APPEAL NO. 03-8060
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GRACE UNITED METHODIST CHURCH, Plaintiff/Appellant, vs. CITY OF CHEYENNE; CITY OF CHEYENNE BOARD OF ADJUSTMENT; DOROTHY WILSON, City of Cheyenne Development Director; and CHEYENNE CITY COUNCIL, Defendants/Appellees.	FILED United States Court of Appeals Tenth Circuit APR 21 2004 PATRICK FISHER Clerk

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF WYOMING, HON. CLARENCE A. BRIMMER, PRESIDING
Case No. 02-CV-35-B

BRIEF OF APPELLEES

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ORAL ARGUMENT IS REQUESTED

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CASES

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PRIOR OR RELATED APPEALS

There are no prior or related appeals pending before this Court.

Appellees, City of Cheyenne, City of Cheyenne Board of Adjustment, Cheyenne City Council, Dorothy Wilson, and Mountview Homeowner's Association, submit this brief in opposition to the issues raised by Appellant on appeal.

STATEMENT OF JURISDICTION

Appellees are satisfied with Appellant's statement of jurisdiction.

STATEMENT OF THE CASE

Appellant's statements of the case and facts contain significant inaccuracies and are misleading. Unbelievably, in nearly 100 pages of briefing from Appellant and Amicus, neither mentions the verdict rendered by the jury below or provides the Court with a copy of it. Thus, Appellees submit their own statements of the case and facts as follows:

Appellant sought a license from the City of Cheyenne to operate a 100-child daycare center in a low-density residential zone (LR-1) of the City. The daycare would be open to all members of the public regardless of religious affiliation and would operate from 6 a.m. until midnight seven days a week. The applicable zoning ordinance of the City prohibited any entity from receiving a license to operate a day care of over 12 children in an LR-1 zone, and the City informed Appellant of that fact.

On March 15, 2001, Appellant filed an application for a variance from the zoning restrictions placed on an LR-1 property. The matter was set for a public hearing before the Board of Adjustment, the municipal entity that hears zoning issues, on April 19, 2001. Appellant attended the hearing and was represented by counsel. All interested parties

were allowed to present witnesses and evidence. Following the hearing, the Board of Adjustment issued written Findings of Fact and Conclusions of Law dated May 22, 2001 denying the Appellant's application for a variance.

Appellant brought the underlying action on February 20, 2002 alleging that the City's actions in denying the granting of a license to operate the daycare center violated the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc *et seq.* (RLUIPA). Appellant also alleged that the City's actions violated 42 U.S.C. §1983 *et seq* by infringing upon Appellant's rights to free exercise of religion, speech, assembly and association under the 1st Amendment to the United States Constitution. Finally, Appellant asserted another §1983 claim alleging that the decision violated the Appellant's equal protection and due process rights under the 14th Amendment to the United States Constitution.

The matter eventually came before the District Court on cross-motions by the City and Appellant for summary judgment on all claims. The District Court granted summary judgment to the City on all of Appellant's constitutional and §1983 claims but found sufficient evidence to allow the RLUIPA claim to proceed to trial. Following the decision by the District Court to allow the RLUIPA claim to go to trial, Appellee, Mountview Homeowner's Association, moved to intervene seeking declaratory relief that the proposed day care center violated the covenants of the neighborhood. The motion of the Association was granted, and the trial was continued pending the taking of further discovery.

A jury trial on the RLUIPA and covenant issues was held from June 9, 2001 through June 17, 2001 before a jury of eight persons. Following the close of evidence, the jury unanimously returned a verdict finding that the Appellant's application for the operation of the day care center was not done pursuant to a sincerely held religious belief and that it violated the covenants of the neighborhood. The District Court entered its Judgment for the City of Cheyenne on the RLUIPA claim and enjoined Appellant from operating a daycare center on its property. It further entered declaratory and injunctive relief for Appellees on the covenant claim. This appeal follows the Verdict and Judgment.

STATEMENT OF FACTS

Appellant is the owner of real property located in a residential neighborhood of Cheyenne, Wyoming. Appellant was deeded the property in 1956 subject to the covenants existing in the neighborhood, and the property has been operated as a Methodist church since that time. (Aplt. App., Vol. III at 1237-1238, 1367). The neighborhood in which Appellant is located is zoned LR-1 residential which is the lowest density zone in the City of Cheyenne. (Aplt. App., Vol. IV at 1536). Pursuant to the City Code in existence in 2001, no daycare facility that provides care for more than 12 children can exist in an LR-1 zone. (Aplt. App., Vol. V at 2000-2001). No evidence exists that the ordinance had a religiously based motive or that any entity, religiously affiliated or not, has ever been granted a variance to this provision of the City ordinance.

Appellant initially made inquiry to the City about the operation of the daycare center in January of 2001. It was informed by Lisa Pafford, a staff member of the City/County Development Office, that the City did not have any leeway in allowing the operation of the daycare center on the Church property because daycare facilities of over 12 children were not allowed in LR-1 zones pursuant to City ordinance. (Aplt. App., Vol. III at 1413, Vol. V at 1896-1898). Pafford suggested to Appellant that it seek a zone change for the property that would allow such a daycare center to be operated on the property, but Appellant chose not to do so. (Aplt. App., Vol. V at 1898-1899). Appellant instead informed the City that because it was a Church, it was not required to seek a zone change. (Aplt. App., Vol. V at 1899, 1915).

On March 15, 2001, Appellant filed an application with the City of Cheyenne for a variance of the City ordinance to allow for the operation of the proposed daycare center in the Church. (Aplt. App., Vol. I at 395-396). The matter was set for a public hearing before the Board of Adjustment. The hearing was held on April 19, 2001, and at that hearing Appellant was represented by counsel and allowed to present witnesses and evidence. (Aplt. App., Vol. I at 106, 108).

Appellant's witnesses testified at the hearing that the proposed daycare would operate between the hours of 6:00 a.m. and midnight, provide care to infant children up to thirteen years of age, charge a fee for its services to commensurate with fees charged by other daycare facilities in the Cheyenne area, and hire caregivers or instructors that are not members of the Grace United Methodist Church congregation and who may or may not have any religious training whatsoever. (Aplt. App., Vol. I at 134-135, 137-138,

140). The testimony also was that the daycare would offer religious instruction to only those children who wanted it, such instruction would be non-denominational, and the instruction would not be specifically Methodist in nature.[1] (Aplt. App., Vol. I at 135-137).

Immediately upon the close of testimony, a motion was made to deny the variance by a member of the Board of Adjustment. The essence of the motion was that the requested variance was not one that the Board had the power to approve under the ordinance. (Aplt. App. Vol. I at 210-214). The Board unanimously agreed.

Subsequently, the Board of Adjustment issued written Findings of Fact and Conclusions of Law dated May 22, 2001. The Board again found that it must deny the application because the applicant failed to meet Cheyenne Laramie County Zoning Ordinance 1988, Section 74.020(a). The Board found that the use sought was not a use permitted within the zoning district, as defined by the Cheyenne, Laramie County, Zoning Ordinance and that it had no authority or discretion to grant the proposed daycare use. It found that the proposed use was incompatible with the neighborhood and would harm community goals as expressed in the zoning ordinance. It also made other non-essential conclusions related to the fact that the operation of the daycare appeared to be a commercial venture with little relation to the exercise of Appellant's religion. (Aplt. App., Vol. I at 92-96).

Following the denial of its application, Appellant did not seek a change in the zoning of its property or a change in the City code that would have allowed daycare

[1] The testimony at trial in these regards mirrored the testimony at the hearing before the Board of Adjustment.

centers in low-density residential LR-1 zones. Instead, the Church brought this litigation against the City of Cheyenne and its Development Director seeking relief under federal law from the decision of the Board of Adjustment. Appellant's Complaint alleges two claims under 42 U.S.C. §1983 that the Board of Adjustment's decision violated Appellant's constitutional rights and one claim pursuant to RLUIPA that the Board of Adjustment's action substantially burdened its sincerely held religious beliefs. (Aplt. App., Vol. I at 22-30). Following the granting of summary judgment to the City on Appellant's §1983 claims and the intervention of Mountview Homeowner's Association, this matter came on for trial.

