UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 10-24549–CV–WILLIAMS

TEMPLE B'NAI ZION, INC.,

Plaintiff,

vs.

CITY OF SUNNY ISLES BEACH, FLORIDA, *et al.*,

Defendants.
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ORDER

THIS MATTER is before the Court on Defendants' motion to dismiss (DE 12), Plaintiff's opposition (DE 28), Defendant' reply (DE 31), and Plaintiff's sur-reply (DE 33-1). Having permitted and reviewed extensive briefing on the issues raised, and having heard the parties at oral argument on April 2, 2012 and considered the record as a whole, Defendants' motion is granted.

I. BACKGROUND

This case focuses on events in the City of Sunny Isles Beach, a seaside municipality located in northern Miami-Dade County, Florida, and the governance of its mayor, Norman S. Edelcup, and its Board of Commissioners. Plaintiff Temple B'Nai Zion Inc. ("B'Nai Zion" or the "Temple") is a religious organization that owns a sanctuary, social hall, and building connecting those structures located on a one-acre plot in the City which it operates as a Jewish Synagogue. In September 2010, the City

designated the main sanctuary, as well as a portico and a memorial tower that are apparently on the site, as historic landmarks. (Compl. ¶¶ 117, 102). It was that act and its potential limitations on B'Nai Zion's use of its property that gives rise to this lawsuit, brought by the organization under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1, *et seq.* ("RLUIPA"), the Florida Religious Freedom Act of 1998, FLA. STAT. § 761.01, *et seq.* ("FRFRA"), the Free Exercise Clause of the Florida Constitution, the Equal Protection, Free Exercise, and Substantive Due Process Clauses of the United States Constitution by operation of 42 U.S.C. § 1983, and the Declaratory Judgment Act, 28 U.S.C. § 2201. In sum, Plaintiff asserts that it was discriminated against by the City and its mayor when Sunny Isles' City Commission enacted a resolution affirming the Historic Preservation Board's granting those portions of its property landmark status, which in turn limits Plaintiff's ability to build a new structure for worship.

Both parties agree that the proffered basis for the designation was a ceremony that took place on the site on March 28, 2004. The event, which B'Nai Zion agreed to host, featured a color guard of the City's police department, remarks by B'Nai Zion's president, and an invocation and the singing of the Israeli national anthem by its Rabbi. (Compl. ¶¶ 42, 46.) But the ceremony's purpose and pinnacle was the recognition of two hundred survivors of Europe's Holocaust who had gathered at the Synagogue that day. (Compl. ¶¶ 2, 46.) Some time later, a historic preservation officer with the City of Miami named Ellen Uggucioni was hired as an independent consultant by the City. Ms. Uggucioni prepared a report in favor of landmarking and testified at a city hearing that the Holocaust survivor gathering was a "once-in-a-lifetime event" that "has a lasting

effect on the community." (Compl. ¶¶ 83-85 92.)[1] The complaint suggests that the City might also have been prompted to confer the historic designation because of B'Nai Zion's requests for permits to demolish unspecified portions of the property in 2009 and 2010 and the belief held by former congregants that Plaintiff intended to destroy some of its religious artifacts, such as its religious scrolls. (Compl. ¶¶ 4, 82, 88, 108-09.)

Plaintiff claims, however, that the property does not have the historical significance that the City ascribes to it. For instance, the ceremony giving rise to the designation took place in a part of the structure (the social hall) that was not subject to the landmarking. (Compl. ¶ 93.) It notes that Holocaust survivor gatherings have been relatively commonplace throughout the country and that this particular one was not large in number or even reported in the local or national news (suggesting that it was, in fact, unremarkable from a historical standpoint). (Compl. ¶ 48.) And much of the complaint compares the Synagogue, a mid-century modernist building bearing little architectural significance (Compl. ¶ 97), with other similar buildings in the city that hosted other relatively notable events without those structures receiving landmark status.[2]

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[1] The preservationist's report was accepted by the City's Historic Preservation Board at a public hearing conducted on March 9, 2010. (Compl. ¶ 87.) By a vote of four-to-one at a subsequent public hearing held on June 22, 2010, the Preservation Board issued a recommendation in support of landmarking. (Compl. ¶¶ 91, 101.) The City Commission then heard the matter on September 2, 2010 and enacted Resolution No. 2010-1597, which affirmed the historic site designation, again by a four-to-one vote. (Compl. ¶¶ 106, 117.)

