims fail as a matter of law. Count 3 alleges a claim under 42 USC § 2000cc(b)(3) that the historic designation "unreasonably limits religious assemblies", while Count 4 alleges a "substantial burden" on religious exercise which is not justified by a compelling purpose under 42 USC § 2000cc(a)(1). Neither states a viable claim.

Count 3 fails on its face because this case presents no issue as to "limitation" on religious assembly whatsoever; to the contrary, the pertinent religious assembly is free to continue exactly as it has for decades in the same location. The "reasonable limitation" subsection applies to zoning actions which unreasonably prevent religious assemblies from all or part of a locality: "From the plain language of the [unreasonable limitation clause of RLUIPA, section 2000cc(b)(3)(B)] it is clear that the purpose of this subsection is not to examine the restrictions placed on individual landowners but to prevent municipalities from broadly limiting where religious entities can locate. Plaintiff simply has not demonstrated any such conduct by Defendant." *Adhi Parasakthi Charitable Society v. Township of West Pikeland,* 721 F. Supp.2d 361, 387 (E.D. Pa. 2010). The same is true here. Further, even if the location-based "unreasonable limitation" provision were pertinent at all, case law on the "unreasonable limitation" element of RLUIPA has established that the provision is not violated by neutral regulations based on "legitimate, nondiscriminatory planning goals." *Vision Church v. Village of Long Grove,* 468 F.3d 975, 990-91(7th Cir. 2006) (zoning code which limited churches to certain areas absent a special use permit did not violate RLUIPA unreasonable limitation provision where ordinance set forth factors for board to apply in granting permit). Count 3 should be dismissed.

As for "substantial burden," as alleged in Count 4, the facts of this case are the polar opposite of what must be alleged to succeed on such a claim: a regulation is a "substantial burden" on religious exercise only if it "completely prevents the individual from engaging in religiously mandated activity, or if the regulation requires participation in an activity prohibited by religion." *Midrash Sephardi*, 366 F.3d at 1227. In this case, neither is alleged: the Temple's location has been used for Jewish worship since 1977 and orthodox Jewish prayer and worship since 2004 (Complaint ¶¶14, 49-51, 77-78). While Plaintiff suggests that the interior renovation request was "denied" by the City (*id.* ¶¶80- 82), these allegations are disproven by the terms of the sublease (DE 11) and, further, are inconsistent with Plaintiff's own allegations that a large and increasing number of observant "orthodox" Jews have worshipped in the Temple since 2004 (Complaint ¶¶14, 49-51, 77-78). There is no issue of any violation of religious beliefs in this case. While the Landlord may not be completely free to demolish the Temple, build a new and larger one without attempting to save preserved exterior historic elements of the existing Temple, or sell its property for as high a price as it might obtain if completely unrestricted, at most these issues are an "inconvenience" rather than a substantial burden. All that is alleged is that on one occasion, the Temple could not accommodate all who attempted to attend in the existing main sanctuary (*id.* ¶26). Plaintiff has not, in fact, shown that it could not be expanded consistently with preservation of the Temple's historic exterior elements.[9] Furthermore, a limitation on expansion of an existing religious building based on facially neutral land use regulations inherently cannot be a "substantial burden" on congregants. E.g., *Vision Church,* 468 F.3d at 998-99 (7th Cir. 2006) (restriction on size of church complex did not represent "substantial burden" under RLUIPA); *Living Water Church of God v. Meridian,* 258 Fed. Appx. 729, 2007

[9] This is indeed the central basis for Defendants' contention that this case should be dismissed as unripe, as is discussed above.

WL 729 (6th Cir. 2007) (denial of church expansion did not represent "substantial burden" under RLUIPA). Count 4, like the other claims under RLUIPA, should be dismissed.

VIII. PLAINTIFF'S CONSTITUTIONAL CLAIMS (COUNTS 5, 6, 7) FAIL AS A MATTER OF LAW

In Counts 5, 6 and 7 of the Complaint, Plaintiff alleges claims under 42 U.S.C. § 1983 for violations of the Equal Protection Clause of the Fourteenth Amendment, the Free Exercise Clause of the First Amendment, and the right to substantive due process embodied in the Fourteenth Amendment, respectively. Each of these claims fails a matter of law.

A. The City's Actions Plainly Satisfy Rational Basis Review

The Equal Protection Clause (addressed in Count 5) requires local governments to treat similarly situated people alike. *See Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1313 (11th Cir. 2006); *E & T Realty v. Strickland*, 830 F.2d 1107, 1112 n.4 (11th Cir. 1987). In its Complaint, Plaintiff alleges an "as-applied" challenge. In the context of an as-applied equal protection challenge based upon the discriminatory application of a facially neutral land use ordinance, like the one presented here, Plaintiff must first establish that it is "similarly situated" to other entities that are being treated differently under the ordinance, and second, that there was no rational reason[10] for the City's differential treatment of the similarly situated entities. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 447-50, 61 (1985).

