**UNITED STATES DISTRICT COURT**
**DISTRICT COURT OF NEW JERSEY**
**DOCUMENT ELECTRONICALLY FILED**

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| THE LIGHTHOUSE INSTITUTE FOR EVANGELISM INC., d/b/a THE LIGHTHOUSE MISSION, and REVEREND KEVIN BROWN,<br>Plaintiffs<br><br>vs.<br><br>CITY OF LONG BRANCH, BCIC FUNDING CORP., BREEN CAPITAL SERVICES, INC., ABRAMS GRATTA & FALVO, P.C., PETER S. FALVO, ESQ., EUGENE M. LaVERGNE, ESQ., AND John Does, A-Z,<br><br>Defendants | : | HON. WILLIAM H. WALLS, U.S.D.J.<br><br>Case Number: 00-cv-3366 (WHW)<br><br>**TRIAL BRIEF OF DEFENDANT CITY OF LONG BRANCH** |

**TRIAL BRIEF ON BEHALF OF DEFENDANT, THE CITY OF LONG BRANCH**

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**STATE STATUTES AND COURT RULES**

## FACTUAL AND PROCEDURAL HISTORY

This case is before this Honorable Court on Plaintiffs, the Lighthouse Institute for Evangelism, Inc. dba the Lighthouse Mission and Reverend Kevin Brown's [hereinafter "the Mission", Second Amended Complaint filed on July 26, 2002. A more comprehensive factual and procedural history is set forth in the City's Statement of Contested and Uncontested Material Facts, this Court's previous opinions as well as that of the Third Circuit at The Lighthouse Institute v. City of Long Branch, 100 Fed. Appx. 70 (3rd. Cir. 2004).

## ARGUMENT

### I. Overview

This Court need not try the merits of the Mission's claims against the City. First, the Mission's reinstated claims pursuant to Zoning Ordinance 20-6.13, as with the remaining claims, are completely mooted by the fact that Zoning Ordinance 20-6.13 was superseded by the Redevelopment Plan enacted in October 2002. Second, the Mission's new claims based upon the City's enactment and implementation of the Redevelopment Plan, are barred because the Mission failed to appeal the City's May 11, 2004 resolution denying an amendment of the plan within the 45 day limitations period, set forth in N.J.S.A. 10:4-15(a) and N.J. Ct. R. 4:69-6(a) by filing an action in lieu of prerogative writ. No claims with regard to either ordinance can be adjudicated.

The City further asserts that even if the claims as to Zoning Ordinance 20-6.13 and the Redevelopment Plan are deemed justiciable, they lack any substantive merit. The Mission cannot prove that the City acted arbitrarily or capriciously pursuant to Count I, or violated the Mission's rights pursuant to the United States or New Jersey Constitutions, 42 U.S.C. §1983, RLUIPA, the Fair Housing Act, or as to any other remaining claims.

### II. All of the Mission's Claims as to Zoning Ordinance 20-6.13 [Counts I-IX and XIII] are moot.

The original source of the Mission's claims against the City, is Zoning Ordinance 20-6.13. By its orders of April 4, 2003 this Court dismissed the "as applied" portions of Counts I through IX (action in lie of prerogative writ; unconstitutionality of April 27, 2000 Development Application and Ordinance pursuant to 42 U.S.C. §1983; violation of the Establishment Clause, Equal Protection, Substantive Due Process, discriminatory use of zoning power, New Jersey Constitution, Fair Housing Act) and XIII (violation of RLUIPA) of the Amended Complaint, holding that the Mission's claim that Zoning Ordinance 20:6-13 was unconstitutional as applied, were not ripe for review. [1] This Court also denied summary judgment as to the remaining claims.

Although the "as applied" claims set forth in these Counts have been reinstated, they are now moot, as are those which remained. Zoning Ordinance 20-6.13 has been entirely superseded and subsumed, by the Redevelopment Plan adopted by Ordinance 47-02 in October, 2002. The boundaries of the zoned area have changed along with the permitted and non-permitted uses. Zoning Ordinance 20-6.13 regarding the "Central Commercial District" was divided into eight sections of "permitted uses": (1) retail trade stores, (2) services (such as finance, insurance, governmental, educational); (3) entertainment (assembly hall, bowling alley, theater),(4) municipal buildings,(5) temporary buildings, (6) high technology and light industrial; and (7,8) personal grooming and physical fitness. The uses requiring a conditional use permit were public utilities, service stations, senior citizen housing.

However, under the Design Guidelines adopted with the Redevelopment Plan, 162 Broadway is now located in a Regional Entertainment Commercial zone where the primary

[1] . This Court also denied the Mission's Motion for Summary Judgment as to Count III, and Motion for Preliminary Injunction against the City and BCIC, in its entirety.

permitted uses are theaters, cinemas, culinary schools, dance studios, music instruction, theater workshops, fashion design schools, and art studios and workshops. Secondary uses are restaurants, bars, clubs, entertainment related businesses, and specialty retail.

Consequently any relief sought by the Mission as to Zoning Ordinance 20:6.13 is mooted, or at the least its claims of damages, if any remain, are strictly limited in their substance and duration.

If a claim no longer presents a live case or controversy at stages of certiorari and appellate review, the claim is deemed moot, and the federal courts lack jurisdiction. Allen v. Wright, 468 U.S. 737, 750 (1984). Mere voluntary cessation of allegedly illegal conduct does not in itself moot a case. City of Mesquite v. Aladdin's Castle, 455 U.S. 283, 288-290 (1982). However, where there is no evidence that the defendants intend to reenact the allegedly unconstitutional legislation, a controversy is moot. Brazos Valley Coalition for Life, Inc. v. City of Bryan Texas, 421 F.3d 314 (5th Cir. 2005)( claim regarding differing previous ordinance was moot where nothing suggested that the City intended to repealing superseding ordinance).

Here, as with Brazos, the newly enacted Redevelopment Plan is of such different scope, terms and breadth than the challenged Zoning Ordinance 20-6.13, and the City has exerted such effort and resources in connection with the plan, that it is self-evident that the City of Long Branch has neither reenacted the same allegedly objectionable provision in a different form, nor will it reinstate the old ordinance.

The Mission can now never obtain use of 162 Broadway as a church by variance to Zoning Ordinance 20-6.13, even were Zoning Ordinance 20-6.13 to be deemed in retrospect to be unconstitutional, violative of RLUIPA or the Fair Housing Act or otherwise invalid. Indeed, the Mission cannot obtain the same relief by amendment to the Redevelopment Plan, which

although narrowly tailored, even further restricts those uses previously asserted by the Mission to be allegedly similarly situated to its own.

**III. The Mission is barred from pursuing its claims based upon the Redevelopment Plan (Count XIV) in that it failed to meet the statutory limitations period set forth in N.J.S.A. 10:4-15(a) and N.J. Ct. R. 4:69-6(a).**

The Mission's claims as to the City's enactment and implementation of the Redevelopment Plan are barred for jurisdictional reasons. The Mission failed to appeal the May 11, 2004 City Council Resolution, which denied the Mission's application to amend the plan, within 45 days, as required by N.J.S.A. 10:4-15(a) and N.J. Ct. R. 4:69-6(a). No action in lieu of prerogative writs was ever filed as to the City Council's May 11, 2004 decision. N.J. Ct. R. 4:69-6(a) provides in relevant part: "[n]o action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed…" City of Hoboken v. City of Jersey, 347 N.J. Super. 27, 789 A. 2d 668 (Law. Div. 2001). Failure to meet this statutory filing deadline is a "fatal jurisdictional defect." Macleod v. City of Hoboken, 330 N.J. Super. 502, 750 A. 2d 152 (App. Div. 2000).