Appellant argued at trial that the City's actions prevented it from engaging in religious instruction on its property. That position is found again in its Opening Brief and the brief of Amicus Curiae, but it is unsupported by any evidence. Appellant's Pastor, Jon Laughlin, admitted at trial that Appellant has never been prevented from engaging in religious instruction on its property. (Aplt. App., Vol. III at 1368-1369). The witnesses uniformly testified that the City does not license or regulate religious instruction and that the Appellant's parishioners have always engaged in religious instruction on the property without interference from the City. (Aplt. App., Vol. IV at 1514; Vol. V at 2005-2007). Although Appellant claims that what it sought to place on the property was a religious school, it would have had to seek an application from the State of Wyoming to operate a school, and it never did. (Aplt. App., Vol. III at 1369-1370).

The jury verdict form broke down the elements of the parties claims into interrogatories. The first interrogatory asked whether Appellant proved by a

preponderance of the evidence that the proposed operation of a daycare center was a sincere exercise of Appellant's religion. The jury found that it was not. Pursuant to the Court's instructions, the jury then skipped the remaining questions related to RLUIPA and addressed the covenant issue.[2] The jury found with respect to the covenants that they were applicable to the property and that the proposed day care violated them. (Aplee. Supp. App. at 95-98). The District Court then entered its Judgment on the jury verdict making further findings that the zoning ordinance was enacted pursuant to a compelling governmental interest and was accomplished by the least restrictive means. The District Court further enjoined Appellant from operating a daycare center on its property. (Aplt. App., Vol. II at 837-841). This appeal follows.

SUMMARY OF ARGUMENT

The District Court found on summary judgment that the City did not violate any of Appellant's constitutional rights in denying it a license to operate a daycare center. The jury subsequently found that the Appellant's proposed operation of the daycare center was not a sincere exercise of its religion and that it violated the covenants of the neighborhood. Finally, the District Court entered a post-trial Judgment based upon the jury verdict dismissing Appellant's RLUIPA claim and enjoining Appellant from operating a daycare center. In doing so it also found as a separate basis for dismissing the RLUIPA claim that the zoning ordinance was adopted pursuant to a compelling

[2] Neither party objected to the structure of the verdict form in this regard. (Aplt. App.,Vol. V at 2163-2171).

governmental interest and pursuant to the least restrictive means. (Aplt. App., Vol. II at 837-841).

All of these findings are consistent and supported by the evidence and the law, and Appellant's assertions of error are without merit. Moreover, the finding of the jury that the operation of the daycare center was not a sincere exercise of Appellant's religion has not been contested and is sufficient by itself to warrant a dismissal of all of Appellant's claims. Even Appellant, in its requested jury instructions, recognized that there can be no substantial burden on the exercise of religion unless the restricted activity involves a sincerely held religious belief. (Aplt. App., Vol. II at 643). "The Court of Appeals may affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." *Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263, 1266 (10th Cir. 2004).

ARGUMENT

I. The Constitutional Claims Were Properly Dismissed

Appellant's second claim for relief, brought pursuant to 42 U.S.C. § 1983, alleges that the City, acting under color of state law, deprived Appellant of its constitutional rights to the free exercise of religion, freedom of speech, and freedom of association in violation of the First Amendment to the United States Constitution. Appellant's third claim for relief, also brought pursuant to 42 U.S.C. § 1983, alleges that the City deprived Appellant of its rights to due process and equal protection of the law under the Fourteenth Amendment to the United States Constitution.

The City filed a motion to dismiss the Complaint which was converted to a motion for summary judgment, and Appellant filed a cross-motion for summary judgment on all claims. (Aplt. App., Vol. I at 31-49, 52-379). Following the filing of supplemental briefings and evidence, the District Court held a hearing on the motions and granted the City's motion with respect to the constitutional claims. (Aplt. App., Vol. II at 523-578, 842-913, 914-967).

Appellant seems to argue as one ground for reversal that the granting of summary judgment was done without the benefit of discovery. The argument is without merit and very strange in that Appellant was a participant in discovery prior to the hearing and actually submitted deposition and affidavit testimony in support of its motion for summary judgment. (Aplt. App., Vol. I at 455-522). In fact, it was Appellant that caused the District Court to convert the City's original motion to dismiss into a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure by presenting materials outside of the pleadings and a cross-motion for summary judgment in response to the City's Motion to Dismiss. Certainly Appellant made no claim below that it was somehow handicapped by an inability to engage in discovery.

A. Free Exercise of Religion.

The District Court held that the City was entitled to summary judgment on Plaintiff's claim that it violated Appellant's First Amendment rights to the free exercise of its religion, speech and association because Cheyenne's land use regulations are neutral, generally applicable, and do not substantially burden Appellant's exercise of religion.

The District Court findings were correct in these regards and supported by a reasoned 56 page published opinion.[3] Its finding that Appellant was not substantially burdened in the exercise of its religion was further supported by the jury's verdict finding that the daycare center did not involve a sincerely held religious belief.

The First Amendment to the United States Constitution guarantees that Congress shall make no law prohibiting the free exercise of religion. *U.S. Const. Amend. I.* The Free Exercise Clause was made applicable to the states and local governments through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

The Free Exercise Clause provides protection to religious beliefs and opinions. *Braunfield v. Brown*, 366 U.S. 599, 603 (1961). However, it does not prohibit Congress and local governments from validly regulating religious conduct. *Reynolds v. United States*, 98 U.S. 145, 164 (1878); *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 824 (10th Cir. 1988). The Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

The Supreme Court's Free Exercise cases hold 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...A law failing to satisfy these requirements

[3] With respect to addressing the constitutional claims, Appellees often can do no better than to track the reasoning found in the District Court opinion.

> [i.e., is not neutral or generally applicable] must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (citing *Smith*, 494 U.S. 872). As the District Court noted, the threshold question in free exercise cases is whether the law that allegedly prohibits the free exercise of religion is neutral and of general applicability. *First Assembly of God of Naples, Fla., Inc., v. Collier County*, 20 F.3d 419, 423 (11th Cir. 1994). If the law is neutral and generally applicable, then it need only be rationally related to a legitimate government end to be constitutional. *United States v. Hardman*, 297 F.3d 1116, 1126 (10th Cir. 2002).

A law is neutral if its object is something other than the infringement or restriction of religious practices. *City of Hialeah*, supra. at 533. In other words, a "law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Id.* at 543. Appellant and Amicus seem to acknowledge that the zoning ordinance in question in this case is facially neutral. They instead argue that it was discriminatorily enforced. Justice Scalia explained the difference between the two standards in his concurring opinion in *City of Hialeah*:

> [T]he defect of lack of neutrality applies primarily to those laws that by their terms impose disabilities on the basis of religion (e.g., a law excluding members of a certain sect from public benefits...; whereas, the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment...

Id. At 557 (Scalia, J., concurring) (internal citations omitted).

Most courts have held that land use regulations are neutral and generally applicable notwithstanding that they may have some individualized procedures for obtaining special use permits or variances. *See Civil Liberties For Urban Believers v. City of Chicago,* 342 F.3d 752, 764 (7th Cir. 2003); *First Assembly of God of Naples, Fla., Inc., v. Collier County*, supra. at 423; *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 (8th Cir. 1991); *Mount Elliot Cemetery Ass'n v. City of Troy*, 171 F.3d 398, 405 (6th Cir. 1999); *Rector of St. Bartholomew's Church v. City of New York,* 914 F.2d 348, 354 (2d Cir. 1990). These courts have reasoned that although zoning laws generally require some individualized assessment for special use permits or variances, they are motivated by secular purposes and impact all land owners within the city that seek a variance or special use permit equally. *See e.g., First Assembly of God of Naples, Fla., Inc., v. Collier County*, supra. at 423-24.

The District Court found that this Court would follow the approach taken by the circuits in the cases above. The District Court's opinion in this regard was directly on target. *See Swanson v. Guthrie Indep. Sch. Dist.*, 135 F. 3d 694, 701 (10th Cir. 1998) (finding that the Free Exercise Clause offers no protection when a regulation contains broad objectively defined exceptions not entailing subjective individualized considerations).