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[10] As recognized by Plaintiff, and as held by numerous Courts of Appeals, Defendants' actions with regards to the City's Historic Landmarks provisions of its code are subject to rational basis review. *See* Complaint ¶166 ("There was no rational basis for such different treatment.").) *See also Congregation Kol Ami v. Abington Township*, 309 F.3d 120, 133-34 (3d Cir. 2002) ("While the Supreme Court has not yet directly addressed the constitutional incidents of municipal restrictions on use of land by religious institutions, its application of the rational basis test in cases involving other alleged liberty restrictions by municipalities exercising land use authority suggests that the same highly deferential standard of review is applicable here"); *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303 (6th

Here – even assuming, *arguendo*, that Plaintiff has demonstrated that it is similarly situated to other entities that are being treated differently under the Ordinance – Plaintiff's equal protection claim fails as a matter of law. Plaintiff cannot demonstrate that the designation of the Temple as historic is not rationally related to a legitimate government purpose. Rational basis review of government regulation and legislation is a two-step process. The key issue is whether there was any purpose or goal which arguably supported the City's action, i.e., any purpose "which the enacting government body *could* have been pursuing. The *actual* motivations of the enacting governmental body are entirely irrelevant." *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995) (emphasis in original); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-15 (1993).

The City's designation of the Temple as a historic landmark under the Ordinance and through Resolution Nos. 2010-13 and 2010-1597 easily satisfies rational basis review. First, the preservation of significant historical landmarks within the City is clearly a legitimate goal for the City to pursue. *E.g., Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 128-29 (1978) (preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal). Although the Court is not confined to the record in determining whether a rational basis for the designation exists, *see Panama City Medical Diagnostic Ltd. v. Williams*, 13 F.3d 1541, 1546 (11th Cir. 2004), the Report to the Historic Preservation Board, attached as an exhibit to the Complaint, and the Board's decision, are more than sufficient to satisfy rational basis review. "The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various

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Cir. 1983) (upholding zoning ordinance that prohibited construction of church buildings in virtually all residential districts of the city using rational basis review).

groups or persons." *Romer v. Evans*, 517 U.S. 620, 632 (1996). As Defendants' actions plainly satisfy rational basis review on the face of the Complaint, Plaintiff's equal protection claim fails as a matter of law. Plaintiff's procedural default to pursue on certiorari any challenge to the substantial evidence supporting the findings of the Historic Preservation Board or the Commission as to the Temple is further evidence that the requirements of the ordinance were met.

Plaintiff's "class of one" equal protection claim founders unless it can show it was treated differently than another *similarly situated* party and that there is no *rational basis* to support the distinction. *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1202-08 (11th Cir. 2007) (dismissing equal protection complaint when its exhibits confirmed plaintiff was not similarly situated to others). Plaintiff meets neither requirement, and consequently Count 5 should be dismissed.

B. Plaintiff Has No Valid Free Exercise Claim

Count 6 attempts to elevate the conduct which does not even state a claim under RLUIPA in Counts 3 and 4 to constitutional status, purporting to state a claim under the First Amendment prohibition of the government from legislating "an establishment of religion or prohibiting the free exercise thereof." U.S. Const. Amend. I. Not surprisingly, this effort fails.

While the First Amendment provides absolute protection to religious thoughts and beliefs, the free exercise clause does not prohibit Congress and local governments from regulating conduct which may have religious motivation. *Reynolds v. United States*, 98 U.S. 145, 164 (1878). Nor does it prevent the application of neutral regulations to adherents of any particular religion; neutral land use regulations, like other laws, do not raise free exercise concerns, even if they incidentally burden a particular religious practice or belief. *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 879 (1990). Rather, a law that is both

neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge. *Id.* at 877-82. *See also Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993) (holding that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice). In adjudging neutrality, the Supreme Court has instructed courts to look first to the text of the law itself, and determine whether the law discriminates on its face. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* at 533. There is no issue of facial discrimination here[11]. The City acknowledges, however, that a neutral law may be applied in an unconstitutional fashion if its purpose is the infringement or restriction of religious practices. *Id*. In this case, the Ordinance is neutral both facially and "as-applied" to Plaintiff, for reasons addressed above in the discussion of Count 2 (RLUIPA discrimination).

Laws that are neutral and generally applicable need only survive rational basis review, *see Combs v. Homer-Center School Dist.*, 540 F.3d 231, 242-43 (3d Cir. 2008), and are presumed constitutional. *See Deen v. Egleston*, 597 F.3d 1223, 1230-31 (11th Cir. 2010). As discussed above in reference to Plaintiff's failed equal protection claim, the Ordinance and Resolutions satisfy rational basis review. For that reason, Plaintiff free exercise claim fails as well.

[11] The Ordinance applies to any properties which meet one or more of the following criteria: "A. Are associated in a significant way with the life of a person important in the past; or B. Are the site of an historic event with significant effect upon the community, City, state, or nation; or C. Exemplify the historical, cultural, political, economic, or social trends of the community; or D. Have yielded, or are likely to yield, information important in prehistory or history; or E. Contain any subsurface remains of historical or archaeological importance or any unusual ground formations of archaeological significance; or F. Are designated in the City of Sunny Isles Beach Comprehensive Plan/or Florida Master Site File." Ordinance § 171-5.