N.J.S.A. 10:4-15(a) is also relevant and provides for a 45 day appeal period for acts by public bodies. This timeliness issue is controlled by the substantive New Jersey law as set forth in Essex County Bd. of Taxation v. Newark, 340 N.J. Super. 432, 774 A.2d 655 (App. Div. 2001), cert. denied, 170 N.J. 387, 788 A.2d 772 (2001). Essex County v. Twp. of Caldwell, 21 N.J. Tax 188 (App. Div. 2003). The New Jersey courts have enforced this 45-day time limit strictly and failure to comply results in waiver. Waldorf v. Shuta, 142 F.3d 601, 619 (3d Cir. 1998).

In Newark, the New Jersey Superior Court enforced a twenty-nine year old revaluation order where in an in lieu of prerogative writs action that was filed after the forty-five day filing

period had passed. Likewise in Caldwell, a prerogative writ action filed five years after the adoption of a resolution requesting the Attorney General to enforce the subject 1989 order was dismissed as untimely based upon Newark. Here the Mission's right to challenge the City's enactment and implementation of the Redevelopment Plan expired on June 26, 2004 when the Mission failed to file an action in lieu of prerogative writs as set forth by rule and statute. The Mission is barred from presenting any claims set forth in Count XIV or otherwise based upon the Redevelopment Plan, because of lack of jurisdiction.

Even if the amendment of the Mission's Complaint could be viewed as a action in lieu of prerogative writs, which it cannot, the Second Amended Complaint was not filed until July 26, 2004, again more than 45 days past the City's May 11, 2004 Resolution. Also, to the extent that the Mission's claims pursuant to Zoning Ordinance 20-6.13 are piggybacked upon the Redevelopment Plan, they have also been waived in that the dismissed claims were not reinstated until July 6, 2004, more than 45 days past the May 11, 2004 Resolution date.

**IV. Neither Zoning Ordinance 20-6.13 nor the Redevelopment Plan are neither inherently unconstitutional nor unconstitutional as applied [Counts I, II-VIII, XIV].**

Even should this Court elect to consider the mooted claims as to Zoning Ordinance 20-6.13 and the barred claims as to the Redevelopment Plan, the Mission cannot show that either of these zoning regulations are unconstitutional under the Federal or New Jersey Constitution.

In its opinion as to its denial of an injunction, this Court found that the Mission would likely be unable to prevail on its claims that the City of Long Branch 's Zoning Ordinance 20-6.13 is unconstitutional. No further evidence has been adduced from that time which would otherwise alter this Court's prediction as to the Mission's ability to prevail as to its claims under Zoning Ordinance 20-6.13. The same reasoning applies to the Mission's claims brought pursuant to the Redevelopment Plan.

**A. The Mission cannot prove that the City and its officials acted arbitrarily and capriciously with regard to the Zoning Ordinance 20-6.13 and the Redevelopment Plan; moreover, deference must be given to the City in legitimately exercising its zoning function [Count I].**

The City's actions with regard to Zoning Ordinance 20-6.13 (although now moot) and the Redevelopment Plan (although barred) did not violate N.J.S.A. 59:2-9 and N.J.S.A. 59:3-6. The Mission cannot prove that the City and its officials acted arbitrarily and capriciously with regard to Zoning Ordinance 20-6.13 or the Redevelopment Plan.

The Mission's claims with regard to Count I (except for the compensatory damage claim) are now apparently reinstated, although there is some question in that the reinstatement order does not refer to Count I at all. Even if the claims as to Zoning Ordinance 20:6.13 were not moot, the Zoning Officer's letter of April 17, 2000 simply applied the terms of Zoning Ordinance 20-6.13 and advised that the relief requested by the Mission must be requested by variance. The Mission never applied for a variance as to Zoning Ordinance 20-6.13, thus the City never had the opportunity to consider the request and act arbitrarily or otherwise. Notably, the Mission presents no evidence that any religious entity which applied for a variance in the C-1 zone was ever denied a variance nor has it produced evidence of "similarly situated" being given preferred treatment.

There is likewise no evidence that the City acted arbitrarily or capriciously with regard to implementing or applying the Redevelopment Plan, even were this claim properly raised. The City had full legal authority for adopting and implementing the Redevelopment Plan pursuant to N.J. Stat. § 40A:12A-4, N.J. Stat. § 40A:12A-6c, N.J. Stat. § 40A:12A-8 and N.J. Stat. § 40A:12A-8n. The City also fully complied with the statutory process required in connection with the Mission's application to amend the Plan. Pursuant to the provisions of N.J. Stat. Ann. § 40A:12A-7, an amendment to a redevelopment ordinance must first originate with the municipal

planning board who must make a formal recommendation to the municipal governing council. City of Hoboken v. City of Jersey, 347 N.J. Super. 279, 789 A. 2d 688 (Law. Div. 2001). As to amendments to the Plan, N.J. Stat. § 40A:12A-7 provides:

> The governing body of a municipality may direct the planning board to prepare a redevelopment plan or an amendment or revision to a redevelopment plan for a designated redevelopment area. After completing the redevelopment plan, the planning board shall transmit the proposed plan to the governing body for its adoption. The governing body, when considering the proposed plan, may amend or revise any portion of the proposed redevelopment plan by an affirmative vote of the majority of its full authorized membership and shall record in its minutes the reasons for each amendment or revision. When a redevelopment plan or amendment to a redevelopment plan is referred to the governing body by the planning board under this subsection, the governing body shall be relieved of the referral requirements of subsection e. of this section.
>
> N.J. Stat. § 40A:12A-7 (emphasis added).
>
> Moreover:
>
> (7) If a person who filed a written objection to a determination by the municipality pursuant to this subsection shall, within 45 days after the adoption by the municipality of the determination to which the person objected, apply to the Superior Court, the court may grant further review of the determination by procedure in lieu of prerogative writ; and in any such action the court may make any incidental order that it deems proper.
>
> N.J. Stat. § 40A:12A-6.

Notably, the Mission never objected to the adoption of the Redevelopment Plan. Moreover, the Mission's application for RFQ status was considered and denied, as incomplete, noncompliant and involving a non-permitted use as explained in correspondence from Redevelopment Counsel. The Mission's application for an amendment to the Plan to permit use of the property as a church, was accorded a full evidentiary hearing by the Mayor of Long Branch and the City Council acting as the Redevelopment Authority, even though a hearing was not required. The Mission was given the opportunity to present witnesses and other evidence on

two occasions. While two witnesses appeared on behalf of the City, the Mission failed to present any witnesses other than Kevin Brown.

Additionally, following the hearing and upon consideration of the evidence of record, the City Council passed a Resolution declining to amend the Redevelopment Plan, accompanied by explicit factual findings. The City Council found that the City had demonstrated that there was a compelling governmental interest in restricting houses of worship in the Redevelopment Zone; that houses of worship would be totally incompatible with the permitted uses within the zone necessary to its rebirth; and, that the zoning restrictions set forth in the Plan were the least restrictive means of furthering this compelling governmental interest. The Council observed that there are 33 houses of worship and retreats within City limits in areas that are diverse in the City and that religious uses can be accommodated in approximately ninety percent (90%) of the physical areas within the City. The Resolution also stated that the approval of the Mission's RFQ/RFP was denied for two reasons: (1) it is not permitted in the zone; and (2) the RFQ/RFP were not complete, thus no determination could be made from the sketchy application. Notably, when two actions are open to a municipal body, municipal action is not arbitrary and capricious if exercised honestly and upon due consideration, even if an erroneous conclusion is reached. Id. (citing Worthington v. Fauver, 88 N.J. 183, 204-05, 440 A.2d 1128 (1982); Bayshore Sewerage Co. v. Department of Envtl. Protection, 122 N.J. Super. 184, 199, 299 A.2d 751 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37, 328 A.2d 246 (App. Div. 1974). No evidence here suggests that the City acted arbitrarily or capriciously or in disregard to statutory mandate in making this determination to deny amendment of the Redevelopment Plan.