In *Messiah Baptist Church*, this Court considered a free exercise challenge by a church to a county's denial of a special use permit which would have allowed it to build a church in an agricultural ("A-2") zoned area of the county. *Messiah Baptist Church v. County of Jefferson,* supra. at 821-23. In holding the county's denial of the special use

permit did not violate the Free Exercise Clause, this Court concluded that the construction of the church in an A-2 zoned area was not integrally related to the underlying religious beliefs of the Church. *Id.* at 824. This Court found it important that there was no evidence that "building a church or building a church on the *particular site* [was] intimately related to the religious tenets of the church." *Id.* at 825 (emphasis added). That the county's zoning regulations had the incidental effect of making the practice of religion more expensive for the church because it had to build elsewhere in the county was inconsequential. *Id.* The Court concluded by unequivocally stating that "a church has no constitutional right to be free from reasonable zoning regulations nor does a church have a constitutional right to build its house of worship where it pleases." *Id.* at 826.

In *Swanson,* the Tenth Circuit went even further and suggested that where a system of individualized or particularized exceptions has been set in place, a religious reason must only be given as much weight as a non-religious reason. *Swanson v. Guthrie Indep. Sch. Dist.*, supra. at 701. This Court has recently confirmed the holdings of *Swanson* and *Messiah* regarding neutral rules of general applicability. *Axson-Flynn v. Johnson*, 356 F. 3d 1277 (10th Cir. 2004). In *Axson-Flynn,* this Court held that a neutral rule of general applicability is one that is not discriminatorily motivated or applied. *Id.* at 1294.

Appellant and Amicus rely heavily on *Axson-Flynn*, but they do not accurately cite it for the propositions for which it stands. *Axson-Flynn* is not a land use case but rather involved a Mormon student at the University of Utah who was enrolled in its acting

program. She brought suit against the program administrators alleging that she was forced out of the program as a result of refusing to utter certain profanities during classroom exercises. She alleged that her refusal to utter the profanities was based upon her religious beliefs. The defendants alleged that the requirement that she utilize the words in the scripts was a legitimate pedagogical requirement.

Axson-Flynn's claims were dismissed on summary judgment, and on appeal this Court reversed, finding that the Free Exercise claim presented issues of fact. However, the Court did so based upon evidence presented by Axson-Flynn that the University had made exceptions for her and other students in the past relieving them of the obligation to utter the profanities. Axson-Flynn further claimed that the faculty specifically referenced her religion and acted out of "anti-Mormon sentiment" in refusing to except her from the requirement. *Id.* at 1293.

No such specific targeting of Appellant's religion or system of exceptions existed in this case. As the Board of Adjustment and the District Court both found, Cheyenne's zoning ordinance simply does not permit anyone, whether they are a religious institution or not, to operate a childcare center in a LR-1 zoned area, and there was no evidence that any entity had ever been granted a variance to the ordinance in question. (Aplt. App., Vol. II at 837-841; Vol. VI at 2527-2528).

Appellant and Amicus argue that the fact that the Board held a hearing in which the peculiar circumstances of this case were discussed is proof that the City had a system of individualized exceptions. This Court in *Axson-Flynn* negated that argument. "While of course it takes some degree of individualized inquiry to determine whether a person is

eligible for even a strictly defined exception, that kind of limited yes-or-no inquiry is qualitatively different from the kind of case-by-case system envisioned by the *Smith* Court in its discussion of *Sherbert v. Verner*, 374 U.S. 398 (1963), and related cases." *Axson-Flynn v. Johnson* supra. at 1298.

The stated objects of Cheyenne's zoning ordinance are, among others, to: (1) promote the health, safety, and general welfare of the citizens of Cheyenne and Laramie County; (2) create an attractive living and working environment; (3) lessen congestion in the streets; (4) prevent the overcrowding of land; and (5) facilitate provisions for transportation, water, sewage, schools, parks and other public requirements. (Aplt. App. Vol. VI at 2281-2290). Appellant did not submit any evidence prior to the granting of summary judgment, or for that matter at trial, that LR-1 zoning regulations were enacted for a non-secular purpose.

Similarly, there was no evidence submitted prior to summary judgment or at trial from which the Court could conclude that the ordinance had ever been selectively or discriminatorily applied. The only testimony at trial even remotely related to this indicated that another church located on a heavy traffic artery had in the past sought to change the zone designation on its property from residential to commercial. In another instance, a church sought to change the zoning ordinance itself to allow daycare centers in high-density residential areas. In both of these instances, the churches were able to process their desires through the City because they utilized the established procedures available to all applicants. (Aplt. App., Vol. IV at 1537-1543).

The City informed Appellant of the options that it had available to attempt to accomplish its goal. Appellant, however, refused to pursue any attempt to alter its zone designation despite being advised of this option. Instead it simply insisted that it was exempt from the zoning laws. A church cannot fail to follow the procedural systems in place under a local government's land use plan and later claim that it is exempt from them. *Civil Liberties for Urban Believers v. City of Chicago*, supra. at 764; *Open Door Baptist Church v. Clark County*, 995 P.2d 33, 46 (Wash. 2000).

In denying Appellant's application for a variance, the Board of Adjustment specifically concluded that it had "no authority or discretion" to grant Appellant a variance for a daycare license for a program which would enroll up to one hundred kids for eighteen hours a day, seven days a week. (Aplt. App., Vol. VI at 2527-2528). The zoning ordinance by its clear language did not permit daycare centers as a use by right or by Board approval in an LR-1 zone. Appellant presented no evidence prior to the granting of summary judgment or at trial that any subjective individualized considerations were at play in this case. *See Swanson v. Guthrie Indep. Sch. Dist.*, supra. at 701. In short, Appellant completely failed to show that the City engaged in "a pattern of ad hoc discretionary decisions amounting to a system" of individual assessments. *Axson-Flynn* supra. at 1298.

Moreover, the LR-1 zoning regulations are generally applicable because they do not impose "burdens" on conduct motivated by religious belief. There was simply no testimony that LR-1 zoning regulations and their enforcement target the practices of the

Methodist religion for discriminatory treatment or affect its practices. They place Appellant on a footing equal with that of non-religious entities.

As the District Court found, Appellant's Free Exercise claim fails because, viewing the facts in the light most favorable to it, all the evidence demonstrates is, at most, an incidental burden on its religious conduct. As was the case in *Messiah Baptist Church*, the jury and the District Court found that the operation of a daycare center was not integrally related to Appellant's underlying religious beliefs and operations. There was no evidence that religious instruction was regulated at the site. Moreover, Appellant could operate a daycare in another of Cheyenne's 28 zones properly zoned for such an operation. Even if the zoning ordinance had the incidental effect of restricting religious instruction in a residential neighborhood, which it didn't, an ordinance which restricts nothing more than the location of a religious practice does not substantially burden the free exercise of religion. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004), *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961 (N.D. Ill. 2003).

To have granted Appellant a special variance to operate its daycare center in an LR-1 zoned area would be to give a religious organization special treatment by Cheyenne solely on the basis of religion. "Nothing in the Free Exercise Clause requires that special treatment be provided." *Swanson* supra. at 702. In fact, granting such a special variance may run afoul of the Establishment Clause. *Id.* at 702.

The District Court found that Cheyenne's zoning regulations have the incidental effect of making Appellant's practice of religion more expensive and inconvenient.

Appellees do not necessarily agree with this finding, but regardless, as this Court explained in *Messiah Baptist Church*, the Free Exercise Clause does not provide Appellant a remedy for these incidental effects imposed upon it by Cheyenne's reasonable zoning ordinance. *Messiah Baptist Church v. County of Jefferson* supra. at 824-26. See also *Konikov v. Orange County, Florida,* 302 F. Supp.2d 1328, 3179 (M.D. Fla. 2004).