[2] For instance, the City is home to numerous post-war motel properties on its "Motel Row," including one that the music group the Beatles visited during a trip to appear on the Ed Sullivan television show and another that hosted a "legendary nightclub[ ]" frequented by period celebrities. (Compl. ¶¶ 19-27, 65.) Plaintiff has suggested that another place of worship built in the modernist style,

Instead, Plaintiff contends that the landmarking is a pretext for religious discrimination. Mayor Edelcup and three of the five City Commissioners are former congregants who left after they became unhappy with the congregation's shift to orthodoxy and its installment of a new Rabbi the same year as the Holocaust ceremony. (Compl. ¶¶ 2-3, 49-51.) Illustrating the profound discord the fallout engendered, Plaintiff alleges that Mayor Edelcup subsequently called the Synagogue's congregants "a bunch of pigs" during a meeting with its new Rabbi, who in turn, might have accused one of the commissioners of being an anti-Semite. (Compl. ¶¶ 60, 113-14.) Plaintiff has pointed to the role those individuals play in city governance and has explained how they were able to push through the landmarking initiative even though Plaintiff's structure did not meet the City's preservation criteria.[3]

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the Saint Mary Magdalen Catholic Church, is even more historically significant given that the structure was built before the Synagogue and was the first to serve tourists in the area (one additional suggested basis for the Synagogue's designation). (Compl. ¶ 94.) Yet, none of those structures have been landmarked and some have been allowed to be demolished. (Compl. ¶ 97.) In the case of the Saint Mary Magdalen Catholic Church, the city respected its request not to be designated after it was targeted by the Preservation Board. (Compl. ¶¶ 66-67.) Plaintiff's Synagogue currently stands as the only building in the city with the designation.

[3] For example, Mayor Edelcup suggested B'Nai Zion host the 2004 ceremony and then convinced the City's Historic Preservation Board to explore landmarking after it initially declined to take action. (Compl. ¶¶ 45, 73-76.) At the second of the Preservation Board's meetings, Plaintiff claims the city did not allow it to present all of its witnesses. (Compl. ¶ 98.) And at the final commission hearing, which was dominated by the former congregants, the lone dissenting commissioner commented that the others "miss[ed] the point" since the vote was not a referendum on the Synagogue or its leadership, but on the designation and Plaintiff's property rights. (Compl. ¶ 116.)

Alternatively, or in addition to religious discrimination, Plaintiff asserts that the city might be interested in acquiring B'Nai Zion's property and forcing the sale by limiting its land rights. The site is located next to the municipality's government

Plaintiff contends that the City's actions have impeded it from using the property in a manner consistent with the exercise of its religious beliefs, which it seeks to remedy in this action. Principally, Plaintiff argues that the operation of the City's historic preservation ordinances results in a prohibition on the structure's expansion, something the parties called the "chief injury" and "gravamen of the case" respectively at oral argument. Plaintiff points to the fact that in 2006, B'Nai Zion hired an architect who drafted plans for a new structure to meet the needs of its growing congregation. (Comp. ¶ 56.) The plans (or schematics) were presented to city "staff" who indicated that they would not support the expansion. Apparently, Mayor Edelcup disapproved of the plans as well. (Compl. ¶¶ 58-59.)