C. Plaintiff's Substantive Due Process Claim Also Fails

As an initial matter, Plaintiff's claim for violation of its substantive due process rights (Count 7) is improperly brought. The Supreme Court has held that, when a particular Bill of Rights provision has been made applicable to the states by the Fourteenth Amendment, and provides an explicit textual source of constitutional protection against a particular sort of government behavior, that amendment, and not some more generalized notion of substantive due process, must be the guide for analyzing claims. *See Albright v. Oliver*, 510 U.S. 266, 274 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Here, although Plaintiff's claims are meritless, they are still more properly analyzed as First Amendment Free Exercise claims.

Even if the substantive due process claim is considered, it fails as a matter of law. In the Eleventh Circuit, courts are to apply a two-pronged test in determining whether government land use action constitutes a violation of substantive due process: "First, it must be determined whether there has been a deprivation of a federal constitutionally protected interest, and secondly, whether the deprivation, if any, is the result of an abuse of governmental power sufficient to raise an ordinary tort to the statute of a constitutional violation." *Rymer v. Douglas County*, 764 F.2d 796, 801 (11th Cir. 1985). A deprivation of a property interest is of constitutional stature if it is undertaken "'for an improper motive and by means that were pretextual, arbitrary and capricious, and . . . without any rational basis.'" *Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989), *quoting Hearn v. City of Gainesville*, 688 F.2d 1328, 1332 (11th Cir. 1982).

In this case, as shown above, Plaintiff has failed to show deprivation of any constitutionally-protected interest. As well, the City's action was supported by any number of readily apparent non-arbitrary and legitimate bases. Therefore, Plaintiff's substantive due

process claim must be dismissed. *See Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1577 (11th Cir. 1989) (holding that zoning regulations will not be declared unconstitutional as violative of substantive due process unless they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare").

IX. COUNTS 8 AND 9 MUST BE DISMISSED AS THOSE CLAIMS FAIL TO STATE A CAUSE OF ACTION UNDER FLORIDA LAW

Plaintiff brings Count 8 against the City for violating the Florida Religious Freedom Restoration Act of 1998, Fla. Stat. §761.01 ("FRFRA") [12] and Count 9 for violation of Florida's free exercise clause. Even if the Court hears these claims, notwithstanding Plaintiff's failure to pursue its remedies under Florida law, Plaintiff's allegations contained in the Complaint, taken as true, clearly fail to establish that the City violated Florida law. The key failure, as with Plaintiff's "substantial burden" argument under RLUIPA and the federal Free Exercise clause, is the reality that the City's designation of the Temple property as "historic" does not substantially burden anyone's free exercise of religion.

The Florida Supreme Court, following federal precedent, has held that a substantial burden on the free exercise of religion under either the Florida Constitution or FRFRA "is one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires." *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1024 (Fla. 2004). In *Warner*, the court acknowledged that its adoption of this definition of

[12] Section (1) of Fla. Stat. §761.03 states:
(1) "The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that the government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:
(a) Is in furtherance of a compelling governmental interest; and
(b) Is the least restrictive means of furthering that compelling governmental interest."

substantial burden "may occasionally place courts in the position of having to determine whether a particular religious practice is obligatory or forbidden." *Id.* Thus, the proper analysis in determining whether the City's designation of the property as a historic landmark is whether the designation compels Plaintiff to engage in conduct that its religion forbids or forbids Plaintiff from engaging in conduct that its religion requires.[13]

The courts have carefully scrutinized and readily rejected implausible "substantial burden" arguments under Florida law. In *Hollywood Community Synagogue v. City of Hollywood*, 430 F. Supp.2d 1296 (S.D. Fla. 2006), a synagogue claimed that the City of Hollywood's denial of a permit to allow it to operate in a residential neighborhood violated both FRFRA and RLUIPA. *Id.* at 1318. This Court, while finding an issue of fact as to intentional discrimination in that case, rejected the "substantial burden" argument, finding that a synagogue's inability to locate where it chose was not a "substantial burden" under either RLUIPA, FRFRA or the Free Exercise clause. *Id.* at 1322. Thus, the city's action was nothing more than a "mere inconvenience" and did not compel the synagogue to engage in conduct that its religion forbade or forbid the synagogue from engaging in conduct that its religion required. *Id.* at 1318, 1321. Accord *Christian Romany Church Ministries, Inc. v. Broward County*, 980 So. 2d 1164, 1168 (Fla. 4th DCA 2008) (condemnation of church property was not a substantial burden).