Finally, Appellant asserts that its claim is not governed by the "generally applicable" rule enunciated by the Supreme Court in *Smith* because its claim is a "hybrid" of both free exercise rights and other constitutionally protected rights. In *Smith*, the Supreme Court noted that the only decisions in which it has held that the "First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press ...." *Smith*, supra. at 881.[4]

In *Swanson*, the Tenth Circuit explained that " it is difficult to delineate the exact contours of the hybrid-rights theory discussed in *Smith*." *Swanson v. Guthrie Indep. Sch. Dist.*, supra. at 699. However, the Tenth Circuit explained that at the very least, the hybrid-rights exception requires a "colorable showing of infringement of recognized and

[4] The constitutional validity and extent of the hybrid-rights exception is debatable. The Sixth Circuit has rejected the assertion that a hybrid-rights claim is subject to strict scrutiny. *Prater v. City of Burnside*, 289 F.3d 417, 430 (6th Cir. 2002). The Supreme Court has recognized the Sixth Circuit's view with respect to hybrid-rights claims but has not addressed the Sixth Circuit's contention that the hybrid-rights exception is not binding because the language was dicta. *See Watchtower Bible and Tact Society of New York, Inc. v. Village of Stratton,* 122 S. Ct. 2080, 2085-86 & n.8 (2002). Justice Souter also questioned the validity of the hybrid-rights exception in *City of Hialeah* when he noted that such an exception would swallow the rule and eviscerate the need for free exercise analysis at all. 508 U.S. at 567 (Souter, J., concurring). Most recently the 10th Circuit in *Axson-Flynn,* before significantly limiting the scope of the doctrine, noted that it has been "roundly criticized from every quarter". *Axson-Flynn supra at 1296.*

specific constitutional rights, rather than a mere invocation of a general right..." *Id.* at 700. This Court in *Axson-Flynn,* revisited the hybrid rights doctrine. The Court again reiterated that it has no applicability unless the constitutional claim is "colorable". Expanding on this, the Court found that in order to invoke the hybrid-rights doctrine it must show a "fair probability or likelihood" of success on the merits. *Axson-Flynn v. Johnson,* supra. at 1297.

Thus, as the District Court found, if the other constitutional claims cannot stand independently of the free exercise claim, there is no basis for applying the hybrid-rights exception. *Thiry v. Carlson*, 78 F.3d 1491, 1496 (10th Cir. 1996). Moreover, the Third Circuit has held that while there is a constitutionally secured right to associate for religious purposes, the religious motivation of those who associate for religious purposes does not entitle them to an exemption from *Smith*'s generally applicable rule because that associational right is derivative of the right to free exercise of religion. *Salvation Army v. Dep't of Community Affairs of N.J.*, 919 F.2d 183, 198-200 (3d Cir. 1991). (citing *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958)).

In this case, Appellant has alleged numerous constitutional claims in addition to its Free Exercise claim in an attempt to fall within the hybrid-rights exception. However, as discussed more fully below, Appellant has not alleged a colorable claim of a violation of its First Amendment rights to free speech or association or its Fourteenth Amendment rights to due process or equal protection. Therefore, Appellant's case does not fall within the hybrid-rights exception. Because Appellant's other constitutional claims cannot stand

independent of its Free Exercise claim, there is no basis for applying the purported hybrid-rights exception to the general applicability rule announced in *Smith*.

Finally, this Court in *Axson-Flynn* held that because the "hybrid-rights" exception to *Smith*'s rational basis review was not clearly established prior to the decision in *Axson-Flynn*, any defendant whose actions occurred before the opinion was handed down on February 3, 2003 is entitled to qualified immunity on any assertion of the "hybrid-rights" claim. Because the parameters of the "hybrid-rights" doctrine were not clearly established at the time that the City acted in this case, the City is immune from its application.

B. Freedom of Speech, Assembly and Freedom of Association

Appellant also claims that its "speech, assembly, and associational rights were violated because they are prohibited from gathering together with children to teach the Church's message." As discussed above, the object of the City's land use regulations is unrelated to expression, and there was no evidence presented that the zoning regulations have affected the ability of the church members to speak, assemble and associate with one another. It should also be recognized that the fact that Appellant claims that the speech being infringed upon is religious speech is irrelevant in that religious speech is entitled to no more protection than non-religious speech. *Axson-Flynn*, supra. at 1292.

In relevant part, the First Amendment provides that "Congress shall make no law ... abridging the freedom of speech, ... or the right of the people to peaceably assemble." *U.S. Const. Amend. I.* The First Amendment's Free Speech Clause and Freedom of

Association Clause apply to the states through the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652 (1925); *Jonge v. Oregon*, 299 U.S. 353 (1937).

With respect to the Free Speech Clause, a content-neutral regulation that incidentally burdens speech, including symbolic speech, is subject to intermediate scrutiny. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). A "municipality's right to use its zoning power in the public interest is perhaps the paradigm of such a [content-neutral] restriction." *Gascoe, Ltd. v. Newtown Township*, 699 F. Supp. 1092, 1095 (E.D. Pa. 1988); *see also C.L.U.B. v. City of Chicago*, 157 F. Supp. 2d 903, 915 (N.D. Ill. 2001); *Roulette v. City of Seattle*, 850 F. Supp. 1442, 1448-49 (W.D. Wash. 1994).

Under the intermediate scrutiny standard of review, a "content-neutral regulation will be sustained if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner v. F.C.C.*, 520 U.S. 180, 189 (1997). A municipality has an important or substantial governmental interest in enacting zoning regulations. As explained by Justice Powell:

> [It] is undeniable that zoning, when used to preserve the character of specific areas of the city, is perhaps the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.

Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 80 (1976) (Powell, J., concurring) (internal quotations and citations omitted).

The First Amendment also provides a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and

cultural ends. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-909 (1982). The Supreme Court has afforded constitutional protection to freedom of association in two distinct senses:

> First, the Court has held that the Constitution protects against unjustified interference with an individual's choice to enter into and maintain certain intimate or private relationships. Second, the Court has upheld freedom of individuals to associate for the purpose of engaging in protected speech or religious activities.

Bd. Of Dirs. Of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 544 (1987). However, the "First Amendment protections as to speech and assembly are not so all-encompassing as to include all activity in which [a religious] idea, goal or value is promoted." *C.L.U.B v. City of Chicago*, supra. at 915; *see also Leathers v. Medlock*, 499 U.S. 439 (1991) (upholding the application of a general sales tax to cable television that was not applicable to the print media because it did not suppress ideas).

The District Court considered Appellant's free speech and associational rights in conjunction with the zoning ordinance enacted by the City. The District Court again thoughtfully distinguished between the ordinance in question and one that was content-based, had a disparate impact on certain religious viewpoints, or although facially neutral, was applied in a discriminatory manner.

As stated above, Cheyenne's LR-1 zoning regulations are content neutral, and in fact, they do not even regulate any form of speech. The zoning ordinance does not limit, in any manner, Appellant's ability to communicate its religious message or associate with members of its congregation. Appellant's worship is not excluded from Mountview Park

or any area of Cheyenne. It can gather and worship with members of its congregation as it has done since 1956, and it can gather together with children to teach the church's message. Indeed, it has maintained church school facilities in its present building for religious instruction of children since its inception.

That Appellant is required to comply with Cheyenne's zoning regulations does not violate its rights to free speech or freedom of association because the City has an important governmental interest in preserving the character of specific areas of Cheyenne, such as this quiet residential area. The LR-1 zoning regulations, and the zoning ordinance, as a whole, are unrelated to the suppression of speech and do not burden more speech, if any, than necessary to further that interest. Therefore, the LR-1 zoning regulations survive intermediate scrutiny.

Appellant presented no evidence outside of conclusory allegations to support its claim that its free speech and associational rights were violated. Unsupported propositions, arguments, and statements by counsel in a brief or memorandum in opposition to a motion for summary judgment are insufficient to create an issue of fact for purposes of summary judgment. *See Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir. 1992); *Grace United Methodist Church v. City of Cheyenne*, 235 F. Supp. 2d 1186 (D. Wyo. 2002).

C. Due Process Claim

Appellant contends that Cheyenne's zoning ordinance is arbitrary and unreasonable because there is no basis for the exclusion of religious uses from residential

neighborhoods. The District Court properly found that the City was entitled to summary judgment on this claim as well.

The Fourteenth Amendment Due Process Clause provides that "[n]o State shall ... deprive any person of life, liberty or property, without due process of law ..." *U.S. Const. Amend. XIV, § 1, cl. 3.* This Court has explained the proper analysis for measuring the constitutionality of a zoning ordinance under the Due Process Clause:

> before a zoning ordinance can be declared unconstitutional on due process grounds, the provisions must be clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare ... [I]f the validity of the land classification is "fairly debatable" the legislative judgment must control.