B'Nai Zion also has asserted that a new structure is necessary to accommodate its more traditional religious beliefs. The facilities on the property were initially built for and used as a Lutheran Church from their construction in the late 1950s until B'Nai Zion acquired the property in 1977. (Compl. ¶¶ 14, 37, 40.) Although B'Nai Zion used the sanctuary as a Synagogue for thirty years without making significant changes to the structure,[4] it still bears the hallmarks of its Lutheran past, such as pillars of Christianity's

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center and B'Nai Zion claims that it refused a request by the city in the mid-2000s for B'Nai Zion to sell it. (Compl. ¶ 61.) Consequently, B'Nai Zion was targeted for code violations involving its electrical wiring and unsightly objects left outside the structure. (Compl. ¶ 64.) In addition to annexing the property, the city might have the intention of turning it over to high-rise luxury condominium developers. (Compl. ¶¶ 4, 29-33.)

[4] When it acquired the property, B'Nai Zion undertook efforts to remove Christian symbols including changing the stained glass to omit depictions of angels, replacing the crucifix atop the outside spire with a Star of David, and changing the inside configuration to hide the fact that it is laid out like a crucifix. (Compl. ¶ 41.)

Twelve Apostles that support the roof of the cross-shaped sanctuary. (Compl. ¶ 38.) Plaintiff asserts that to comply with its practice of Judaism, those religious symbols must now be removed, the prayer room must be reoriented to face east toward Jerusalem (instead of west as it currently is), and there must be accommodations for men and women to be seated separately. (Compl. ¶¶ 53-54.) Apparently, the chief Rabbi of Israel, Rabbi Rav Shlomo Avar, said as much during a visit he made to the Synagogue at some unspecified time. (Compl. ¶ 55.)

II. DISCUSSION

A defendant may bring a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) on the basis that the Court lacks subject matter jurisdiction. "On a facial attack, a plaintiff is afforded safeguards similar to those provided in opposing a Rule 12(b)(6) motion – the court must consider the allegations of the complaint to be true." *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). Alternatively, a "factual attack" challenges "the existence of subject matter jurisdiction in fact, irrespective of the pleadings . . . ." *Id.* (quotation omitted). "Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction – its very power to hear the case – there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.* (quotation omitted). "In the face of a factual challenge to subject matter jurisdiction, the burden is on the plaintiff to prove that jurisdiction exists." *OSI, Inc. v. United States*, 285 F.3d 947, 951 (11th Cir. 2002).

After considering the parties' submissions and as the Court indicated at oral argument on Defendants' motion, the sensational claims before the undersigned – while if true paint a curious portrait of the municipality's handling of this matter – are not justiciable at present.[5] Article III of the United States Constitution limits the subject matter jurisdiction of federal courts like this one to "cases" and "controversies." *Christian Coal. of Fla., Inc. v. United States*, 662 F.3d 1182, 1189 (11th Cir. 2011) (quotation omitted). The doctrine of ripeness – one of three recognized justiciability doctrines (*id.*) – requires that a plaintiff present an actual, real, and sufficiently immediate and redressable injury, in contrast to a complaint about an uncertain or contingent future matter. *See, e.g., Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." (quotations omitted)); *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (11th Cir. 2009) (recognizing that "the jurisdiction of federal courts [is] limited to actual cases and controversies" and that claims must be "sufficiently mature, and the issues sufficiently defined and concrete, to permit effective decisionmaking by the court" (quotations omitted)); *L.M.P. ex. rel. E.P v. Fla. Dep't of Educ.*, 345 Fed. App'x 428, 431 n.2 (11th Cir. 2009) (affirming dismissal under theories of ripeness and standing since "[i]n order for there to be a 'case' or 'controversy' that a federal court can adjudicate, a plaintiff must make a sufficient showing of an injury that the court's decision-making can redress"). The exercise of restraint is meant to "prevent[ ] the courts, through avoidance of premature adjudication,

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[5] Because justiciability goes to a court's subject matter jurisdiction and is a threshold inquiry, the Court does not pass judgment as to the merits of Plaintiff's claims or its likelihood of prevailing.

from entangling themselves in abstract disagreements . . . ." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1224 (11th Cir. 2004) (quoting *Abbott Labs v. Gardner*, 387 U.S. 136 (1967)).