Plaintiff does not allege that any of its members have been forbidden to engage in conduct required by its religion. Plaintiff simply states vaguely and without plausible specifics

[13] Article I, Section 3 of the Florida Constitution provides that "[t]here shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof." In considering the Florida Free Exercise clause along with the federal Free Exercise clause, Florida courts have "treated the protection afforded under the state constitutional provision as coequal to the federal [provision], and have measured government regulations against it accordingly." *Id.* Thus, the Free Exercise allegation adds nothing new to Plaintiff's Complaint.

that certain structural elements of the property were "major impediments in allowing Plaintiff to adhere to its religious precepts" (Complaint ¶54). Given the ongoing use of the Temple for orthodox worship, there is nothing to confirm that any "impediment" is more than an "inconvenience." In any event, the Complaint's allegations fall far short of what is required, namely, an allegation that the structure of the property *forbids Plaintiff from engaging in conduct that its religion requires*. Likewise, Plaintiff fails to allege that any of its adherents have been *compelled to engage in conduct that its religion prohibits.* According to Plaintiff, the congregants using and worshipping at the Temple have been overwhelmingly Orthodox since 2005, when the constituency shifted from primarily Conservative Judaism to Orthodox Judaism (*id.* ¶¶49-51). Plaintiff describes the Temple's operation since 2005 as an Orthodox Jewish temple with a thriving membership. It is simply impossible for Plaintiff to make any argument that its adherents are being *compelled* to engage in conduct that its religion forbids when it has willingly practiced its religion with the property in its current state since 2005. There is no allegation that the actual users of the Temple, although not disclosed by Plaintiff, have not expressed the slightest concern about any restrictions on their ability to practice their faith in the Temple "AS IS." As with its other "substantial burden" claims, Plaintiff's FRFRA allegations fail to pass muster.

X. THE CITY'S HISTORIC DESIGNATION ORDINANCE IS NOT "VOID FOR VAGUENESS"

Count 10 of the Complaint seeks a declaratory judgment that Section 171.5 of the City's Code of Ordinances ("Section 171.5")(Exhibit A hereto), setting forth the standards for designation of landmark status, is unconstitutionally vague. Plaintiff is unable to state a claim because it relies on a facial misinterpretation of the challenged provision and its position is

contrary to settled law approving substantively similar landmark designation laws against vagueness challenges.

A preliminary matter that bars the claim in Count 10 is Plaintiff's failure to exhaust its state law remedies. As discussed above, it failed to raise a certiorari challenge to the constitutionality of Section 171.5 and thus has waived its right to raise such a claim here. Even if there was no waiver, however, Plaintiff's void for vagueness argument still fails.

While conceding that Section 171.5 sets forth the standards for designating a property as a historical landmark (*see* Complaint ¶203), Plaintiff strangely harps on that section's use of the term "archaeological sites", contending that the City has no standards for designation of an historic site (*id.* ¶205). This claim is belied by the terms of the Code of Ordinances. Chapter 171 of the Code of Ordinances, entitled "Historic Landmarks", defines "historic landmark" as "[a]ny site, building, structure, landscape feature, improvement, or archaeological site, which property has been designated as an historic landmark pursuant to procedures described in this chapter." Code of Ordinances §171-1. "Archaeological site", in turn, is defined as a "single specific location, which has yielded or is likely to yield information on local history or prehistory. Archaeological sites may be found within historic sites or historic districts." *Id.* Section 171-4 further notes that "[p]roperties which meet the criteria set forth in § 171-5 herein below may be designated as archaeological or historical sites" in accordance with specified procedures that Plaintiff does not dispute were followed here. Finally, Section 171-5, entitled "Standards for designation of archaeological and historic landmarks", is quoted at paragraph 203 of the Complaint and sets forth six criteria related to historic and/or archaeological significance.

Therefore, it is plain that the Code of Ordinances establishes a procedure for designation of locations with historic or cultural significance as historic landmarks, which is what was done

here. Equally clear is the reliance on explicit criteria found in Section 171-5 by the City's Historic Preservation Board and Commission. Plaintiff has no basis to assert that criteria for historic designation do not exist. The criteria are identified in the code and Plaintiff admits that they were applied by the City, albeit in a manner with which Plaintiff disagrees (Complaint ¶¶92-95).

Because valid criteria for historic designation were indisputably met here, the thrust of Plaintiff's argument is that the applicable criteria are too "vague and general and easy to satisfy" (*id.* ¶6) to be constitutional. Plaintiff is wrong as a matter of law. Void for vagueness constitutional challenges are disfavored under the law. *See Jones v. Continental Ins. Co.*, 670 F. Supp. 937, 943 (S.D. Fla. 1987) (on a motion to dismiss, holding that, "[i]f a statute can be made constitutionally definite by reasonable construction, the Court is under a duty to give it such a construction"), *citing Buckley v. Valeo*, 424 U.S. 1 (1976), for the proposition that "courts are under an obligation to construe a statute, if that can be done consistent with the legislature's purpose, to avoid the 'shoals' of vagueness."

By way of example, the vanguard New York City Landmarks Law has been determined to be "a facially neutral regulation of general application within the meaning of Supreme Court decisions. It thus applies to '[a]ny improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value.' N.Y.C. Admin. Code § 25-302(n)." *Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 354 (2d Cir. 1990). Although the plaintiff in *St. Bartholomew's* challenged the "great discretion" provided in the determination of landmark status, the Second Circuit held that there was "no constitutional relevance" to that contention, noting that "[z]oning similarly regulates land use but it is hardly a process in which the exercise of discretion is

constrained by scientific principles or unaffected by selfish or political interests, yet it passes constitutional muster." *Id.* at 354-55.