Also, under both state and federal law, deference must be given to the City in exercising its zoning function as to the Zoning Ordinance 20-6.13, and the Redevelopment Plan. As a

matter of New Jersey law, the courts have established that zoning regulation is a municipal legislative function beyond the purview of judicial interference. See Sporkin v. Stafford Township, 227 N.J. Super. 569, 571, 548 A. 2d 218 (App. Div. 1998). The only exception to this principle, is where an ordinance is seen in whole, or in application to any particular property, to be clearly arbitrary, capricious or unreasonable, or plainly contrary to the fundamental principles of zoning or statute. Sporkin, supra. The federal courts are in agreement as to the deference to be given local zoning authorities, recognizing that land use is one of the bastions of local control, largely free of federal intervention. Congregation Kol Ami v. Abington Township, 309 F. 3d 120, 137 (3d. Cir. 2002). There is no evidence of any such "arbitrary, capricious or unreasonable" circumstances here and the ordinances in fact complement and further the fundamental principals of zoning as well as the City's objectives in revitalizing the Broadway Corridor.

Under New Jersey law, a municipality need not provide for every use within its borders. 966 Video v. Mayor and Township Committee, 299 N.J. Super. 501, 691 A. 2d 435 (Law. Div. 1997); Fantale v. Borough of Hasbrouch Heights, 26 N.J. 320, 139 A. 2d 749 (1958). "Zoning is by its very design discriminatory, and that, alone, does not render it invalid." Kol Ami at 136. As a result of this deference, a legislative enactment is presumed constitutionally valid, and the burden to prove otherwise is a heavy one. 966 Video, supra, at 513 (citing Hutton Park Gardens v. West Orange Town Council), 68 N.J. 543, 350 A. 2d 1 565 (1975)). Municipal actions enjoy a presumption of validity. Bryant v. City of Atlantic City, 309 N.J. Super. 596, 707 A.2d 1072 (App. Div. 1998). Local zoning ordinances are subject to a meaningful, but "very forgiving" standard of review in the federal courts. Id. at 136:

> Indeed, because the purpose of zoning ordinances is to distinguish among uses in order to draft comprehensive municipal plans, a degree of arbitrariness is inevitable. The question

> presented in these cases is when does a distinction cross the constitutional line. As long as a municipality has a rational basis for distinguishing between uses, and that distinction is related to the municipality's legitimate goals, then federal courts will be reluctant to conclude that the ordinance is improper.

Kol Ami, supra, at 136; See Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

Here neither Zoning Ordinance 20-6.13 or the Redevelopment Plan or the City's actions in whole, or in application to any particular property, are clearly arbitrary, capricious or unreasonable, or plainly contrary to the fundamental principles of zoning or statute. Sporkin, supra.

**B. The Mission cannot show the constitutional or other violations necessary to support its §1983 claim [Count II-VII, XIV].**

Section 1983 confers no rights on its own; rather, it provides a direct cause of action for breaches of rights secured by the Constitution. Fallick v. Deerfield Twp., 2003 U.S. Dist. LEXIS 16013 (D.N.J. 2003). To prevail under 42 U.S.C. § 1983, a plaintiff must show that a person acting under color of state law deprived the plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States. 42 U.S.C. § 1983 (1994). Fallick, supra. Before reaching the issue of governmental immunity, the Court first must determine whether the plaintiff has alleged a deprivation of a constitutional right at all. U.A. Theatre Circuit v. Twp. of Warrington, 316 F.3d 392, 398-399 (3d Cir. 2003). Here the Court should find no such deprivation in addition to finding the claims either moot or time-barred.

However, even if the Mission could prove a constitutional violation, the City's actions are protected by the doctrine of qualified immunity, which protects government officials performing discretionary functions from civil damages so long as the officials' "conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known." U.A. Theatre Circuit v. Twp. of Warrington, 316 F.3d 392, 398-399 (3d Cir.

2003)(citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). No such analysis is required here because the Mission cannot show that it been deprived of any constitutional right, much less that such a right was known and violated by the City or its officials.

**C. The Mission cannot prove its Free Exercise and Establishment Clause Claims in that neither Zoning Ordinance 20-6.13 or the Redevelopment Plan impose a substantial burden on the Mission's exercise of religious freedom [Counts II, III, IV, VII and XIV].**

The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. Amend. I. As the Supreme Court stated in Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), the Free Exercise Clause prohibits above all "governmental regulation of religious beliefs as such." 494 U.S. at 877 (quoting Sherbet v. Verner, 374 U.S. 398 (1963)). The government may restrict certain activities associated with the practice of religion pursuant to its general regulatory powers. Rector, Wardens and Members of Vestry of St. Bartholomew's Church v. The City of New York, 914 F. 2d 348 (2d. Cir. 1990).

This Court previously ruled in connection with the Mission's Free Exercise claims that Zoning Ordinance 20:613 is a general law of neutral application which does not facially discriminate against churches and in favor of nonreligious land use. See National Advertising Co. v. Denver, 912 F.2d 405, 411 (10th Cir. 1990). The Mission never appealed this final determination and is precluded from re-litigating this issue. This Court stated that the sole remaining claim against the City was whether Zoning Ordinance 20-613 is inherently unconstitutional, noting that the Mission had not demonstrated a likelihood of success on the merits and that it had addressed and disposed of "most" of the Mission's claims against the City as a matter of law .

In ruling that Zoning Ordinance 20-6.13 was a neutral law of general applicability, this Court stated:

> Here Long Branch enacted Ordinance 20-6.13 with the goal of rejuvenating the Long Branch Commercial District and in doing so limited property uses in the C-1 area to commercial enterprises. All property owners, not just religious organizations, must apply for a variance to use property within the C-1 Commercial District for purposes not specifically authorized by the Ordinance. Moreover, religious organizations are allowed to use property in many other zones in Long Branch without a variance. Plaintiffs have not alleged or submitted evidence that Long Branch enacted the Ordinance with the intent of purpose to inhibit the exercise of religion or suppress religious beliefs. Accordingly, this Court finds that Long Branch Ordinance 20-6.13 is a neutral law of general applicability.(emphasis applied).

These rulings are the law of the case, although the claims as to Zoning Ordinance 20:6.13 are now moot. The same reasoning applies with regard to the Redevelopment Plan, which likewise does not specifically prohibit conduct because it is undertaken for religious purposes; is such that churches are only one of numerous uses which are not specifically permitted; the zoning is such that churches are still permitted in 90% of the City's limits; and, the Plan has as its purpose, the promotion of economic revitalization not the impairment or prohibition of certain speech. Consequently, the Redevelopment Plan is also a neutral law of general application. See Smith, supra.. The Mission has failed to produce any evidence to show that either ordinance treats religious and nonreligious institutions unequally or discriminatorily. The City constitutionally exercised its general regulatory powers by instituting and enforcing its zoning plan through Zoning Ordinance 20-6.13 and the Redevelopment Plan.

Significantly, the right of "Free Exercise" does not exempt the Mission with the obligation to comply with Zoning Ordinance 20-6.13 or the Redevelopment Plan, which prohibit conduct that a state is free to regulate. Kol Ami, supra, 309 F. 3d at 139. The Mission was under the same obligation to comply with the restrictions and procedures as other entities seeking a non-permitted use, or, an amendment to the Redevelopment Plan.