Ripeness also considers prudential limitations on the court's exercise of judicial authority, asking "whether it is appropriate for this case to be litigated in a federal court by these parties at this time." *Id.* (citing *Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallendale*, 922 F.2d 756, 759 (11th Cir. 1991)); *see also Nat'l Advertising Co. v. City of Miami*, 402 F.3d 1335, 1349 (11th Cir. 2005) ("In some circumstances, although a claim may satisfy constitutional requirements, prudential concerns 'counsel judicial restraint.'"); *Cheffer v. Reno*, 55 F.3d 1517, 1524 (11th Cir. 1995) ("The ripeness doctrine raises both jurisdictional and prudential concerns.") "In deciding whether a claim is ripe for adjudication or review, we look primarily at two considerations: 1) the fitness of the issues for judicial decision, and 2) the hardship to the parties of withholding court consideration." *Midrash Sephardi, Inc.*, 366 F.3d at 1224 (citing *Abbott Labs.*, 387 U.S. at 149)).

As this Circuit has held in the context of challenges to land regulations arising under the Constitution, such claims are not ripe until the municipality arrives at a "final and definite" decision with respect to the property at issue. *See, e.g., Strickland v. Alderman*, 74 F.3d 260, 265 (11th Cir. 1996) ("As applied due process and equal protection claims are ripe for adjudication when the local authority has rendered its final decision with respect to the application of the regulation."); *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573-74 (11th Cir. 1989) (applying final decision requirement to substantive due process claim based on rezoning of certain property and relying on

Williamson County v. Hamilton Bank, 473, U.S. 172 (1985)); *Nat'l Advertising Co.*, 402 F.3d at 1340-41 (instructing district court to dismiss First and Fourteenth Amendment claims since lack of final decision would make it "impossible to determine if the City's zoning ordinance violates the constitution"). In particular, there is an absence of finality if the property owner did not avail himself of non-remedial procedures for review such as seeking a variance or waiver from the decision (if a procedure for doing so is available) or did not submit a plan to the municipality for consideration. *Greenbriar, Ltd.*, 881 F.2d at 1574-75.

Williamson County, the Supreme Court's landmark takings case, reasoned that variances are part of the decision-making process and are not equivalent to an appeal of an already in-force decision. Accordingly, where a variance has not been sought, a final decision is lacking, and it is unclear how the local government will apply the regulations at issue. *Williamson County*, 473 U.S. at 191-94; *Murphy*, 402 F.3d at 352 ("A variance is more than a mere remedial measure."). For a takings claim, for instance, that would render the fact-finder unable to gauge factors such as the economic impact of the challenged action and how it interferes with investment-backed expectations, a required showing that would make the action unripe. *Williamson County*, 473 U.S. at 190-91; *see also MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 (1986) ("The local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other."). Similarly, requiring a specific development plan to be submitted recognizes that "zoning is a delicate area where a [local government's] power should not be usurped without giving [it] an opportunity to

consider concrete facts on the merits prior to a court suit." *Eide v. Sarasota County*, 908 F.2d 716, 726-27 & n.17 (11th Cir. 1990); *see also Nat'l Advertising Co.*, 402 F.3d at 1339 ("[I]t is hornbook law that courts must exercise patience and permit the administrative agency the proper time and deference for those agencies to consider the case fully.").