Indeed, in rejecting the constitutional challenge to the New York City Landmark Law, the Second Circuit relied on the Supreme Court decision in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), approving the New York City Landmark Law against a constitutional challenge. *St. Bartholomew* quoted *Penn Central* for the following proposition: "In contrast to discriminatory [reverse spot] zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city." *St. Bartholomew*, 914 F.2d at 355, *quoting Penn Central*, 438 U.S. at 132.

The equivalent landmark ordinance enacted by Sunny Isles Beach embodies the same sort of comprehensive plan blessed by the Supreme Court in *Penn Central* and thereafter upheld in *St. Bartholomew*. If anything, the criteria utilized here are more specific and detailed than what is utilized by, and given judicial approval for, New York City. *See* N.Y.C. Admin. Code § 25-302(n) (defining "landmark" as "[a]ny improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation, and which has been designated as a landmark pursuant to the provisions of this chapter").[14] A wealth of precedent requires that Count 10 of the Complaint be dismissed with prejudice.

[14] Other cases to the same effect abound. *See Conner v. City of Seattle*, 223 P.3d 1201, 1208-09 (Wash. Ct. App. 2009) (affirming dismissal of land use petition challenging ordinance as unconstitutionally vague and noting that "it is impractical for a single ordinance to set forth development criteria or standards that could apply to every landmark"), *review denied*, 233 P.3d 889 (Wash. 2010); *Park Home v. City of Williamsport*, 680 A.2d 835, 838-39 (Pa. 1996) (rejecting void for vagueness attack on historic district ordinance despite the absence of precisely defined guidelines); *Nadelson v. Township of Millburn*, 688 A.2d 672, 679 (N.J. Super. Ct. App.

Lastly, if an ordinance is alleged to be unconstitutional, the Attorney General or State Attorney of the judicial circuit in which the action is pending shall be served with a copy of the complaint and is entitled to be heard thereon. Fla. Stat. § 86.091. Plaintiff has failed to allege compliance with this statute, which is an additional basis to dismiss Count 10.

XI. COUNTS 5, 6 AND 7 AS AGAINST MAYOR EDELCUP MUST BE DISMISSED AS THEY ARE BARRED BY ABSOLUTE AND QUALIFIED IMMUNITY

Plaintiff brings three separate counts against Mayor Edelcup in his individual capacity under 42 U.S.C. § 1983 for purported violations of the equal protection clause, the free exercise clause, and the due process clause. At all relevant times, Edelcup was the Mayor of the City of Sunny Isles Beach, Florida, and all alleged actions were taken in his capacity as Mayor. The

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Div. 1996) (finding historic district ordinance prohibiting "incongruous" features is not void for vagueness given its context and purpose); *A-S-P Assocs. v. City of Raleigh*, 258 S.E.2d 444, 454-55 (N.C. 1979) (same); *Bellevue Shopping Ctr. Assocs. v. Chase*, 574 A.2d 760, 764-65 (R.I. 1990) (historical area zoning act is not unconstitutionally vague, despite its subjective nature, because "the standards set forth in the historic-zoning legislation sufficiently alert the public of the statute's scope and meaning"); *South of Second Assocs. v. Georgetown*, 580 P.2d 807, 810-11 (Colo. 1978) (historic preservation ordinance governing "[t]hat which has a special historical or aesthetic interest or value as part of the development, heritage, or cultural character of the city, region, state, or nation" is sufficiently definite to overcome a void for vagueness challenge); *Kruse v. Town of Castle Rock*, 192 P.3d 591, 598-600 (Colo. Ct. App. 2008) (rejecting void for vagueness attack on historic designation municipal code provision that "provides property owners with fair notice that their property may be designated a historic landmark if one or more of [the] criteria are satisfied", since "courts recognize that historic properties are unique … [and] such ordinances must contain broad terms to permit application to different potentially historic properties"); *Maher v. City of New Orleans*, 516 F.2d 1051, 1061-63 (5th Cir. 1975) (ordinance enacted to promote the social and economic goals of preserving the New Orleans French Quarter is not unconstitutionally arbitrary), *cert. denied*, 426 U.S. 905 (1976); *U-Haul Co. of E. Missouri, Inc. v. City of St. Louis*, 855 S.W.2d 424, 427 (Mo. Ct. App. 1993) (landmark ordinance requiring "external appearance, design or nature as to be generally compatible with the style and design of surrounding improvements and conducive to the proper architectural development of the community and shall not constitute an unsightly, grotesque or unsuitable structure in appearance, detrimental to the welfare of the surrounding property or residents", is not unconstitutionally vague); *Figarsky v. Historic Dist. Comm'n of City of Norwich*, 368 A.2d 163, 170-71 (Conn. 1976) (affirming dismissal of appeal of municipal historic district commission denial of application to demolish historically-designated building and holding that the ordinance is not unconstitutionally vague); *Bohannan v. City of San Diego*, 106 Cal. Rptr. 333, 338 (Cal. Ct. App. 1973) (historic preservation ordinance meets constitutional muster).