Messiah Baptist Church v. County of Jefferson, supra. at 822 citing *Village of Euclid Ohio v. Ambler Realty Co.*, 272 U.S. 365, 388, 395 (1926). Additionally, where Appellant has not been denied the right to exercise its religion, strict scrutiny does not apply and the land use regulation "need only bear a substantial relationship to the general welfare." *Id.* at 823; *see also Okla. Educ. Ass'n. v. Alcoholic Beverage Laws Enforcement Comm'n*, 889 F.2d 929, 935 (10th Cir. 1989).

As set out above, Cheyenne's zoning regulations do not violate Plaintiff's right to the free exercise of religion. Appellant has been denied a variance to operate a large-scale alleged day care center. That, standing alone, does not amount to a denial of the exercise of religious preference. The LR-1 zoning regulations only affect property interests and therefore need only bear a substantial relation to the general welfare. There can be little doubt that Cheyenne's zoning regulations bear a substantial relation to the

general welfare of the residents of Cheyenne. *See Young v. Am. Mini Theatres, Inc.*, supra. at 80 (Powell, J., concurring). There is nothing arbitrary or unreasonable about precluding an operation that would service up to one hundred children for eighteen hours a day, in a section of town zoned for residential purposes. In fact, such a zoning regulation serves to promote the health, safety, and general welfare of the residents of Cheyenne. (Aplt. App. Vol. V at 1975-1978, 1982-1992; Vol. IV at 1624-1643).

D. Equal Protection Claim

Appellant alleges that the City's zoning ordinance treats Appellant's use of its land differently and worse than other religious and non-religious uses of land and thus unconstitutionally discriminates against it in violation of the Equal Protection Clause of the Fourteenth Amendment.

The Fourteenth Amendment mandates that no state shall deny a person in its jurisdiction equal protection of the laws. *U.S. Const. Amend. XIV, § 1, cl. 4.* The Equal Protection Clause seeks to guarantee that all similarly situated persons are treated alike. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). If the challenged statute does not make classifications based upon a fundamental right or a suspect class, the statute must survive only a rational basis standard of review. *Curley v. Perry*, 246 F.3d 1278, 1285 (10th Cir. 2001) *cert. denied* 534 U.S. 922 (2001). In the land use context involving the zoning of churches, "absent evidence of purposeful discrimination based on religious status, the rational basis standard should apply." *Cornerstone Bible Church v. City of Hastings*, supra. at 472.

Under the rational basis test, Appellant had the burden of proving that the legislative facts on which the statutory classification is apparently based could not reasonably be conceived as true by the government. *Okla. Educ. Ass'n. v. Alcoholic Beverage Laws Enforcement Commission*, supra. at 934; *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992). Absent an invidious or gender-based classification drawn by the ordinance, it is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *City of Cleburne v. Cleburne Living Ctr., Inc.*, supra. at 440. To determine whether a classification is rationally related to a legitimate interest, "a court must consider the law's logical tendency to promote its stated goals as against its tendency to impair other, more important, goals." *Coburn v. Agustin*, 627 F. Supp. 983, 991 (D. Kan. 1985).

There is no fundamental right involved in this case, nor has a suspect classification been identified. In fact, Appellant did not even attempt to argue for purposes of summary judgment that a fundamental right is involved or that it is a suspect class. Rather Appellant simply alleges that it was "treated differently and worse," but it failed to identify any entity that was treated differently or better. Consequently, the rational basis test applies.

Cheyenne's zoning ordinance is rationally related to its promotion of the general welfare of its citizens. Municipal zoning has been a common and accepted exercise of the police power to protect city residents from the effects of urbanization, overcrowding, and encroachment of commercial business for over three-quarters of a century. *See Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Contrary to Appellant's suggestions, Cheyenne's zoning ordinance seeks to accommodate religious organizations. Appellant can operate its Church, and has operated its Church, in a residentially zoned area for nearly fifty years. It can also operate a large-scale daycare center if it does it in one of the areas in the City properly zoned for such an operation. Appellant did not present any evidence of another entity, religious or otherwise, that is currently operating a daycare center in an LR-1 zoned area. As the District Court properly noted, Appellant is not seeking to be treated like similarly situated institutions in Cheyenne, but rather it is seeking preferential treatment. Its Equal Protection claim was properly dismissed.

II. The District Court Did Not Commit Reversible Error In Its Instructions to the Jury

Appellant's first claim for relief asserts that the City's decision violated RLUIPA. This claim was submitted to a jury, and the jury found that the operation of a daycare center was not a sincere exercise of Appellant's religion. Appellant argues that the District Court erred in its instructions regarding the RLUIPA claim, although it does not argue that the Court's "sincere exercise" instruction was in error.

In order to overturn the jury's findings, the Appellant must prove that the alleged error was "both prejudicial and clearly erroneous." *Guides, LTD v. Yarmouth Group Property Management, Inc.*, 295 F.3d 1065, 1074 (10th Cir. 2002). In analyzing whether error was committed, this Court "must view challenged jury instructions in their entirety, deciding not whether instruction was completely faultless, but whether jury was misled in

any way." *Coleman v. B-G Maintenance Management of Colorado, Inc.*, 108 F.3d 1199, 1202 (10th Cir. 1997).

The Court's instructions on RLUIPA were generally taken directly from the statute itself. The alleged error occurred in Instruction No. 19 which was one of four instructions setting forth the elements that Appellant was obligated to prove under RLUIPA. These instructions are found in the Court's package of instructions at Instruction Nos. 17-20. Utilizing the language of the statute, the Court instructed the following in Instruction No. 17:

The term "religious exercise" as used in the Religious Land Use and Institutionalized Persons Act includes any exercise of religion, whether or not compelled by or central to a system of religious belief. The use, building or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

The language in Instruction No. 17 was taken directly from 42 U.S.C. §2000cc (7) (A)-(B) and states that for the purposes of RLUIPA, the religious exercise being asserted need not be compelled by or central to a system of religious belief. It is subject to doubt that one can actually engage in a religious exercise that is not compelled by or central to a system of religious belief, but regardless the Court instructed from the language of the statute as requested by Appellant. Not coincidentally, Appellant offered no objection to Instruction No. 17. (Aplee. Supp. App. at 81; Aplt. App., Vol. V at 2146-2182).

The Court went on to instruct as follows in Instruction No. 18, again without objection from Appellant:

In order to prove the essential elements of the plaintiff's claim under RLUIPA, the burden of proof is on the plaintiff to establish by a preponderance of the evidence each of the following: First, that the City of Cheyenne's land use regulation or the Board of Adjustment's application of that land use regulations imposes a substantial burden on Grace United Methodist Church's exercise of religion.

And second, that Grace United Methodist Church's operation of the childcare or daycare center would be a sincere exercise of religion.

And third, that Grace United Methodist Church is a religious assembly or institution.

The second paragraph of Instruction No. 18 correctly instructed that in order to make a claim under RLUIPA, the Appellant had the obligation to prove that the operation of the daycare center must be a sincere exercise of Appellant's religion. Instruction No. 20 further defined the word "sincere" as being truly held and religious in nature. As stated above, Appellant made no objection to these instructions. (Aplee. Supp. App. at 82, 84; Aplt. App., Vol. V at 2146-2182).

Finally, Instruction No. 19 dealt with RLUIPA's requirement that Appellant prove that the exercise of a sincerely held religious belief had been "substantially burdened". It is with this instruction that Appellant claims error. This Court need not address this claim of error since the jury found that Appellant failed to prove that it was engaged in a sincere exercise of its religion, and the issue of substantial burden became moot. However, the District Court did not err in the language of the instruction. Instruction No. 19 read as follows:

A government regulation substantially burdens the exercise of religion if the regulation, first, significantly inhibits or constrains conduct or expression that manifests some tenet of the institution's belief;

And two, meaningfully curtails an institution's ability to express adherence to its faith; or

Three, denies an institution reasonable opportunities to engage in those activities that are fundamental to the institution's religion.

Thus, for a burden on religion to be substantial, the government regulation must compel action or inaction with respect to the sincerely held belief. Mere inconvenience to the religious institution is insufficient.