The Mission has also presented no evidence that the City has selectively enforced Zoning Ordinance 20-6.13 or the Redevelopment Plan, so as to favor secularly motivated conduct but not comparable religiously motivated conduct. Tenafly Eruv Association, Inc. v. The Borough of Tenafly, 309 F. 3d 144, 165, 166 (3d. Cir. 2002). Neither zoning regulation targets religious conduct for distinctive treatment inherently or as applied. Id. at 167. In identifying an unconstitutional burden to the free exercise of religion, the central question is whether the affected party has been denied the ability to practice his religion or coerced in the nature of those practices. St. Bartholomew, supra, 914 F. 2d at 355 (citing Lying v. Northwest Cemetery Protective Ass'n, 845 U.S. 439 (1988)). Plainly, neither Zoning Ordinance 20-6.13 nor the Redevelopment Plan deny the Mission the ability to practice its religion or coerces it in the nature of those practices.

Numerous decisions from the federal appellate courts hold that zoning regulations which incidentally affect religious exercise, are neutral laws of general applicability which do not infringe upon the free exercise of religion. See Mount Elliot Cemetery Ass'n v. City of Troy, 171 F. 3d 398, 405 (6th Cir. 1999); Cornerstone Bible Church v. City of Hastings, 948 F. 2d 464 (8th. Cir. 1991); See also Christian Gospel Church, Inc. v. City of San Francisco, 896 F. 2d 1221 (9th Cir. 1990), cert. denied, 498 U.S. 999 (1991)(denial of permit to establish church in residential district did not violate Free Exercise or Equal Protection Clauses);Messiah Baptist Church v. County of Jefferson, 859 F. 2d 820 (10th Cir. 1988), cert. denied, 490 U.S. 1005 (1989)(denial of permit to build church not violation of Free Exercise or Due Process Clauses). At the most, the City's prior and current Zoning Ordinances only incidentally affect or inconveniences the Mission, which can operate as a church within 90% of the City limits.

Additionally, neutral regulations that diminish the income of a religious organization do not implicate the Free Exercise Clause. St. Bartholomew, supra, 914 F. 2d. 355 (law preventing church from replacing building with office tower not unconstitutional)(citing Jimmy Swaggart Missionaries v. Board of Education, 493 U.S. 378 (1990)). Consequently the Mission's claims that donations to the Mission have suffered, or that Reverend Brown's income has otherwise been adversely affected, do not implicate the constitutionality of either ordinance. The Mission's claims that an inability to use 162 Broadway as a church deprives it of the ability to serve its constituents also fails, because Reverend Brown has conceded that he could move his operation four blocks and still serve the same population. Consequently both Zoning Ordinance 20-6.13 and the Redevelopment Plan only inconvenienced the Mission in this regard.

The Free Exercise Clause can prompt either strict scrutiny or rational basis review depending upon the nature of the challenged law or government action. Tenafly Eruv, 309 F.3d at 165. Here rational basis review is required given the neutrality of Zoning Ordinance 20-6.13 and the Redevelopment Plan. As the Third Circuit stated in Tenafly Eruv: "If a law is "neutral" and "generally applicable," and burdens religious conduct only incidentally, the Free Exercise Clause offers no protection." A "strict scrutiny" standard of review is inapplicable because the Mission cannot prevail on its other constitutional claims. " Smith, 494 U.S. at 881-882(re: hybrid claims.)

Zoning Ordinance 20-6.13 easily survives a rational basis review in that this Court held that "Long Branch enacted Ordinance 20-6.13 with the goal of rejuvenating the Long Branch Commercial District and in doing so limited property uses in the C-1 area to commercial enterprises." Plainly, the Redevelopment Plan as well as Zoning Ordinance 20-6.13, was enacted with the same goal, thus was also rationally related to a legitimate governmental objective.

The Mission also cannot prevail on its claim that the City's zoning ordinances violate the Establishment Clause. An analysis of whether government practice offends the Establishment Clause looks to: (1) whether it has a secular purpose; (2)whether its principal or primarily effect advances or inhibits religion; (3) whether an excessive entanglement of the government with religion is created. Lemon v. Kurtzman, 40 U.S. 602 (1971). Again this Court found that the purpose of Zoning Ordinance 20-6.13 was to revitalize the C-1 district as a commercial center. The Redevelopment Plan, which is a more comprehensive effort to develop an Entertainment and Commerce Center, also has nothing to do with religious expression.

There is also no evidence that the City selectively enforced the ordinances or acted arbitrarily or capriciously with regard to the Mission's application. The Mission never applied for a variance to Zoning Ordinance 20-6.13 or appeal the Zoning Office's decision, filing suit instead. There is no evidence that the City acted arbitrarily or capriciously or favored non-religious land uses with regard to the Mission's RFQ and amendment applications as to the Redevelopment Plan. The Mission also alleges that the City "enticed" it to purchase the building at 162 Broadway, then subsequently "betrayed" it by enforcing Zoning Ordinance 20-6.13. There is no evidence to suggest that the City induced the Mission to purchase the building, promised that the Mission could operate a church at that location or otherwise caused the Mission to detrimentally rely upon its conduct. Consequently, the Mission cannot prove a violation of the Free Exercise or the Establishment Clauses.

**D. The Mission cannot prove its claims for violation of its right to Substantive Due Process in that the City did not act arbitrarily or capriciously much less "shock the conscience" in applying the challenged zoning regulations [Counts VI, VII and XIV].**

In the Count VI of its Second Amended Complaint, the Mission alleges a violation of its right to Substantive Due Process, thus must prove that the governmental authority infringed a property interest encompassed by the Fourteenth Amendment. John E. Long, Inc. v. Borough of Ringwood, 61 F. Supp. 2d 273 (D.N.J. 1998), affirmed without opinion, 213 F.3d 628 (3d. Cir. 2000) (citing Acierno v. Cloutier, 40 F.3d 597, 600, 616 (3d Cir. 1994)). In land use cases the substantive component of the Due Process Clause is violated by executive action only when it is conscience shocking, in a constitutional sense. U.A. Theatre, 316 F.3d at 398 (applying standard from County of Sacramento v. Lewis, 523 U.S. 833(1998)). Application of the "shocks the conscience" standard" in land use cases prevents the federal courts us from being cast in the role of a "zoning board of appeals." U.A.Theatre, 316 F.3d at 402 (citing Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982)(quoting Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting)).

The Mission cannot prove that the City acted in any way which would "shock the conscience" with regard to Zoning Ordinance 20-6.13 or the Redevelopment Plan and its does not identify any specific actions as shocking the conscience. The City is simply accused of enforcing Zoning Ordinance 20-6.13 which was a valid and enforceable ordinance at the time.

In Count XIV the Mission alleges that its RFQ Application was rejected on December 23, 2003 and that the City Council vetoed this relief, as well as an amendment, on May 11, 2004. The City's denial of an amendment to the Plan, which has as its central purpose entertainment and commercial revitalization goals which would be destroyed by allowing use as a church, in no way shocks the conscience. As set forth in Section "A" above, there is not even an issue of material fact as to the Mission's claim that the City acted arbitrarily or capriciously and the evidence instead showed that the City has always acted with due regard for the Mission's rights.

In that the City's actions did not constitute a misuse of its zoning authority, much less shock the conscience, the Mission's Substantive Due Process claims fail.

Also, neither ordinance effect an unconstitutional "taking" in violation of the Mission's property rights by allegedly denying the Mission all viable use of the subject matter building. First, as to Zoning Ordinance 20-6.13, the Zoning Board of Adjustment may well have granted a variance had the Mission applied for one; it did not. Second, the property at 162 Broadway was approved for a number of uses for the Mission, such as a retail store and offices for Reverend Brown. The Mission has never presented any evidence to show that it has been deprived of viable use of the property, or will be deprived of its value, by reason of the Redevelopment Plan.