crux of Plaintiff's claims against Mayor Edelcup is that the Mayor violated its constitutional rights when the City Commission, serving in a quasi-judicial and appellate capacity, voted to affirm the decision of the Historical Preservation Board to designate the Temple as a historic site.[15] The ruling affirming the Preservation Board's decision resulted from a public hearing which followed an appeal of its earlier decision by Plaintiff. Assuming for the purposes of this motion the veracity of all factual allegations in the Complaint regarding Mayor Edelcup's actions and motives, the claims against the Mayor still fail to state a cause of action as they are barred by absolute quasi-judicial immunity and qualified immunity.

A. Quasi-Judicial Absolute Immunity Bars the Claims Against Mayor Edelcup

Quasi-judicial and legislative immunity may be asserted by a motion to dismiss where allegations of the complaint disclose activities protected by absolute immunity. *See, e.g., Berkos v. Village of Wellington*, 2003 WL 21383886 at *3 and 4 (S.D. Fla. March 20, 2003); *Long v. Satz*, 181 F.3d 1275, 1279 (11th Cir. 1999); *Hyatt v. Town of Lake Lure*, 225 F. Supp.2d 647, 656 (W.D. N.C. 2002); *Thomas v. City of Dallas*, 175 F. 3d 358 (5th Cir. 1999). Ruling on the defense of quasi-judicial and legislative immunity at the motion to dismiss stage is appropriate because "[a]bsolute immunity is meant to protect not only from liability, but from going to trial at all." *Harris v. O'Deveaux*, 780 F.2d 911, 913 (11th Cir. 1986)

It is well-established that public officials have absolute immunity from Section 1983 claims arising from the performance of judicial and quasi-judicial functions. *Pierson v. Ray*, 386 U.S. 547 (1967); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Dunham v. Wadley*, 195 F. 3d 1008 (8th Cir. 1999). The Supreme Court has held that absolute immunity is appropriate when an official's functions are similar to those involved in the judicial process, *see Butz v. Economou*,

[15] Pursuant to the City Charter, the Mayor is a voting member of the City Commission and serves as Chair of the City Commission.

438 U.S. 478, 513 (1978), an official's actions are likely to result in lawsuits for damages by disappointed parties, *id.* at 515, and sufficient safeguards exist through appeals and other means to control unconstitutional conduct, *id.* at 512. *See also Ostrzenski v. Seigel*, 177 F.3d 245, 249 (4th Cir. 1999); *Romano v. Bible*, 169 F.3d 1182, 1187 (9th Cir. 1999). The examination of whether absolute immunity is appropriate is a functional one that relies on the roles and responsibilities of the officials in question far more than their positions. *Berkos*, 2003 WL 21383886 at * 2. In conducting the functional examination, the courts "should determine whether the action shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suit for damages. *Id.*, *quoting Butz v. Economou*, 438 U.S. 478 (1978). *See also Antoine v. Byers & Anderson*, 508 U.S. 429 (1993). Simply put, "quasi-judicial immunity is a doctrine under which government actors whose acts are relevantly similar to judging are immune from suit." *Dotzel v. Ashbridge*, 438 F. 3d 320 (3d Cir. 2006).

In determining whether the Mayor's action, voting in an appellate capacity to affirm the decision of the Preservation Board, following the recommendation of a historic preservation professional, shares enough of the characteristics of the judicial process, the Supreme Court has noted six factors that courts should consider. The following factors are relevant to determining whether absolute quasi-judicial immunity applies: (1) the need to assure that the individual can perform his functions without harassment or intimation; (2) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (3) insulation from political influence; (4) the importance of precedent; (5) the adversarial nature of the process; and (6) the correctability of the error on appeal. *Berkos*, 2003 WL 21383886 at *2, *citing, Cleavander v. Saxner*, 474 U.S. 193, 202 (1985). While the aforementioned factors

are relevant, "none of these factors are controlling; rather the Court considers the totally of the factors with regard to the functions in question to reach the determination of absolute immunity." *Id.*

In *Berkos*, this Court conducted the appropriate analysis under similar circumstances and concluded that members of the Village of Wellington Planning, Zoning and Adjustment Board were protected by quasi-judicial absolute immunity against plaintiffs' claims of violation of their constitutional rights based on the members' actions. *Id.* The *Berkos* case is instructive in conducting the appropriate analysis because the Village Board, like the City Commission, was serving in a quasi-judicial capacity in reviewing an appeal filed in a land use matter. As more fully discussed below, the analysis conducted in *Berkos* clearly supports a finding that Mayor Edelcup is entitled to absolute quasi-judicial immunity in this case.