Plaintiff's motion attempts to distinguish *Williamson County* and the applicability of its finality requirement because that case did not involve a RLUIPA challenge and because later decisions have counseled that the Supreme Court's holding should be applied cautiously outside the takings context. But other circuits have applied the final decision prong of *Williamson County*[6] to RLUIPA claims such as the ones presented here, reasoning that Congress did not intend to "relieve religious institutions from applying for variances, special permits or exceptions, where available without discrimination or unfair delay" when it enacted that statute. *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 349-550 (2d Cir. 2005) (quoting RLUIPA's legislative history and holding that although "the Supreme Court developed the *Williamson County* ripeness test in the context of a regulatory takings challenge . . . it has not been so strictly confined"). The Ninth Circuit, which very recently extended the final decision requirement of *Wiliamson County* to RLUIPA claims, recognized the consensus among

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[6] As conceded by Defendants at oral argument, courts have not extended *Williamson County*'s other prong – the exhaustion of state remedial process to obtain just compensation – to RLUIPA claims. *See, e.g., Gautay Christian Fellowship*, 670 F.3d at 978 n.16 (agreeing with the Second Circuit that exhaustion should not be required); *Shenkel United Church of Christ v. North Coventry Twp.*, No. 09-1823, 2009 WL 3806769, at *5 (E.D. Pa. Nov. 13, 2009) (collecting precedent from the Third Circuit and holding that "[w]here a land use dispute arises from constitutional claims that do not require just compensation, the second prong of *Williamson* does not apply").

"[m]any of our sister circuits" in this regard. *Gautay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 977-979 (9th Cir. 2011) ("All of the circuits to address this issue have applied the final decision requirement to RLUIPA claims . . . ."). And although the Eleventh Circuit has not had occasion to consider its application directly, the Court reads its decision in *Konikov v. Orange County, Fla.*, 410 F.3d 1317, 1319 (11th Cir. 2005) (per curiam) to portend a similar result.[7] Indeed, at least one district court in this Circuit has considered the finality requirement in resolving RLUIPA claims. *See Church of Scientology of Ga., Inc. v. City of Sandy Springs, Ga.*, No. 1:10-cv-00082, 2012 WL 500263, at *11-13 (N.D. Ga. Feb. 10, 2012) (publication forthcoming). Thus, this Court sees no reason to refrain from extending the requirement to other land regulation contexts like the situation presented here.

Moreover, courts have applied the *Williamson County* ripeness standard with equal force to analogous state law claims. *See, e.g., Murphy*, 402 F.3d at 354 & n.8 (instructing district court to dismiss unripe claims under First Amendment, RLUIPA, and California's religious freedom act relating to municipality's land use regulation); *Shenkel United Church of Christ*, 2009 WL 3806769, at *3 (granting defendant's motion to dismiss on ripeness grounds as to claims under First Amendment, RLUIPA, and

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[7] In that case, a Rabbi brought suit under RLUIPA and the Due Process Clause, claiming that a zoning ordinance limiting religious gatherings in residential areas like the one in which he resided violated his religious freedom. Without invoking *Williamson County*, the court found the claim ripe because the ordinance had been "finally applied" to the property at issue. *Konikov*, 410 F.3d at 1322 (quoting *Eide*, 908 F.2d at 725). In particular, notwithstanding the fact that he had not applied for an exception to the zoning code or appealed the board's finding, he had been fined for violating the ordinance "indicat[ing] that the Code Enforcement Board had made a final decision to apply the Code to [Plaintiff]." *Id.* (citation omitted).