**E. The Mission cannot prove that it has been denied the "Equal Protection" of the laws [Counts V, VII and XIV].**

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Kol Ami, at 133; U.S. Const. Amend. XIV. Land use ordinances that do not classify by race, alienage, or national origin, will survive an attack based on the Equal Protection Clause, if the law is "reasonable, not arbitrary" and "bears a rational relationship to a (permissible) state objective." Id.(citing Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974)). Indeed, "the general rule " is that state legislation (such as zoning ordinances), are presumed to be valid absent an invidious or gender-based classification.

As to the Mission's Equal Protection claims, this Court determined that the Mission was not a member of a protected class nor was a fundamental right impinged upon.

Indeed, neither Zoning Ordinance 20-6.13 nor the Redevelopment Plan classify land use by race, alienage or national origin, facially or otherwise. In that no suspect distinctions are

implicated in either ordinance, and they are presumed valid. Notably, there is a dearth of evidence of anti-religious animus in this record. See Kol Ami, 309 F. 2d at 143.

It is only where the classification set forth in the legislation negatively affects a suspect class must the courts apply strict scrutiny and find that it is "precisely tailored to serve a compelling governmental interest in order to uphold it." Pyler v. Doe, 457 U.S. 202, 216-17 (1982). Consequently, the challenged classifications in the respective ordinances here need only be rationally related to a legitimate state interest, that is, possess a legitimate interest in promoting the public health, safety, morals, and the general welfare of its citizens. See Kol Ami. Strict scrutiny is therefore not applicable. See Civil Liberties for Urban Believers (C.L.U.B.) v. City of Chicago, 157 F. Supp. 2d 903, 915 (N.D. Ill. 2001)( rational basis review, inasmuch as supervising church location distinguishable from regulating right to worship).

Significantly, this Court has reasoned that "Defendant can likely prove that the ordinance is rationally related to a legitimate government interest. " The Mission raises no genuine issue of material fact to controvert this assertion. Indeed, the record shows that the City's economic revitalization goals with regard to both ordinances, are dependant upon these ordinances regulating land use in the Central Business District or Entertainment and Commerce Zone.

In applying the two-step Equal Protection analysis, the first inquiry to be made is whether the proposed use is similarly situated to the other permitted uses, as or right or by special permit and only then must the City justify its different treatment of the two. Kol Ami, 309 F. 2d at 137 (Citing City of Cleburne, 473 U.S. at 447-50)). Here, however, this Court noted in its April 4, 2003 opinion that the Mission failed to submit evidence that all forms of secular assembly were permitted, thus it would deny summary judgment. To this day the Mission cannot demonstrate that its proposed use is "similarly situated" to the other permitted uses, as of right or by special

permit. The Mission has never produced evidence of "similarly situated" uses which were allegedly given preference over the Mission's proposed religious use of the property. Not only does the Mission fail to "cure" this problem with regard to Zoning Ordinance 20-6.13, but the superseding scheme in the Redevelopment Plan provides even less fodder, for a " similar use" argument. Indeed in the Redevelopment Plan amendment hearing before the City Council, the Assistant City Planner testified that any other religious entities presently existed in the subject area were pre-existing non-conforming uses.

Additionally, the Mission applied for a permit as a "church" not as an assembly. As the Third Circuit stated in The Lighthouse Institute v. City of Long Branch, 100 Fed. Appx. 70 (3d Cir. 2004) "it is not clear whether the City would permit the Mission to operate under the assembly hall category, had it listed that use on its application." * 75. Thus, denial of use as a "church" does not establish whether the Mission's application as an "assembly hall" would have been approved. Lighthouse, *75.

Further, the specifically permitted uses set forth in old Zoning Ordinance 20-6.113 and the new Redevelopment Zone scheme have a theme commensurate with the City's interest in establishing commerce and high end entertainment in a central zone. While the Mission may allegedly serve food, train for job skills, educate and counsel, these charitable functions are not commerce or entertainment-driven. Equivalent secular assembly uses are subject to the same requirements as the Mission.

A church is also dissimilar to permitted uses by reason of N.J.S.A. §33:1-76, in that a liquor license cannot be issued for the sale of alcoholic beverages within 200 feet of any church or public schoolhouse. No such similar restriction apples to "assemblies" in general. There is also an Ordinance in the City of Long Branch which prohibits the sale of alcohol within 1000

feet of another establishment selling alcohol, with the exception of the Redevelopment Zone, where there is no limitation with respect to the distance between establishments which can sell alcohol. The purpose of this Ordinance is to encourage the use of alcohol in the contained area of the Redevelopment Zone to attract people to the entertainment and commerce area of Broadway to stimulate economic growth. The unrebutted evidence adduced at the hearing before the City Council established that placement of a church in the subject area would damage and/or preclude the commercial development of the Redevelopment Zone.

The Mission cannot submit evidence to show that the proposed church and the permitted secular assemblies were similarly situated, thus the City is not required to justify its allegedly different treatment. An ordinance is only irrational if the plaintiff shows that the state interest is illegitimate or the chosen classifications are not rationally related to the interest. Kol Ami, supra. Here, the zoning restrictions regarding churches in the new Entertainment Zone, which will house numerous restaurants and other entertainment establishments are also rationally related to the City's legitimate objective of economic development. Also neither ordinance limits the Mission 's association with others, but rather limit the place of association within the City to the other 90% of its limits. No case law supports a contention that limiting the place of association to other districts constitutes a deprivation of equal protection, through a law of general applicability.

The Mission does not genuinely seek "equal protection", it seeks "special protection" and preferential treatment. However, the fact that the Mission wishes to build a church does not automatically immunize it from the City's zoning power, either legally or morally. In Kol Ami, the Third Circuit Court pointedly commented that the premise that religious institutions should get a preference in the land use context, would pose "a significant problem." Id., p. 139.

For the foregoing reasons the Mission cannot prevail on its Equal Protection Claims or any other claim for deprivation of property or constitutional rights.

**F. Zoning Ordinance 20-6.13 and the Redevelopment Plan do not violate the Freedom of Speech or Assembly components of the First Amendment [Counts II, VII and XIV].**

The Free Speech clause of the First Amendment provides that "Congress shall make no law…abridging the freedom of speech…or the right of the people peaceably to assemble." U.S. Consti. Amend. I. This Court has already denied summary judgment to the Mission on this claim based upon its determination that the act of constructing houses of worship does not implicate the Free Speech clause. The law is plain that the operation of a house of worship is not equivalent with religious speech and the Federal Courts analyze cases concerning the construction of houses of worship under the Free Exercise Clause, not the Free Speech Clause. See Tenafly Eruv, 309 F. 2d at 163 (inasmuch as merely erecting a wall between secular and religious world does not constitute "speech", "hybrid" rights claim cannot arise merely from zoning challenge."

The Mission also alleges a constitutional violation based upon its claim that its members are not allowed to assemble, maintaining that Zoning Ordinance 20-6.13 and the Redevelopment Plan permit secular assembly but not religious assembly. However, as previously held by this Court, Zoning Ordinance 20-6.13 does not regulates land use based upon the content or viewpoint of proposed use. The same is true of the Redevelopment Plan, which, along with Zoning Ordinance 20-6.13 in no way limits the Mission plaintiffs' rights to assemble with others. Also, this Court has previously held that "… religious organizations are allowed to use property in many other zones in Long Branch without a variance."