1. The need to assure the function can be performed without harassment or intimidation

First, like *Berkos*, the threat of intimidation through harassing litigation is great in this case. The threat was a reality in this case because Plaintiff had sued the City in state court to prevent it from holding a hearing regarding the designation of the Temple.[16] Moreover, the City Commission, like the Village Board, in considering appeals of decisions of land use matters finds itself resolving highly contentious issues regarding the City's authority to regulate private property for the benefit of the public welfare. The cases cited herein have demonstrated that historical designation of private property is a highly controversial matter, in which the property owner generally files a lawsuit against the local government. The City Commission, like the

[16] Plaintiff had filed a frivolous lawsuit against the City to prevent it from holding a quasi-judicial public hearing regarding the designation of the Temple as a historic site. The City had to seek a ruling from the Third District Court of Appeal in order to proceed with the hearing. *See City of Sunny Isles Beach v. Temple B'Nai Zion*, 43 So. 3d 904 (Fla. 3d DCA 2010). The City was awarded attorney's fees in the aforementioned case.

Village Board, "could be paralyzed, or least severely inhibited, the possibility that every decision could result in lawsuits against each member individually as has occurred here." *Id.* at *3.

2. The presence of institutional safeguards against improper conduct

Second, even more than in *Berkos*, the City has provided safeguards to ensure that quasi-judicial proceedings are constitutional without the need for private damage actions against the individual officials. Plaintiff was provided with two quasi-judicial hearings – one before the Preservation Board and one before the City Commission. Notice is required under the City's historic preservation regulations. Plaintiff received notice of the hearings and was afforded due process of law, including the right to put on witnesses and the right of cross-examination. Although its appeal rights were not invoked, Plaintiff's right to pursue an appeal via the certiorari appeal process clearly demonstrates that adequate safeguards were provided during the quasi-judicial hearings before the City Commission and the Preservation Board.

3. The degree of insulation from political influence

Third, like *Berkos*, the substantive land use decision in designating the Temple as historic was made by Preservation Board members who were not elected to their positions. Four members of the Board are appointed to their positions by City Commissioners and the Mayor appoints the Chair of the Board. *See* Section 171-2 of the City Code. Two other members are appointed at large by the City Commission. *Id*. The members are required to serve a two year term without the ability to be removed by the City Commission. *Id*. Thus, contrary to Plaintiff's allegations, the board members are shielded from direct political influence.

With respect to the City Commission, Florida law requires elected officials to be apolitical when they are serving in a quasi-judicial capacity. *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991), *review denied*, 598 So. 2d 75 (Fla. 1992). They are required to

disclose ex-parte communications. *Id*. They are required to abstain from voting when there is a legal conflict relating to a matter. *See* Fla. Stat. §§ 112.3143, 286.012. It is not uncommon for a state court to reverse a quasi-judicial decision that maybe based on political influence, as demonstrated in *Jennings*. The fact that members of the City Commission are elected or appointed is not decisive. *See Dotzel*, 438 F.3d at 326. Here, the City Charter does not provide for the recall of elected officials. They can only be removed for cause under Florida law. Fla. Stat. § 100.361(1)(b). These legal limitations on removal from office substantially insulate the Mayor and City Commissioners from political pressure.

4. The use of precedent in resolving controversies

Fourth, the process utilized by the Preservation Board or the City Commission to designate the Temple as historic was consistent with previous precedents that the City inherited from Miami-Dade County pre-incorporation. As in previous precedents, a designation report was prepared to support the designation of the Temple. Even if there was no precedent, the Board and the City Commission are required to apply historical preservation regulations based on the standards outlined in the regulations. Like *Berkos*, the possibility of arbitrary applications of those regulations is adequately addressed by the possibility of appeal to the Circuit Court, which option Plaintiff elected not to exercise.

5. The adversarial native of the process

Fifth, like *Berkos*, there is no question that the proceedings regarding the designation of the Temple were adversarial in nature. Plaintiff was represented by several attorneys in the proceedings before the Preservation Board and the City Commission. It presented evidence to contest the designation. It presented a number of witnesses during the proceedings. Its counsel cross-examined the City's witnesses. It filed evidence into the record. Additionally, it sued the

City in state court to prevent it from holding a hearing to discuss the designation of the Temple. Thus, it is undisputed that the proceedings were adversarial.

6. The availability of appellate review

Finally, the ability to correct error on appeal is also undisputed. The court in *Berkos* stated that the ability to correct error is perhaps the most important factor. *Berkos*, 2003 WL 21383886 at *3. Under state law, "parties to a quasi-judicial proceeding may obtain first-tier certiorari review to the Circuit Court as a matter of right…. Subsequently, they may seek second-tier certiorari review of the Circuit Court decision in the District Court of Appeal…. This appellate protection obviates much of the need for private suit for damages as a means of preventing unlawful and unconstitutional decisions by the individual Board members." *Id*. In the instant case, Plaintiff, without regard to judicial economy, sprinted to federal court despite the availability of appellate protection to remedy allegedly unconstitutional conduct. This Court should reject these actions and find that Mayor Edelcup is entitled to absolute quasi-judicial immunity.