Congress indicated that it intended the substantial burden test existing in RLUIPA to mirror the constitutional standard found under the Free Exercise Clause. *Civil Liberties for Urban Believers v. City of Chicago*, supra. at 760-761. Instruction 19 is taken directly from the discussion of the substantial burden test found in Tenth Circuit and Supreme Court case law. See *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996); *Cruz v. Beto*, 405 U.S. 319, 322 (1972); See also *Mack v. O'Leary et al.*, 80 F.3d 1175 (7th Cir. 1997). (Aplee. Supp. App. at 83; Aplt. App., Vol. V at 2146-2182). The instruction was an accurate statement of the law.

Other courts have recently gone further and said that in the context of RLUIPA, a substantial burden "is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise ... generally impracticable". *Civil Liberties for Urban Believers v. City of Chicago supra.* at 761; *San Jose Christian College v. City*

of Morgan, supra. at *9. The denial of non-fundamental activities such as building expansion does not render the practice of religion impractical or substantially burden religious exercise. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn*, 2004 WL 575699 (Or. App.); *Konikov v. Orange County*, supra. at 1344-1345.

At the instruction conference, Appellant sought to substitute the word "important" for the word "fundamental". (Aplt. App., Vol. V at 2151-2152). It cited no law in support of the proposed substitution other than its claim that Instruction No. 19 and Instruction No. 17 were in conflict. The concepts discussed in Instruction No. 17 and Instruction No. 19 are two entirely different concepts. Both contain accurate instructions concerning the principals being discussed, and Appellant provided no authority for the substitution of the word "fundamental" with the word "important". Instructions 17-20 accurately instructed the jury on the law of RLUIPA. There was no error committed by the District Court in its instructions on the substantial burden test. *Castle Hills First Baptist, Church, v. City of Castle Hills,* 2004 WL 546792 (W.D. Tex); *North Pacific Union Conference Association of the Seventh-Day Adventists v. Clark*, 74 P.3d 140, 147 (Wash. App. 2003).

In its brief, Appellant argues that its position is supported by the case of *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001). *Kikumura* involves a claim made by a prisoner against the federal government under a predecessor statute to RLUIPA because he was denied pastoral visits. The case generated three different opinions from three different judges, and none of them dealt with the definition of the substantial burden test that is the

subject of Instruction No. 19. None of them even suggested that the word "important" should be placed into the substantial burden test. *Kikumura* provides no authority for Appellant's position.

III. The District Court Did Not Commit Reversible Error In Admitting Bishop Brown's Letter

Following the Board of Adjustment's denial of Appellant's requested variance, Appellant's Pastor, Jon Laughlin, sent a letter to Bishop Warner Brown, the presiding Bishop over the Rocky Mountain and Yellowstone Conferences of the United Methodist Church. Attached to the letter was a detailed history of the daycare center project and the hearing before the Board of Adjustment. The letter and resolution informed Bishop Brown of the background of the dispute between Appellant and the City and sought monetary and other support from Bishop Brown and the Conference in pressing RLUIPA litigation. (Aplt. App., Vol. II at 1106-1108).

With full knowledge of the Church's teachings and a detailed history of Appellant's project, Bishop Brown responded to Pastor Laughlin with a letter dated May 18, 2001 indicating that Appellant's proposed operation of a daycare center appeared to be more of a commercial venture and less of a religious function. The letter recognized the government's compelling interest in limiting traffic, noise and congestion in a residential area. The letter further recognized that Appellant is still allowed to operate in the neighborhood and even expand its sanctuary and children's educational needs. (Aplt. App., Vol. VI at 2557).

The City was provided copies of the letters in discovery by Appellant without the assertion of any privilege. Appellees listed the letters as trial exhibits, and a deposition of Bishop Brown was taken at his offices in Denver, Colorado. The sole purpose of the deposition of Bishop Brown, as evidenced by the questions asked in the deposition, was to explore his view of the proposed daycare's place in Methodist teachings. In his deposition, which was subsequently used by Appellant at trial, Bishop Brown testified that his letter to Pastor Laughlin of May 18, 2001 accurately expressed the concerns he had about Appellant's position at the time he sent the letter. (Aplt. App., Vol. IV at 1804). Not surprisingly Bishop Brown also testified that after further consideration he no longer held the same view of the project and that he now found the project to "an important ministry" of the Methodist Church. (Aplt. App., Vol. IV at 1806).

Both parties listed Bishop Brown as a witness in their final pretrial memorandum, and Appellant called Bishop Brown in its case in chief by way of deposition. (Aplee. Supp. App. at 1-15, Aplt. App., Vol. IV at 1796). Prior to trial, Appellant filed a motion in limine seeking only to exclude the opinions contained in the letter of May 18, 2001 as evidence. Appellant's argument for the exclusion of the letter at trial was that Bishop Brown is not a spokesman or a representative for any party in the case and thus his letter was hearsay and inadmissible. Appellants further asserted that if Bishop Brown was a representative of the Church that the letter was inadmissible as work product. The District Court found that the letter was admissible as an admission against interest. (Aplt. App., Vol. III at 1118).

Appellant's first contention on appeal is one that was not raised before the District Court. It is that Bishop Brown's letter was not admissible because his opinions in the letter were not rationally based on his perceptions. Evidently it is Appellants position that Bishop Brown was not qualified to testify on the subject of whether the running of daycare centers constitutes a sincere exercise of Methodism.

Appellant cannot be heard to complain on appeal about Bishop Brown's ability to testify in this regard. Appellant made the determination to call Bishop Brown as a witness for the sole purpose of bolstering Appellant's claim that the daycare center was an important ministry of the Methodist Church. It is certainly proper examination by Appellees to point out that he held a different opinion two years earlier. Whether Bishop Brown's testimony was lay testimony or expert testimony, neither party objected to him as a witness, and no other purpose for his testimony existed other than to express the opinions regarding the daycare center juxtaposed against the teachings of the Methodist church. "The 'invited error doctrine' is equitable in nature; it prevents a party from inducing action by a court and later seeking reversal on the ground that the requested action was error". *Eateries, Inc. v. J.R. Simplot Company*, 346 F.3d 1225, 1229 (10th Cir. 2003).

Regardless, Appellant's contention that Bishop Brown is not a spokesman or representative for any party or that his opinions were not rationally based upon his perceptions was simply not accurate. (Aplt. App., Vol. III at 1113-1118). Bishop Brown heads the region of the Methodist Church under which Appellant operates. Bishop Brown described the organization of the United Methodist Church as similar to the U.S.

Government, with an executive, judicial and legislative branch. He compared his position to that of president of the Rocky Mountain Conference and testified that he was the person who makes policy decisions about the Church in the region that he heads. The United Methodist Church includes the States of Utah, Colorado and parts of Wyoming, including that part of Wyoming in which Appellant is located. (Aplt. App., Vol. IV at 1800).

The Conference is the corporate body that oversees the work of the ministry in its region. The pastors, including Pastor Laughlin, are voting members of the Conference, and they are not members of any particular congregation. The Bishop is a general superintendent over all local pastors, and he and the other bishops make up the executive branch for the general church globally. The Bishop assigns the local pastors and is essentially responsible for supervising their work. The local pastors are expected to follow the principles, ethics, and format of the Conference. In the event a local church goes out of business, the property and assets of the local church revert to the Conference on behalf of the whole. (Aplt. App., Vol. IV at 1801).

Bishop Brown grew up in the Methodist Church and has been an ordained minister for thirty years. He has been a local church pastor for urban and suburban congregations, a district superintendent and a director of program staffs. He was nominated by his colleagues to be considered for the Bishop's position. (Aplt. App., Vol. IV at 1801). If anyone is qualified to speak on the issues surrounding whether a daycare center is a sincere exercise of Methodist religion, Bishop Brown is that person. Appellants obviously understood this and made Bishop Brown their own witness without any

suggestion to the District Court that he might not have a rational basis for his testimony in this regard. The District Court appropriately found under Rule 804 (3) of the Federal Rules of Evidence that Bishop Brown's letter was a statement against his own interest.

Appellant next argues that even if Bishop Brown's opinions were admissible, the letter itself was inadmissible as work-product. The problem with this argument is threefold. First, Appellant did not assert a work-product privilege with respect to the letter, and voluntarily produced the letter. The privilege is waived by the voluntary release of materials otherwise protected by it. *Simmons, Inc. v. Bombardier, Inc, et al.*, 2004 WL 526927 (D.C. 2004).

Second, the privilege only applies to attorneys' or legal representatives' thought processes authored in anticipation of litigation. Fed.R.Civ.P. 26(b)(3), *Genentech, Inc. v. United States International Trade Commission*, 122 F.3d 1409 (Federal Cir. 1997). The party asserting the work product privilege must prove its applicability. It is not enough to merely allege that it applies. *Resolution Trust Corporation v. Dabney et al.*, 73 F.3d 363 (10th Cir. 1995). Here, Appellant contended throughout that Bishop Brown was not a representative of Appellant and never tried to show that he fell within the privilege. Moreover, the letter was drafted almost a year before this litigation was commenced by an individual who had no role in the decision to proceed with litigation.

Finally, any error in admitting the letter is harmless in that Appellant called Bishop Brown as a witness at trial, and Bishop Brown reaffirmed the opinions contained in the letter through his testimony. (Aplt. App., Vol. IV at 1804). At most the letter was cumulative to the opinion testimony offered at trial by Appellants.

The Federal Rules of Evidence provide for the admissibility of relevant evidence. Under RLUIPA the jury had an obligation to determine whether the daycare center was a sincere exercise of the Methodist religion. It is difficult to imagine that the opinion of the presiding Bishop in the region was not relevant in this regard. While the testimony of the presiding Bishop that the project was more of a commercial venture than a religious exercise certainly did not help Appellant's cause, it was just as certainly admissible. The motion to exclude Bishop Brown's testimony was properly denied.

IV. The District Court Did Not Commit Error in any Other Rulings on the Admissibility of Evidence

During the final pretrial conference, Appellant objected to Appellees' listing of the Board of Adjustment's findings as an exhibit. The District Court indicated that it intended to allow the Board's findings to be admitted. The District Court then engaged in a discussion with Appellant's counsel as to its general philosophy regarding the admission of evidence in the case. The Court in that discussion stated its belief that the RLUIPA claim raised issues concerning not only Appellant's religious beliefs but also the City's secular motives. In this discussion, the District Court informed Appellant's counsel that it would allow all of the parties to be heard regarding their actions leading up to the lawsuit and that they would be allowed to present themselves to the jury in the "best light". (Aplt. App., Vol. II at 1054-1057, 1065-1067).

Appellant in two portions of its brief takes the District Court's comments in this regard out of context and argues that the Court replaced the Federal Rules of Evidence with a "best light" standard and allowed any evidence to be admitted which placed one

party or another in the "best light". Appellant's arguments in this regard are spurious. Not a single objection by any party during the trial was overruled on the basis of the "best light" standard. The expression by the Court that it would allow all parties to present their cases in the "best light" may not have been artful, but the District Court was correct in its view of the evidentiary issues. The City's motives in adopting its zoning plan and in denying Appellant's license to operate a daycare center were proper evidence. The information that the City had in front of it at the time that it made its decision was relevant in this regard.

Under RLUIPA, assuming that Appellant was able to prove that the City substantially infringed upon a sincerely held religious belief, the City nonetheless had a defense that its actions were taken pursuant to a compelling governmental interest. The City properly asserted this defense, and the District Court ruled that the RLUIPA claim presented issues of fact for a jury. As Appellants and Amicus have also pointed out in their briefings on appeal, the actions of Appellees are scrutinized under much more exacting standards if the ordinance was enacted pursuant to a religious motive or if the ordinance was applied differently to Appellant than to others. Thus, not only were the findings of the Board of Adjustment relevant, but the other evidence objected to by Appellant was as well.[5] In carrying its burden to prove that the City acted pursuant to a compelling governmental interest in the adoption and application of the ordinance, and in proving that it did not act pursuant to anti-religious bias, the City by necessity was

[5] Appellant on appeal makes no argument that the decision of the Board of Adjustment was improperly admitted.

required to present its reasons for the adoption of the ordinance and evidence surrounding its neutral application in this case.

Appellant references three exhibits that it alleges were impermissibly admitted but does not spend any time discussing them. It fails to even attempt to explain how the exhibits created prejudice to its case. The exhibits to which Appellant objects in this portion of their brief were introduced to show what information the City had before it when it ruled, the considerations of the City in evaluating the requested variance, and Appellees' reasons for opposing the proposed daycare.

Defendants' Exhibit C, the City's staff report analyzing the requested variance, is an official public record that demonstrates that the City did nothing more than compare the variance to the language of the ordinance. Defendants' Exhibits M and O showed that the homeowners made, and the City had before it, legitimate concerns of increased traffic and safety. These documents are part of the official record of the City, and pursuant to Rule 803 (8) of the Federal Rules of Evidence, they are not hearsay. (Aplt. App., Vol. Vl at 2520-2522, 2545-2551).

Appellant also objects to testimony from the neighbors that in their discussions with Appellant, the church representatives never mentioned anything about the daycare providing religious instruction. Appellant's notes of a neighborhood meeting held to explain the project to the neighbors bolster that testimony in that they contain no mention of religious instruction. Appellant does not attempt to explain how testimony concerning the failure of Appellant to raise religious instruction with the neighbors is hearsay.

Appellant finally argues that the evidence, if relevant, was insufficient to carry the City's burden under the compelling interest standard. Whether the evidence actually reached the bar in this regard is a moot issue since the jury never was required to reach this issue. Because the jury found that Appellant's desire to operate a daycare center was not a sincere exercise of any religious belief, it never had to reach the issue of whether the City was acting pursuant to a compelling governmental interest.

Regardless, Appellant is incorrect in its argument that the evidence presented did not support the City's claim that it acted pursuant to a compelling governmental interest, and the District Court found as much in its post-trial Judgment. (Aplt. App., Vol. II at 837-841). There was significant testimony regarding the City's purposes in enacting the ordinance and the potential that the daycare presented for greatly increased traffic and noise in a quiet residential neighborhood. (Aplt. App., Vol IV at 1624-1642; Vol. V at 1756-1762, 1920-1992). Even Appellant's own traffic expert had to admit that the proposed daycare would create significant increases in traffic at odd hours of the day and night. (Aplt. App., Vol V at 2099- 2142).

Numerous courts have found that a government's interest in zoning is indeed compelling. *Konikov v. Orange County,* supra. at 1343; *Murphy v. Zoning Comm'n. of the Town of New Milford,* 289 F. Supp.2d 87, 108-109 (D. Conn. 2003); *First Baptist Church of Perrine v. Miami-Dade County*, 768 So.2d 1114, 1117 (Fla. 3d DCA 2000). The United States Supreme Court has held that a government's interest in the protection of citizens from unwelcome noise is "substantial." *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989).

V. Restrictive Covenants

The District Court allowed Appellee, Mountview Homeowner's Association, to intervene in this matter. The District Court in its order allowing intervention ruled that the Association would not be able to assert additional claims beyond those raised by Appellant and the City of Cheyenne. The City of Cheyenne in its Answer had already raised the covenants of the neighborhood as an affirmative defense to Appellant's claims. (Aplt. App., Vol II at 579-584). Consistently with its order, the District Court allowed Appellees to proceed to trial with a claim that the proposed daycare center violated the covenants applicable to the neighborhood. Following the intervention of the Association, the District Court continued the trial and allowed the parties the opportunity to engage in discovery regarding the covenants.

The jury found that the covenants applicable to the property prohibit the operation of the daycare center for which the Appellant made application. The District Court, in issuing its post-trial Judgment, cited the jury's findings regarding the covenants as an independent basis for the issuing of an injunction.

Appellant initially argues that the Association has no jurisdiction to assert its claim. The applicable law does not support this argument. The City raised the issue of the covenants in its Answer, and the Court properly asserted supplemental jurisdiction over it. 28 U.S.C. § 1367 allows a district court to assume supplemental jurisdiction "over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy". Even if the City had not

asserted a claim related to the covenants, 28 U.S.C. § 1367 specifically allows for supplemental jurisdiction over claims that involve the joinder or intervention of additional parties.

Appellant next claims that the Association has no standing under which to assert a claim in this case. The Homeowner's Association was formed in 2001 following Appellant's threats of litigation and consists of the owners of a number of the lots governed by the Mountview Park, Fifth Filing, the area in which Appellant's property is located. The two individuals who testified on behalf of the Association were both owners of property in the Mountview Park, Fifth Filing. (Aplt. App., Vol V at 2026 -2043).