This Court further held that inasmuch as Zoning Ordinance 20-6.13 only incidentally affects the mission's rights to free speech, the "rational basis" standard applied:

> Defendant Long Branch enacted the Ordinance with the goal of developing the C-1 zone as a commercial district. All property owners who seek to use land within the C-1 zone for purposes other than that specified in the Ordinance must seek a variance, not just Plaintiffs or others who seek to use property for religious purposes. Under the rational basis standard, the Court finds that Plaintiffs' motion for summary judgment on their claim that the Ordinance violates their rights to free speech and assembly must be denied.

The Mission also argues that the effect of the zoning is "prior restraint." However, this Court specifically rejected the Mission's claim for summary judgment on "time, place and manner." This Court found that found that even if it were to apply the "time place and manner" restriction, the issue before the Court would be whether the Ordinance is sufficiently narrowly tailored to meet the City's stated purpose, which could not be decided at that time because the Mission failed to prove that those other forms of assembly permitted were not for commercial purposes. As argued above, the Mission still cannot produce evidence of similarly situated uses. Also, applying the "time, place and manner" restriction analysis shows that churches are permitted in 90% of other City zones, the City provided ample alternative channels for the Mission to communicate its message. Thirty-one houses of worship and two retreats are presently operating within the City's limits. The Mission cannot show that the Zoning Ordinance is not sufficiently narrowly tailored to avoid violating its rights.

This Court further ruled as to Count II that the City's decision to limit the C-1 zone to commercial enterprises in an effort to rejuvenate the area, does not impinge upon Plaintiff's First Amendment rights to Freedom of Association:

> While the Long Branch Ordinance limits the locations where Plaintiffs can associate, the Court finds that because Defendant provided numerous areas other than the C-1 zone where Plaintiffs can use property for church and other religious functions without seeking a variance, Long Branch's decision to limit the C-1 zone to commercial enterprises in an

effort to rejuvenate the area does not impinge upon Plaintiff's First Amendment rights to Freedom of Association.

Indeed the courts of this Circuit suggest that the right of association does not provide protection in the context of zoning regulations. Doe v. City of Butler, 892 F. 2d 315, 323 (3d. Cir. 1989)(limitation of number of residents of battered woman residence did not prevent the plaintiffs from associating). Again, both challenged zoning regulations merely limit the areas where the Mission can "associate" by operating as a church or mission. As the Third Circuit stated: (a) the Mission "tellingly" had not been restricted at the prior, rented location at 159 Broadway; (b) the Mission did not apply for use as an assembly; and, (c)the Mission could have operated by right in another district in the City. The Lighthouse Institute, 100 Fed. Appx. at 76.

Zoning restrictions that incidentally effect the ability of people to congregate as they desire, are reviewed under a rational basis standard, even where the subject law limits the ability to disseminate the message. C.L.U.B., supra, 57 F. Supp. 2d at 915. Under a "content neutral analysis" as applied by the Third Circuit in Cornerstone, supra, it is irrelevant that the Zoning Ordinance permits forms of assembly other than churches (such as clearly commercial enterprises such as bowling alleys, and others, such as assembly halls). Here the stated reason for not expressly permitting churches is content neutral: the City maintains that the purpose of Zoning Ordinance 20-6.13 was to rejuvenate the C-1 zone as a commercial area. The City likewise maintains that the Redevelopment Plan is a comprehensive effort to create a high end entertainment and commercial district that exists symbiotically with the fringe uses outside of the zone. Also, as the Third Circuit observes in The Lighthouse Institute, there were other channels for communication available in other parts of the City and a church had been permitted at the previous location. The Lighthouse Institute, 100 Fed. Appx. at *76. The unrebutted record shows that the zoning classifications in both ordinances were rationally related to the City's

legitimate interest in revitalizing C-1 as a commercial center and creating a high end entertainment and commercial center in the Broadway Corridor.

**G. The Mission cannot show a violation of the New Jersey Constitution [Count VIII, XIV].**

For the reasons set forth above, the Mission also cannot prevail on its claims that the City violated its rights under the New Jersey Constitution.

**V. The Mission cannot prove its assertion that Zoning Ordinance 20-6.13 or the Redevelopment Plan violate the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §2000, et seq.[Counts XIII and XIV].**

The Mission alleges that Zoning Ordinance 20-6.13 and the Redevelopment Plan violate the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §2201, et seq. (RLUIPA). Even were these claims justiciable, however, the Mission cannot prove a prima facie RLUIPA action.

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

§ 2000cc. Protection of land use as religious exercise

(a) Substantial burdens.

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

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

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

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

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

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

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

(b) Discrimination and exclusion.
(1) Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.
(2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.
(3) Exclusions and limits. No government shall impose or implement a land use regulation that--
(A) totally excludes religious assemblies from a jurisdiction; or
(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

42 U.S.C.S. § 2000cc

In examining the Mission's RLUIPA claims under 2000cc(a), this Court first determined that the Mission's intended use of the property was "religious exercise" pursuant to RLUIPA. This Court next reasoned that a genuine issue of material fact existed as to whether the Zoning Ordinance 20-6.13: "..constitutes an incidental effect that makes it more difficult for the Plaintiffs to practice their religion or a substantial burden such that it has a tendency to coerce Plaintiffs to act contrary to their religious beliefs must be further explored." However, this Court then held that "it was unlikely" that through the submission of further evidence the Mission could establish that the Ordinance in and of itself violated their rights under RLUIPA. This Court reasoned that the fact that the Mission can operate their church and mission in other areas of Long Branch without seeking a variance "weighs in favor of finding that the Ordinance is an inconvenience to Plaintiffs' exercise of religion rather than a substantial burden on such exercise." (emphasis added). This Court held that requiring the Mission to establish their church and mission in a location other than the C-1 Commercial district, does not coerce then into acting contrary to their religious beliefs but rather only requires them to exercise their religious beliefs in another area of the City. This Court also held that the necessity to seek a variance did not

constitute a substantial burden. Consequently, this Court permitted the submission of further evidence to determine whether the Ordinance imposes a substantial burden on the Mission.

The Mission has failed to come forward with any additional evidence of "substantial burden" to support its claim as to either ordinance. In order to substantially burden the right of religious exercise, land use regulations must have a chilling effect. Grace v. United Methodist Church v. City of Cheyenne, 235 F. Supp. 2d. 1186, 1194 (D. Wyo. 2002). Significantly, reasonable "run of the mill" zoning considerations requiring religious institutions to apply for zoning variances do not constitute substantial burdens on religious exercise, and instead allow the zoning commission to consider factors such as size, congruity with existing uses, and availability of parking. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004). RLUIPA does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations. Hale O Kaula Church v. Maui Planning Comm'n, 229 F. Supp. 2d 1056, 1071 (D. Haw. 2002)(citing San Jose Christian College v. City of Morgan Hill, 2002 U.S. Dist. LEXIS 4517, 2002 WL 971779 at *2 (N.D. Cal. Mar. 5, 2002)). Here inasmuch as the City's zoning regulations only incidentally affect or inconvenience the Mission, the Mission will be unable to sustain its burden of proving that it is a "substantial burden." See Lying v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988)(interpreting the RFRA). The Third Circuit specifically noted that the Mission did not establish a likelihood of success on its "substantial burden" claim because it had operated for years at the rented location. The Lighthouse Institute, supra, 100 Fed. Appx. at 77. The Court observed that the Mission could have operated as a church by right in other districts in the City. Id.