Pennsylvania's religious freedom act relating to a municipality's land use regulation). Plaintiff's FRFRA claim follows federal law. *See Primera Inglesia Bautista Hispanica of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1303 (11th Cir. 2006) (noting the district court's holding that "since the standard for finding a violation of FRFRA and RLUIPA's substantial burden provision are identical, there was no violation of the FRFRA"); *Christian Romany Church Ministries, Inc. v. Broward County*, 980 So.2d 1164, 1167-68 (Fla. Dist. Ct. App. 2008) (noting the similarities in the language and analysis applied in RLUIPA and FRFRA claims). Similarly, accompanying facial attacks on the constitutionality of such ordinances – like Plaintiff's claim for a declaratory judgment that the designation ordinance is unconstitutionally vague – may also be properly precluded as a matter of judicial restraint if all remaining as-applied claims are dismissed for lack of ripeness. *See Digital Props., Inc. v. City of Plantation*, 121 F.3d 586, 590 n.4 (11th Cir. 1997) ("To the extent that the complaint challenges the facial constitutionality of the Code of Ordinances, we dismiss the claim for lack of ripeness as a matter of judicial restraint."); *Dolls, Inc. v. City of Coralville, Iowa*, 425 F. Supp. 2d 958, 992 (S.D. Iowa 2006) (construing the *Digital Properties* decision and dismissing facial challenge for prudential concerns where as-applied claims had been dismissed as unripe, since "even if the City's regulatory scheme is actually facially unconstitutional, [Plaintiff] must still have ripe claims"); *but see Harris*, 564 F.3d at 1308 (noting that facial challenges are normally ripe from the time the challenged statute or regulation goes into effect, since a ruling on the issue does not require its application).

Against this legal backdrop, it is clear that the City has not arrived at a final determination to give rise to the "injury in fact" that purportedly underpins Plaintiff's

statutory and constitutional claims – that the restriction as applied prevents it from developing the site (including expanding the structure to serve its growing congregation and to remove iconography objectionable to its religious beliefs), diminishes the value of its property, and requires it to maintain the property in its current condition. The Historic Preservation Board apparently has the authority to approve or deny requests to "permit[ ] specified alterations, demolition, or other work to a designated landmark" by issuing a "Certificate of Appropriateness." (Opp'n Ex. A (DE 12-1).) The City Commission, under Article VI, Sections 161-25, 161-28, and 161-30 of the City Code, has the authority to grant requests for variances. Indeed, the City's designation ordinance "invites [Plaintiff] to submit plans for expansion that are consistent with the City Code and consistent with the designation of the Temple as a historic site." (Compl. Ex. B (DE 1-5).) This is seemingly in line with the locality's authority pursuant to state law. *See, e.g., Estate of Tippett v. City of Miami*, 645 So.2d 533, 535-37 (Fla. Dist. Ct. App. 1994) (Gersten, J., concurring) (noting the proliferation of historic landmarking ordinances at the municipality level and discussing the power of local legislatures and historic preservation boards).[8]

Instead of submitting to this local review process, however, Plaintiff has prematurely come to federal court. As a consequence, the record does not reflect what

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[8] It is worth noting that Plaintiff has pleaded that both the city's "staff" and Mayor Edelcup expressed their opinion that they would not support an expansion on the property. But it is undisputed that Plaintiff has not petitioned the body authorized to approve such plans (i.e., the Historic Board and City Commission) and has accordingly not obtained a final denial of an application. *See Nat'l Advertising Co.*, 402 F.3d at 1339-40 (requiring plaintiff to "obtain a conclusive response from someone with the knowledge and authority to speak for the City regarding the application of the zoning scheme" (quotation omitted)).

Plaintiff intends to do with the land and how the historic designation will affect its rights, if at all. It might be that the Historic Preservation Board decides to provide a partial or entire waiver of the regulation. Or it might be that the City Commission grants Plaintiff a variance to build in a manner not currently permitted under the City Code. Defendants have also raised an interesting point that Plaintiff may be unable to proceed with development plans because it has leased the structure to another congregation. In that case, Plaintiff might be unable to go forward with any plans for years to come.[9] What is certain is that this case cannot proceed past this stage merely by the imposition of a label ("historic landmark"), even if that label ultimately constitutes the City's last word. *See Nat'l Advertising Co.*, 402 F.3d at 1340 (quoting *Digital Properties* 121 F.3d at 590 for the proposition that "[a] challenge to the application of a city ordinance does not automatically mature at the zoning counter"). Applying the rationale of the final decision requirement, submission to the City's codified process would not only establish a record of the potential use and whether the use is permitted, but could also prevent unnecessary intrusion into a matter of local concern and provide Plaintiff with the relief it requests in this litigation.[10] Further factual development could establish Plaintiff's