The covenants governing Mountview Park, Fifth Filing specifically reference that they run with the land and are binding upon all parties to the covenants, "their heirs, successors, personal representatives, grantees and assigns, and all persons claiming under them." (Aplt. App., Vol VI at 2572). They are specifically enforceable by any person or persons owning real property situated in the development. Contrary to the argument of Appellant, nothing in the covenants or law requires an action to be brought on behalf of a majority of the homeowner's in the Filing. Any one of the members of the Association acting alone could have asserted a claim against Appellant, and Appellant has not cited, and Appellees cannot find, any law prohibiting them from asserting that jointly as members of an association. Regardless, the City also properly asserted the covenants as an affirmative defense, and the issue was properly before the Court.

Appellant also argues that the property upon which the Church sits is not governed by the covenants. Appellant's argument that its property is not governed by the covenants

is based upon its claim that its property is not a "lot" as defined by the covenants because a church was built on it rather than a residence. Neither the language of the covenants nor the evidence supports this argument. The District Court could have found as much as a matter of law. Instead it allowed the issue to be submitted to the jury, and the jury found, consistent with the testimony, that the covenants were applicable to the property. The only testimony regarding the covenants presented at trial confirmed that the lot on which the Church sits is governed by the covenants and that the covenants apply to all property within the subdivision. (Aplt. App., Vol. V at 2084-2098; Vol. VI at 2559-2584).

Appellant finally argues that the covenants do not prohibit the operation on its property of a hundred-child day care center. At the very least, this was a question of fact for the jury. The Wyoming Supreme Court has held that ambiguities in covenants are subject to interpretation by fact finders. *Samuel v. Zweirn*, 868 P.2d 265 (Wyo. 1994).

Pursuant to paragraph A of the covenants, all of the lots are "known and described" as "residential lots". Paragraph E of the covenants prohibits the operation of any "noxious or offensive trade or activity" and the doing of anything which may become an "annoyance or nuisance to the neighborhood." (Aplt. App., Vol. VI at 2571-2572). The Wyoming Supreme Court on more than one occasion has recognized a distinction between residential activities and commercial activities on property in the context of restrictive covenants. See *Millheiser v. Wallace*, 21 P.3d 752 (Wyo. 2001); *Fox v. Miner*, 467 P.2d 595 (Wyo. 1970).

Although Appellant argues that all covenants are subject to strict construction, the Wyoming Supreme Court has clearly found that when interpreting covenants, the fact finder may look to the situation of the parties, the subject matter, and the purpose to be served. Restrictive covenants are contractual in nature, and they are to be interpreted in accordance with the principles of contract law. *McClean v. Anderson*, 933 P.2d 468, 474 (Wyo. 1997). The Courts will seek to determine and carry out the intention of the parties, especially the grantors, as it may appear or be implied from the instrument itself. *Hutchinson v. Heel*, 3 P.3d 242 (Wyo. 2000). In interpreting restrictive covenants, the intention of the parties is to be determined from the context of the entire instrument and not from a single clause. *Anderson v. Bommer*, 926 P.2d 959 (Wyo. 1996).

The jury in this case found that the activity sought to be operated on the Church property was commercial in nature, and even the Bishop of the Rocky Mountain Conference of United Methodist Churches has recognized the commercial nature of the activity in question. The District Court also recognized in its Judgment the commercial nature of the daycare center. A daycare is a commercial activity regulated by the State of Wyoming and the City of Cheyenne, and the proposed activity certainly raised a question of fact as to whether or not it violates the terms of the covenants.

As stated above, the covenants in question in this case contain language that prohibits any noxious trade activities or nuisances. The Wyoming Supreme Court has previously ruled that clauses allowing only residential activity prohibit commercial activity and that commercial activity under those circumstances can constitute a nuisance. *Bowers' Welding and Hotshot, Inc. v. Bromley*, 699 P.2d 299 (Wyo. 1985). Other courts

have held that whether an activity constitutes noxious or offensive trade or a nuisance is a question of fact. *Barker v. Jeremiasen,* 676 P.2d 1259 (Colo. App. Ct. 1984).

As Appellant accurately states, all of the courts that have interpreted such covenants have interpreted them as a whole in view of their underlying purposes. The District Court instructed the jury utilizing exactly those words. It also instructed the jury that a nuisance can arise from an unlawful use by a person of his property which does injury to the rights of another. (Aplt. App., Vol. V at 2263 and 2264). The finding of the jury that the proposed daycare center violated the covenants was supported by the law and the evidence.

Finally, Appellant argues that RLUIPA somehow trumps all state law claims. That argument is inaccurate. RLUIPA prohibits actions by governmental entities. It does not void contractual arrangements between private parties.

VI. RLUIPA Is Unconstitutional

Prior to trial, Appellees moved to dismiss Appellant's RLUIPA claim asserting that RLUIPA is unconstitutional. The District Court reserved ruling on the motion until after the trial, and in its post-trial Judgment, it dismissed Appellees' motion because it was moot. Obviously, given the verdict in this case, the District Court's handling of the constitutional defense to RLUIPA was appropriate. Appellees recognize the preference in the law that courts avoid reaching constitutional issues when the case can be decided on non-constitutional grounds. *Cunico v. Pueblo School District No. 60*, 917 F.2d 431 (10th Cir. 1990).

However, three of Appellant's five issues relate to the RLUIPA claim. If this Court overturns the Verdict and Judgment on one of those grounds, then the constitutionality of RLUIPA again becomes an issue. Since the failure to argue an issue can be deemed an abandonment of it, Appellees reassert their contention that RLUIPA is unconstitutional and specifically that it violates the Establishment Clause of the United States Constitution.

The scope of RLUIPA suggests that its actual purpose is not to accommodate religion by removing a particular obstacle to religious exercise, but rather to advance religion relative to other constitutionally protected conduct. In its enactment of RLUIPA, Congress has "abandoned neutrality and acted with the purpose of furthering religion," in violation of the Establishment Clause's fundamental command of governmental neutrality. *Ghashiyah v Dept. of Corrections,* 250 F. Supp.2d 1016, 1025 (E.D. Wis. 2003). "Even if the purpose of RLUIPA fits within the rule of *Amos*, it is still unconstitutional because it has the primary effect of advancing religion." *Cutter v. Wilkinson*, 349 F.3d 257, 264 (6th Cir. 2004).

CONCLUSION

The District Court did not commit error in dismissing Appellant's constitutional claims, in its evidentiary rulings, or in its instructions to the jury. Moreover, the jury's findings that the proposed daycare center was not a sincere exercise of Appellant's religion and violated the covenants were supported by the evidence and proper. The finding that the proposed daycare center was not a sincere exercise of Appellant's religion

is unchallenged and dispositive of all of the issues in the case. The findings of the jury and District Court should be upheld in their entirety.

This case simply does not involve improper treatment of Appellant's religious interests. RLUIPA was never meant to absolve churches of the requirement that they comply with neutrally enacted and applied land use regulations. *Christ Universal Mission Church v. City of Chicago*, 2004 WL 595392 (7th Cir. 2004). Despite Appellant's claims that their constitutional and religious interests were infringed upon, the City of Cheyenne did nothing more than require Appellant to follow the procedures established under its neutrally drawn and enacted zoning code.

STATEMENT CONCERNING ORAL ARGUMENT

This case involves significant issues of federal statutory and constitutional law, and the Court has allowed the filing of an amicus brief herein. The Appellees request oral argument and respectfully requests that both sides be given a total of one-half hour.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)(B)

In accordance with Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned certifies that this brief complies with the type volume limitation set forth in Rule 32(a)(7)(B), and that this brief, exclusive of the items listed in Rule 32(a)(7)(B)(iii) contains 12,932 words. Appellees have relied on the Microsoft Word word counting feature on the undersigned's computer in arriving at this word count.

DATED this 20th day of April, 2004.

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CERTIFICATE OF SERVICE

I, Stephen H. Kline, do hereby certify that a true and accurate copy of the foregoing BRIEF OF APPELLEES was served upon all parties to this action via U.S. mail, postage prepaid, on the 20th day of April, 2004.

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