Also, while the Mission complains that it is "substantially burdened," it never even applied for a variance after the April 27, 2000 Zoning Officer's letter and never appealed the City Council's May 11, 2004 decision. In the similar San Jose, supra, the challenged ordinance's application requirements, were held to imposed "no restriction whatsoever" on the religious exercise of the plaintiff Christian college which failed to ever submit complete application. Here in that the Mission never pursued a variance under Zoning Ordinance 20-6.13, its requirements likewise placed no substantial burden" on the Mission. Zoning Ordinance 20-6.13 is also a general law of neutral application thus does not substantially burden the Mission. Also, in that the Redevelopment Plan is likewise a neutral plan which universally applies to landowners in that zone, it likewise does not trigger RLUIPA considerations.

The Mission also cannot show a substantial burden based upon the present location of 162 Broadway as compared to an alternative site. Walking a few extra blocks to worship is not a "substantial burden" as the term is used in RLUIPA, and as suggested by the Supreme Court. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1228 (11th Cir. 2004). Again, even Reverend Brown conceded in his deposition that the location of the Mission a few blocks distant would not greatly affect his constituency. Only if the Mission can show a substantial burden, would the City be required to demonstrate a compelling interest in upholding its zoning regulations, and that the ordinance was the least restrictive means possible (see Opinion on City's Motion, p. 28). Thus a land use restriction, though substantially burdensome, is nevertheless lawful under 42 U.S.C. 2000cc(a)(1)(A)(B) so long as the governmental entity proves that it furthers a "compelling governmental interest" and that it is the least restrictive means of furthering that interest. Even were the City's burden of proof triggered in this regard, there is ample evidence in the record that the City had a compelling governmental interest in developing

a dynamic commercial center and both zoning regulations are the least restrictive means of assuring this goal.

As to the Mission's "equal terms" claim, the RLUIPA prohibits governmental imposition or imposition in a manner that: (1) " treats a religious assembly or institution on less than equal terms with nonreligious assembly or institution;" (2)" discriminates against any assembly or institution on the basis of religion or religious denomination;" or (3) "(A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. §2000cc, et seq. As to the Mission's §2000cc(b) "equal terms" claim, this Court held that the Long Branch Zoning scheme does not violate the Mission's rights under 42 U.S.C. §2000cc(b)(3) because the jurisdiction includes all of Long Branch and "it is undisputed" that it is a permitted use in other areas of the City." The Third Circuit agreed, likewise noting that the City allowed churches to operate in other jurisdictions in the City by right. Again, the record is devoid of evidence that the zoning permit would have been denied had the City applied as an assembly, thus it did not show that it was limited as a "religious assembly." Id.

This Court ruled, however, that it could not determine the §2000cc(b)(1)(2) claims without further evidence as to the specific types of assemblies the City has permitted in the C-1 zone. Ex. "A"; on City's Motion, pp. 30, 31). As set forth in greater detail above, the Mission has continually failed to produce any evidence to show that either zoning regulation treat religious and nonreligious institutions unequally or discriminatorily, thus cannot prove these claims. Also, as observed by the Third Circuit, the Mission could not show that it was treated on less than "equal terms" because it had not applied for a permit as an "assembly hall." The Lighthouse Mission, 100 Fed. Appx. at *77. The Third Circuit also noted that there is also no indication on

the face of either regulation that any distinction is drawn between religious and secular assembly halls. Id. The Plaintiffs have not come forward with any additional evidence at this juncture.

The Mission will likely rely upon the distinguishable Midrash Sephardi v. Young Israel of Bal Harbor, Inc., 366 F. 3d 1214 (11th Cir., 2004). In Midrash, the plaintiff synagogue congregations, whose zoning variance and special use permits had been denied, challenged town zoning ordinances under RLUIPA. The Eleventh Circuit held that inasmuch as the challenged ordinance permitted private clubs and lodges, but excluded religious assemblies, it violated RLUIPA's equal terms provision, and reversed the summary judgment entered on behalf of the town. Crucial to the decision in Midrash, was the ordinance language which defined the term "private club" as including assemblies. Specifically, a "private club," was defined in the ordinance as " a building and facilities or premises, owned and operated by a corporation, association, person or persons for social, educational or recreational purposes, but not primarily for profit and not primarily to render a service which is customarily carried on as a business." 366 at 1231. Another town ordinance specifically grouped churches and synagogues with "places of assembly." The Court found that the ordinance's definition of private club comported with a natural and ordinary understanding of "assembly," and concluded that churches and synagogues fell within that perimeter, concluding that the ordinance which permitted private clubs and other secular assemblies but not churches or synagogues, violated §(b)(1) of RLUIPA, and, was not neutral or generally applicable. Unlike here, by specifically "grouping" churches and synagogues with "assemblies," the very language of the Midrash ordinance internally conceded that the entities were "similarly situated."

Here, in contrast to Midrash, no definition for the term "assembly hall" is provided in Zoning Ordinance 20-6.13 , nor does any City ordinance "group" or otherwise define churches

and other religious institutions as "assemblies." Indeed the Mission applied for a use variance as a "Church," not an assembly, thus did not classify itself as an assembly at the time application was made.

Significantly, unlike Midrash, the limited record here contains no evidence that the City allowed only assemblies of the secular sort in the C-1 district, nor in the entertainment and commercial district created in the Redevelopment Plan. The Third Circuit specifically noted the "dearth of evidence" in the record before the District Court, as to whether the secular uses identified by the Lighthouse Institute were "similarly situated." Lighthouse, Id. There is still no evidence that churches are treated less favorably than nonreligious institutions.[2] Consequently, as the Mission cannot demonstrate that it would be prohibited from operating in the district as an assembly, thus could not show that it was treated on non-equal terms than a nonreligious assembly.

**VI. The Mission cannot prove its claims for compensatory damages and its Count I damages and punitive damages claims have been dismissed.**

This Court held that the Mission failed to exhaust administrative remedies and ruled that that were it not moot, it would have granted summary judgment on this claim. If this Count has been reinstated, this Court should rule for the City.

Moreover, the Mission will be unable to prove any damages. "Damages are available under § 1983 for actions found to have been violative of constitutional rights and to have caused compensable injury. Allah v. Al-Hafeez, 226 F.3d 247, 250-251 (3d Cir. 2000). However,

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

substantial damages may only be awarded to compensate for actual injury suffered as a result of the violation of a constitutional right, Id. Absent proof of actual injury, compensatory damages may not be awarded. Id. Moreover, there are no presumed damages for violations of First Amendment free speech and free association rights. Id. at 251. The abstract value of a constitutional right may not form the basis for § 1983 damages. Id. at 250-251. Nominal damages, and not damages based on some indefinable "value" of infringed rights, are the appropriate means of "vindicating" rights whose deprivation has not caused actual, provable injury. Id.

The claims for compensatory damages in this case include the following: (1) Reverend Brown's lost wages as a pastor; (2) The Mission's lost revenues, including all charitable contributions from private and public donor; and (3) the costs associated with the disrepair of the building at 162 Broadway, which were the result of the Mission not being able to conduct its religious "business" because of the enforcement of the C-1 Ordinance and then the Redevelopment Ordinance .