The above factors outlined in *Berkos* clearly support the dismissal of the claims against the Mayor on the grounds of absolute quasi-judicial immunity. Voting to affirm a decision of the Preservation Board should not subject the Mayor to a lawsuit in his individual capacity. Absolute quasi-judicial immunity is warranted in this case because the Mayor's conduct in affirming the Preservation Board's decision has judicial characteristics.

Clearly, the Mayor and other Commission had no vote in the Preservation Board's decision to designate the Temple as historic. The Mayor and Commission then addressed this decision in an appellate capacity, following a second public hearing. The judicial characteristics of the City Commission's decision are not diminished by Plaintiff's allegations that the

designation was motivated by a personal vendetta. If personal bias existed below, Plaintiff should have moved to recuse the Mayor and other Commissioners. They did not do so. While the Complaint is laden with conclusory (and implausible) allegations of wrongful intent and personal animus, allegations of subjective intent do not preclude quasi-judicial immunity. *See Dotzel* (finding absolute quasi-judicial immunity despite allegations of personal animus by board members). In determining applicability of quasi-judicial immunity, "the relevant decisional material will be the legal and structural component of the job function as opposed to detailed facts about specific acts and mental states." *Id.* at 325. While it is easy to add inflammatory allegations as to subjective personal motives and ill will, the Mayor remains protected by absolute immunity under the law.

B. Alternatively, Plaintiff's Claims against Mayor Edelcup Must Be Dismissed as he Is Protected by the Doctrine of Qualified Immunity

Further, if the Court reaches the issue, qualified immunity also bars Plaintiff's claims against Mayor Edelcup. Qualified immunity bars actions against public officials, in their individual capacity, if the public official's activity at issue is deemed to have been "administrative" or "discretionary" where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Bryant v. Jones*, 575 F.3d 1281, 1295 (11th Cir. 2009); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Dunham v. Wadley*, 195 F.3d 1008 (8th Cir. 1999); *Griffin Indus.*, 496 F.3d at 1189 (qualified immunity found as a matter of law). "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. " *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Behrens v. Pelletier*, 516 U.S 299, 306 (1996). The Supreme Court "repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation" as "the

entitlement is an *immunity from suit* rather than a mere defense to liability." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *Harlow*, 457 U.S. at 818; *Mitchell*, 472 U.S. at 526; *Davis v. Scherer*, 468 U.S. 183, 195 (1984); *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The defense of qualified immunity is intended to give public officials "a right, not merely to avoid standing trial, but also to avoid the burdens of such pretrial matters as discovery." *Behrens*, 516 U.S. at 308. Therefore, all counts against Mayor Edelcup, in his individual capacity, (Counts 5, 6 and 7) must be dismissed as Plaintiff has failed to state a claim that any of the actions alleged in the Complaint "violate clearly established statutory or constitutional rights of which a reasonable person would have known." There is no basis for a finding that support of historic designation of a building said to be historic violates the owner's rights. To the contrary, a long line of authority, including the Supreme Court's "landmark" *Penn Central* decision, shows the opposite. The opinion of the professional consultant hired by the City, whose qualifications or the sincerity of her conclusions are not disputed, by itself is a sufficient basis for immunizing the Mayor's actions.

For Plaintiff to succeed in getting past qualified immunity, it would be necessary to show that "the state of the law at the time of the events in question gave respondents fair warning that their alleged treatment of the plaintiff was unconstitutional." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004), *citing Hope v. Pelzer*, 536 U.S. 730, 741 (2002). This was not then, and is not now, the law. Certainly, the correctness of Plaintiff's contentions was not clearly established**.**

As with absolute immunity, allegations of malicious intent do not change the result. The standard of "violation of clearly established statutory or constitutional rights of which a reasonable person would have known," is objective rather than subjective. *Harlow*, 457 U.S. at

818. Therefore, the Court should not even inquire into the Mayor's subjective intent or beliefs. *Anderson*, 483 U.S. at 639. In sum, qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341; *Von Stein v. Brescher*, 904 F.2d 572, 579 (11th Cir. 1990). The Eleventh Circuit in *Bryant v. Jones*, recently explained that "the Supreme Court eliminated any subjective feature of its test for qualified immunity, finding that considerations of the official's state of mind while committing the allegedly unlawful acts have proven incompatible with its "admonition ... that insubstantial claims should not proceed to trial." *Bryant*, 575 F.3d at 1300.

For the foregoing reasons, Counts 5, 6 and 7 as against Mayor Edelcup, in his personal capacity, are barred by absolute quasi-judicial immunity and qualified immunity, and must therefore be dismissed with prejudice.

XII. CONCLUSION

For the reasons stated herein, Plaintiff's Complaint against both Defendants should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the Mailing Information for Case 1:10-cv-24549-JLK. Counsel of record currently identified on the Mailing Information list to receive e-mail notices for this case are served via Notices of Electronic Filing generated by CM/ECF. Counsel of record who are not on the Mailing Information list to receive e-mail notices for this case have been served via U.S. Mail.

s/Kendall B. Coffey