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9 Although Defendants have submitted a copy of the lease agreement (DE 11-2, DE 28-1) and the testimony of that congregation's president (DE 70-1), there is some dispute as to the property rights ceded by B'Nai Zion through a shell company (Mishkan Schlomo, LLC) to the other congregation (Beit Rambaum), including whether Plaintiff's plans would violate the lease. *See Christian Methodist Episcopal Church v. Montgomery*, No. 4:04-cv-22322, 2007 WL 172496, at 7 & n.8 (D.S.C. Jan. 18, 2007) (declining to rule on a RLUIPA standing issue that was "not completely clear . . . in light of [the court's] ruling that the case is not ripe for adjudication").

10 *See Gauray Christian Fellowship*, 670 F.3d at 979 ("[R]equiring the Church to submit a full application for a Use Permit . . . will enable us to refer to a full record and to understand precisely how the Church is in fact allowed to use the building . . . this approach may provide the Church with relief without expending further

standing to assert a claim and would help define requisite showings under it – for instance, whether the limitations constitute a "substantial burden" i.e., that they "tend[ ] to force adherents to forego religious precepts or . . . mandate[ ] religious conduct," *Midrash Sephardi*, 366 F.3d at 1227 – that the Court could only speculate to in the abstract at this moment.

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court resources and it will enable us to respect principles of federalism . . . ."); *Miles Christi Religious Order v. Township of Northville*, 629 F.3d 533, 538 (6th Cir. 2010) ("An appeal to the zoning board not only will ground this dispute in a concrete legal setting – by permitting the zoning board to clarify the township's application of its land-use laws to this property – but also may help Miles Christi . . . [a variance or different determination] will considerably narrow the grounds of dispute between the parties if not end the dispute altogether."); *Congregation Anshei Roosevelt v. Planning and Zoning Bd. of Borough of Roosevelt*, 338 Fed. App'x 214, 218-19 (3d Cir. 2009) ("If the Congregation and the Yeshiva apply for a variance, the Board would develop a record to determine the potential effect of the use, and whether (and, if yes, to what extent) the use is permitted . . . The Board may decide to allow the Yeshiva to operate fully, it may place some restrictions, or it may deny any operation of the Yeshiva on its property."). The Second Circuit in *Murphy* also succinctly summarized the rationale of *Williamson County*'s final decision requirement:

> First . . . the *Williamson County* Court reasoned that requiring a claimant to obtain a final decision from a local land use authority aids in the development of a full record. Second, and relatedly, only if a property owner has exhausted the variance process will a court know precisely how a regulation will be applied to a particular parcel. Third, a variance might provide the relief the property owner seeks without requiring judicial entanglement in constitutional disputes. Thus, requiring a meaningful variance application as a prerequisite to federal litigation enforces the long-standing principle that disputes should be decided on non-constitutional grounds whenever possible. Finally, since *Williamson County,* courts have recognized that federalism principles also buttress the finality requirement. Requiring a property owner to obtain a final, definitive position from zoning authorities evinces the judiciary's appreciation that land use disputes are uniquely matters of local concern more aptly suited for local resolution.

402 F.3d at 348 (citations omitted).

Nor, turning to the second ripeness factor, has Plaintiff demonstrated that this outcome would work a hardship upon it. As demonstrated by the fact that Plaintiff has gone decades without making changes to the property and it is still engaging in its religious worship at the venue, there is apparently no exigency to review by the Court. *Cf. Toilet Goods Ass'n Inc v. Gardner*, 387 U.S. 158, 164 (1967) (suggesting the ripeness doctrine should be applied sparingly to claims "where the impact of the [government] action could be said to be felt immediately by those subject to it in conducting their day-to-day affairs"); *Primera Inglesia*, 450 F.3d at 1304 (finding actual injury in Article III standing context where zoning restriction on property use cause plaintiff to be immediately "barred from assembling for religious worship on the Property"). Nor, having plans at the ready and a procedure available at the local level, is there an issue of undue delay or expense (at least none that Plaintiff has substantiated). *See, e.g., Peachlum v. City of York*, 333 F.3d 429, 437 (3d Cir. 2003) (finding plaintiff's claim ripe notwithstanding lack of final decision because it could not afford a "substantial appeal fee" that the city refused to waive).[11] Accordingly, there is little consequence to this Court staying its hand.