Here, the unrebutted record and the testimony of Plaintiff Reverend Brown himself show that the Mission's damages claims are completely arbitrary, speculative and unprovable. In his deposition, Reverend Brown testified that he arrived at the $11,000,000.00 damage claim by calculating the amount of fines that he would have incurred had he operated his church in "civil disobedience." However, Reverend Brown conceded that he did not operate the church, thus did not incur any fines. Reverend Brown further testified that he arrived at the figure for damages of $7,777,777.00 to him personally, by reference to the Gospel of Matthew: "Well, when asked in the scriptures how much should you forgive, 7 by 7 the gospel says." He conceded that only a "small portion" of this claim would represent the income that he would have allegedly received

and along with his expert conceded that his estimate of his compensation package of $41,000.00 was never paid by Lighthouse in any given year. Reverend Brown also concedes that his claims include the alleged loss of contributions ($1,000,000.00), bequests ($5, 000,000.00) and gifts($600,00.00), figures which were a "guess" and that he based his "bequests" estimates "..on what I see people do…when they die, like I said, some people leave it to cats, lot of people leave it to charitable organizations." He stated "One person worth millions could have chosen to give it to us…" Reverend Brown also conceded that although his estimate of lost donations amounted to $110,000.00 per year to the time of his deposition, the Mission actually received less than half of that amount in the years it was operating out of 159 Broadway. The Mission has also failed to present a competent expert report setting forth any support for its damages claims.

Among the Mission's claims is that the Mission lost the support of the AT&T Pioneers, a group which provided funding to select charitable organizations. Ralph Wyndrum, the president of the AT&T Pioneers, testified that the group would essentially provide labor rather than money: interior carpentry work, wiring, and plumbing. Specifically, Mr. Wyndrum testified that these services, rather than cash or heavy construction, were the only support offered by the Pioneers. The AT&T Pioneers agreed to fund the Mission in February 1994, through the value of volunteer work and some monetary funds to pay for the costs of materials used by its volunteer members. Specifically, this funding was contingent upon Reverend Brown getting the permits and the funding to pay for the heavy construction, in order for the Pioneers to start the job. However, the Mission failed to meet its obligations to obtain the necessary plans, additional funding and permits. Due to the Mission's inaction, in or around August or September of 1995, AT&T Pioneers advised Reverend Brown that they could not hold their resources anymore, that

there were other needy organizations, and that they would be pulling funding. The Mission made no further attempts to revive the Pioneers' involvement with Plaintiffs.

Significantly, the Mission had not even submitted a complete application for a non-permitted use by the time that the AT&T pioneers withdrew their support. By letter dated August 21, 1995, the City Zoning Board/Planning Board Secretary advised the Mission that its use application was incomplete because: (1) it was not completely filled out; (2) the plans had no title block, date, seal or signature; (3) the surveys were not sealed; and (4) the required fees were not paid. However, the Mission did nothing further in connection with this response by the City Zoning Board. The funding was not withdrawn because the Mission was required to obtain a permit or variance, it was withdrawn because the Mission did not pursue a permit, a construction plan or the other significant funding that it needed to complete the project. The Mission itself could have mitigated its alleged damages, but instead did nothing.

It was not until five years later in April 26, 2000 that the Mission filed another application with the Zoning Officer, for use as a church. While this application was denied on April 27, 2000 and the Mission was notified that a variance must be sought, that denial could have had no bearing on any funding from the AT&T Pioneers, who bowed out of the project in the fall of 1995. Also, the "funding" was in the nature of labor, not cash. Consequently, the Mission cannot prove any damages by reason of the withdrawal of the AT&T pioneers.

Additionally, the charitable organization, the Lighthouse Mission itself, was viable during this entire period could solicit donations or operate at any one of a number of locations in the remaining 90% of the City in order to mitigate its alleged damages.

Moreover, no stigma which could be translated into damages would attach to Reverend Brown simply by virtue of the requirement that the Mission apply for a variance to the Zoning

Ordinance. The City suggests that if donations to the Mission suffered during the time period claimed in the Second Amended Complaint, the reason lies elsewhere. Reverend Brown has led a high profile existence both locally in the City of Long Branch and globally on the internet. He has both held himself out and been portrayed by the media in numerous capacities, including as a minister, fund raiser, activist, business person and as of March 2004, police detainee. It is equally plausible that adverse reaction to Reverend Brown's very public persona in connection with these other activities caused the alleged drop in contributions. Reverend Brown could have defied the City by holding prayer services or otherwise operating his church at 162 Broadway anyway; indeed he continues to illegally reside on the premises as well as operate a personal business out of the property.

Moreover, the City's motion for summary judgment as to the punitive damages claims in Counts II-XIII was granted and the punitive damages claims no longer exist.

**VII. The Mission cannot show that the City of Long Branch violated the Fair Housing Act, 42 U.S.C. 3601, et. seq. based upon a discriminatory use of its zoning power in denying Reverend Kevin Brown his request to reside in the subject matter building [Count IX, XIV].**

The Fair Housing Act makes it unlawful "to refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a) (1988); United States v. Columbus Country Club, 915 F.2d 877, 880 (3d Cir. 1990). Here the Mission cannot show that the City has discriminated against pastors of putative churches seeking to reside therein, or even that this constitutes a protected class. See Manzo v. Mayor & Twp. Council, 365 N.J. Super. 186, 838 A. 2d 534 (Law Div. 2002)(re: necessity of showing discrimination against protected class). Instead, the Zoning Ordinance regarding residency cuts across all segments of society. Id. Indeed, "the Federal Fair

Housing Act ordinarily cannot and should not be the engine that drives resolution of zoning disputes" Id. (citing Cherry Hill Twp. v. Oxford House, 263 N.J. Super. 25, 621 A.2d 952 (App. Div. 1993)).

Reverend Brown also cannot prove damages by reason of the City's alleged violation of the Fair Housing Act, in that he completely disregarded the Zoning Officer's decision that he could not reside at 162 Broadway and moved in anyway, residing at 162 Broadway to this day. Also, pursuant to 42 U.S.C. §§ 3601 et. seq. punitive damages in private housing discrimination cases are usually limited to $1000 and notably attorney's fees are only awarded to prevailing plaintiffs found financially unable to assume them.

**VIII. This Court has dismissed the Declaratory Count regarding the alleged unjust assessment of property taxes [Count XII].**

This Court dismissed XII of the Complaint, based upon its finding that a declaratory judgment was not a proper remedy for these claims and should permit no further consideration of this issue. Also, the Mission's claim for damages allegedly caused as a consequence of the tax assessment is not sustainable since it is undisputed that the Mission never applied for tax exempt status. Consequently, any damages resulting from the tax assessment were caused by the Mission's conduct alone. Moreover, the record is devoid of evidence that the City in any way interfered with the Mission's attempt to secure non-profit status.

A church may qualify for a tax exemption under N.J. Stat. Ann. § 54:4-3.6. City of Newark v. Block 322, 17 N.J. Tax 103 (N.J. Tax Ct. 1997); N.J. Stat. § 54:4-3.6. The initial statement, or application to the assessor of for exemption of real property from taxation is filed pursuant to N.J.S.A. 54:4-4.4. Atl. County New Sch. v. Pleasantville, 2 N.J. Tax 192, 194 (N.J. Tax Ct. 1981). N.J.S.A. 54:4-4.4 requires the filing of an initial statement by November 1 of the pre-tax year if the property is exempt under N.J.S.A. 54:4-3.6 by virtue of its ownership and use

by an exempt taxpayer on October 1 of the pre-tax year. Id. Here, however, the Mission never applied for tax exempt status during the period claimed in the Complaint. Consequently it is not entitled to the requested relief.

**CONCLUSION**

For the foregoing reasons, Defendant the City of Long Branch respectfully requests that this Honorable Court recognize that the Plaintiffs' claims as to Zoning Ordinance 20-6.13 are moot and claims pursuant to the Redevelopment Plan are barred for jurisdictional reasons. The City also maintains that the Plaintiffs will be unable to prove the merits of their claims as set forth in the Second Amended Complaint.

RESPECTFULLY SUBMITTED,

MARSHALL, DENNEHEY, WARNER,
COLEMAN AND GOGGIN

BY: s/ Howard Mankoff
HOWARD MANKOFF, ESQUIRE

Date: November 21, 2005
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