Finally, Plaintiff has asked that the Court apply a narrow futility exception to the final decision requirement should the Court find its claims unripe. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 622 (2001) (noting that the ripeness doctrine "does not

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[11] When asked about the Temple's plans at oral argument, Plaintiff's counsel reiterated that definite plans had been prepared in anticipation of construction. But when pressed about the timetable involved in presenting those plans to the City for review, counsel downplayed them as mere "schematics" that would be costly to fully develop and submit. As the Court pointed out at the time, Plaintiff cannot have it both ways.

require a landowner to submit applications for their own sake"). In this context, futility has been defined as "conditions that make the process itself impossible or highly unlikely to yield government approval of the land use that claimants seek -- such as government obstinacy or where the only governmental body to which claimants can appeal is unable to authorize claimants' desired land use." *Gauray Christian Fellowship*, 670 F.3d at 981. But in this case, there is authority for the Historic Board to issue a waiver or the City Commission to issue a variance, and courts typically require that at least a single meaningful application with the local government be made before the futility exception can be applied. *See Eide*, 908 F.2d at 726-27 (in the takings context, futility applies where the "repeated" submission of development plans would be unlikely to have an effect); *see also Palazzolo*, 533 U.S. at 620 (stating that the relevant authority must have "the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation"); *Murphy*, 402 F.3d at 353 n.7 (finding that plaintiff's failure "to submit a single variance application in this matter . . . forecloses any contention that requiring *Williamson County* finality [with respect to its RLUIPA claim] would be futile"); *Kawaoka v. city of Arroyo Grande*, 17 F.3d 1227, 1232 (9th Cir. 1994) ("However, this futility exception does not alter a party's obligation to file at least one meaningful development proposal.").[12] The Court is also persuaded that Plaintiff's

[12] The Court is aware of other facts cited to by the Plaintiff in an effort to give substance to the futility claim, such as the fact that Plaintiff unsuccessfully appealed the Historic Board's designation decision to the City Commission (but did not request review of that designation by seeking a waiver); that Plaintiff has applied for certain demolition permits that were rejected by the city (which counsel conceded at oral argument did not relate to the expansion plans); and that Plaintiff has been cited repeatedly for code violations (which do not deal with the ordinances governing historic structures). (Compl. ¶¶ 62-63, 82.)

submission to the process would not be onerous or pointless, especially given that regardless of its relationship with the Mayor and City Commission, there is no allegation that the Historic Board (which would weigh a waiver) cannot be impartial. (Compl. ¶¶ 73-76 (noting that the Historic Preservation Board initially did not pursue landmarking for the site "[t]o the City's chagrin" and that it was reluctant to "further explore whether the Temple should be declared a historic site")).

In sum, because there has been no final decision on how the landmarking ordinances will be applied, Plaintiff's constitutional, FRFRA and RLUIPA claims are not ripe for review. The Court will dismiss its facial challenge to the landmarking ordinance under prudential considerations of ripeness.

III. CONCLUSION

In light of the foregoing, it is hereby **ORDERED AND ADJUDGED** that Defendants' motion to dismiss is **GRANTED** insofar as this action is not ripe for review. This action is **DISMISSED WITHOUT PREJUDICE** to Plaintiff refiling, if necessary, after complying with procedures available at the local level. The Clerk is directed to **CLOSE** this case for administrative purposes.

DONE AND ORDERED in chambers in Miami, Florida, this 7th day of May, 2012.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE