

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS**

CALVARY CHAPEL O’HARE; and	)	
PASTOR JEFF DEANE,	)	
Plaintiffs,	)	
	)	
vs.	)	Civ. No.: 02-C-3338
	)	
THE VILLAGE OF FRANKLIN PARK,	)	Judge Norgle
ILLINOIS,	)	Oral Argument Requested
Defendant.	)	

**MEMORANDUM IN SUPPORT OF PLAINTIFFS’  
PETITION FOR PRELIMINARY AND PERMANENT INJUNCTION**

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## **INTRODUCTION**

Plaintiffs submit this Memorandum of Law in support of their Petition for Preliminary and Permanent Injunction in which Plaintiffs respectfully request this Court to enjoin the Village of Franklin Park from enforcing its facially unlawful zoning code. That motion is based on Plaintiffs' claims under RLUIPA's "Equal Terms" and "Exclusion and Limits" provisions, and their claims under the Free Exercise, Free Speech, Free Association and Equal Protection Clauses.<sup>1</sup> Due to the impending deadlines of the Church's purchase contract, prompt resolution is necessary in order to protect Plaintiffs' constitutional rights. Plaintiffs also submit this Memorandum to clarify the exact nature of their substantive constitutional challenges and to demonstrate Plaintiffs' standing to bring these challenges at this time. In so doing, Plaintiffs respectfully request the Court to reconsider its May 31, 2002 ruling denying Plaintiffs' Motion for Partial Summary Judgment.

## **FACTUAL AND PROCEDURAL BACKGROUND**

Calvary Chapel O'Hare ("The Chapel") is a nondenominational church located in Franklin Park, Illinois. Verified Complaint ¶ 5;<sup>2</sup> Affidavit of Jeff Deane, ¶ 2 (hereinafter "Deane Aff.").<sup>3</sup> The Chapel currently consists of approximately 200 congregants, a population that has *doubled* in the last year, and expects continued growth. Complaint ¶¶ 8, 9; Deane Aff. ¶ 5. With its present and anticipated population, the Chapel's present facility is severely overcrowded. Deane Aff. ¶ 10. Approximately 80 to 100 people attend Sunday service in the 2500 square foot space. *Id.* ¶¶ 6, 8. In addition, 40 to 60 children are simultaneously engaged in the Church's children's ministry, some of which take must place in a moldy and water-damaged

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<sup>1</sup> Granting a permanent injunction on these grounds (facial discrimination) would avoid unnecessary discovery and trial on certain elements of Plaintiffs' several other claims, such as the *substantial burden* Defendant imposed on Plaintiffs' religious exercise, expression and association without compelling interest, and Defendants' discriminatory *application* of their Code to Plaintiffs. Plaintiffs do not raise these claims in the present motion.

<sup>2</sup> The Verified Complaint is included in the record and incorporated herein by reference.

portion of the facility. *Id.* ¶¶ 8, 11. The Chapel cannot expand its mission, nor can it provide the services necessary to its current congregants’ free exercise in its hopelessly unaccommodating space. *Id.* ¶¶ 7, 10. The Chapel must perform weddings and baptisms at other locations because its own facility cannot accommodate the number of individuals in attendance. *Id.* ¶ 12. These are but a few of the hardships that the Chapel currently faces because Defendants’ Zoning Code forbids them from using the Grand Bowl Property, described below. *See also* Complaint ¶¶ 13-15; Deane Aff. ¶¶ 9-21 (describing other burdens on religious exercise).

Since October 2001, Plaintiffs currently have a signed contract to purchase real property at 10040 Grand Avenue, Franklin Park, Illinois (the “Grand Bowl Property”) to use as a place of worship that is sufficient to meet the Chapel’s present and future religious needs. *Id.* ¶ 23. The Property is located in Franklin Park’s C-3 zoning district. Affidavit of James Krieter ¶ 3 (hereinafter “Krieter Aff.”).<sup>4</sup>

Places of worship are absolutely forbidden in the C-3 District, even as a conditional use. *See generally* Franklin Park Zoning Code § 9-5A *et seq.*; Deane Aff. ¶ 42. In contrast, several assembly uses are permitted as of right in that District, including daycare centers, governmental buildings, restaurants, art shops, galleries, banquet halls, art studios, clubs and lodges, schools: for music or dance, libraries, museums, art galleries, meeting halls, gymnasiums, theater, indoor, ticket agencies, amusement, drive-in establishments, hotels and motels, massage salons, public baths, schools, vocational or trade. *See* Franklin Park Zoning Code §§ 9-5A-2, 9-5B-2, 9-5C-2; *see also id.* § 9-5C-2 (“Any use permitted in the C-2 Districts shall be permitted in the C-3 District, . . .”); *id.* § 9-5B-2 (“Any use permitted in the C-1 District shall be permitted in the C-2

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<sup>3</sup> The Affidavit of Jeff Deane is attached hereto as Exhibit A and incorporated herein by reference.

<sup>4</sup> The Affidavit of James Krieter is attached hereto as Exhibit B and incorporated herein by reference.

Districts; . . .”). These permitted assembly uses are both for-profit and non-profit assemblies. *See id.* § 9-5B-2 (“Clubs and lodges, nonprofit and fraternal”).

Many other assembly uses are permitted as a conditional use in the C-3 District such as taverns, cocktail lounges, amusement center, amusement establishments, bowling alleys, pool halls, dance halls, skating rinks, recreation buildings, community centers, tanning salons, shooting galleries, amusement parks, permanent carnivals, kiddie parks, outdoor amusement facilities, stadiums, auditoriums, and arenas. *See Franklin Park Zoning Code* §§ 9-5A-3, 9-5B-3, 9-5C-3; *see also id.* § 9-5C-3 (“Any use allowed as a conditional use in the C-2 Districts shall be allowed in the C-3 District . . .”); *id.* § 9-5B-2 (“Any use allowed as a conditional use in the C-1 District shall be allowed in the C-2 Districts . . .”). These uses are both for-profit and non-profit uses. *See id.* § 9-5B-3 (“Recreation buildings and community centers, noncommercial”).

Because the Franklin Park Zoning Code completely excludes places of worship from a C-3 District, it effectively prevents the Chapel from completing the purchase of the Grand Bowl Property and using it for worship because the Chapel fears civil and criminal penalties if it were to do so. *Deane Aff.* ¶ 44. Despite numerous attempts by the Plaintiffs to negotiate with Franklin Park for the use of the Grand Bowl Property, the Village has refused to agree not to enforce their Zoning Code against the Chapel’s proposed use of that Property as a church. *Deane Aff.* ¶¶41-43; *Krieter Aff.* ¶¶ 8-10.

On May 9, 2002, Plaintiffs filed a Verified Complaint challenging those portions of the Franklin Park Zoning Code that completely exclude places of worship, including the Chapel, from a C-3 District. On May 31, 2001, the Court held a hearing on Plaintiffs’ Motion for Partial Summary Judgment. The Court did not dismiss Plaintiffs’ claim, nor did it rule substantively on Plaintiffs’ Motion, but instead denied Plaintiffs’ motion on the grounds that Plaintiffs lacked a “basis to be heard” because Franklin Park, in this Court’s opinion, “had not act[ed] or refus[ed]

to act.” Transcript of Proceedings Before the Honorable Charles Ronald Norgle, Sr. at 18:2 (May 31, 2002) (hereinafter “Transcript”). Because these considerations are also before the Court on this Petition for Injunction, Plaintiffs first address the Court’s May 31 ruling, and then set forth below the appropriate standard, proof and authorities that support Plaintiffs’ present Petition. Plaintiffs respectfully suggest that the facial invalidity of the Zoning Code creates a “basis to be heard” at this time.

**I. PLAINTIFFS HAVE STANDING TO CHALLENGE FRANKLIN PARK’S ZONING CODE ON ITS FACE.**

On May 31, 2002, this Court denied Plaintiffs’ Motion for Partial Summary Judgment, raising issues concerning Plaintiffs’ injury in fact and the ripeness of Plaintiffs’ claims.<sup>5</sup> Plaintiffs respectfully request this Court to reconsider that ruling and instead hold that Plaintiffs have the requisite standing under the United States Constitution and RLUIPA to challenge a zoning ordinance that categorically excludes places of worship while permitting a multitude of other nonreligious assembly uses.<sup>6</sup> Furthermore, although not a necessary element to establish standing, Plaintiffs note that the Zoning Code provides absolutely no administrative<sup>7</sup> mechanism—whether by permit, variance or otherwise—that would permit the Chapel to use the Grand Bowl Property as a place of worship. Calvary Chapel cannot reasonably be required to apply for a permit for which they so plainly may not apply. Such reconsideration would also conform this Court’s decision to controlling Seventh Circuit precedent. Moreover, as a matter of federal law, exhaustion of administrative remedies is not required before filing a challenge under

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<sup>5</sup> The Court stated that “It is not unusual for persons to challenge ordinances. . . . But there must be some factual, sound basis in terms of standing or denial of rights in order to do so.” Transcript at 15. The Court also stated that, because “it is not any particular action [against Plaintiffs] by way of denial of something [Plaintiffs] applied for,” *id.* at 5, that Plaintiffs “haven’t been denied anything.” *Id.* at 7.

<sup>6</sup> Although Plaintiffs do not seek relief under the Illinois RFRA in this petition, the standing analysis set forth here would also apply to any claim Plaintiffs bring pursuant to that statute.

<sup>7</sup> The availability of a legislative remedy, such as a text or map amendment to the Ordinance, as Defendants argue, is irrelevant. It is beyond question that a party challenging an unconstitutional law need not seek to have that law changed prior to filing a judicial action against it. *See infra.*

42 U.S.C. § 1983.

A. Plaintiffs have suffered injury in fact.

Because of *the facial discrimination of Franklin Park's Zoning Code*,<sup>8</sup> Plaintiffs have been unable to complete their contract to purchase the Grand Bowl Property or use that Property to worship. The Code absolutely forbids<sup>9</sup> places of worship in Franklin Park's commercial districts, including the District in which the Grand Bowl Property is located. Not only have Plaintiffs been unable to seek any administrative relief from the Village or its officials, but the Village could not legally provide such relief in any event, since the Code neither allows places of worship by right, nor permits them pursuant to a conditional use permit in a C-3 District. In short, places of worship are absolutely forbidden in the C-3 District, and the lack of a conditional permitting scheme completely precludes Calvary Chapel from using any administrative process to secure use of the Grand Bowl Property as a place of worship.

Even if there were any administrative remedies available to Calvary Chapel, courts have repeatedly held that exhaustion of administrative remedies<sup>10</sup> is *not* required for actions brought

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<sup>8</sup> In addition to the discrimination between religious and nonreligious uses of property in Franklin Park's commercial districts, the denial of Plaintiffs' use of the Grand Bowl Property also constitutes a *substantial burden* on its religious exercise, expression, and association, *discriminatory enforcement* of Defendant's Zoning Code, and a violation of Calvary Chapel's due process rights and a violation of the Chapel's rights under the Illinois RFRA. See Complaint, Counts II, IV, V, VI, VII, VIII, IX, X, XI, XII. Its current facilities are wholly inadequate for its religious mission. *Id.* ¶ 30. See generally, Deane Aff. ¶¶ 7-22, 46.

<sup>9</sup> Although it appears that Franklin Park occasionally ignores its own Code and, based on sheer municipal whim, permits *other* places of worship to locate unimpeded in its commercial districts, see Deane Aff. ¶ 48, this renders Defendants' actions *more*, rather than less, constitutionally suspect. Such unbridled and standardless discretion—discretion not even permitted by the Village's own Zoning Code—is clearly unconstitutional under both the Free Speech and Free Exercise Clauses. See *Cantwell v. Connecticut*, 310 U.S. 296, 304-307 (1940) (invalidating a discretionary licensing system for religious and charitable solicitations).

<sup>10</sup> The Supreme Court of Illinois has also held that, in the context of a **facial** challenge to a law,

Where the alleged constitutional infirmity is to be found in its terms, prior application for administrative relief is unnecessary. On the other hand, where it is alleged that a statute valid upon its face is applied in a discriminatory or arbitrary manner, the rule generally prevails that recourse must be had in the first instance to the appropriate administrative board.

*Bank of Lyons v. County of Cook*, 13 Ill.2d 493, 150 N.E.2d 97, 98 (1958); see also *Head-On Collision Line, Inc. v. Kirk*, 36 Ill.App.3d 263, 343 N.E.2d 534, 538 (1976). Plaintiffs again note that **there is no administrative remedy available to Calvary Chapel.**

under 42 U.S.C. § 1983. *See, e.g., Viens v. Daniels*, 871 F.2d 1328, 1334 (7<sup>th</sup> Cir. 1989) (“[T]he Supreme Court held in *Patsy v. Florida Board of Regents*, 457 U.S. 496, 102 S. Ct. 2557, 73 L.Ed.2d 172 (1982), that a section 1983 plaintiff need only exhaust state remedies where Congress specifically provided for exhaustion.”).<sup>11</sup> Thus, because Congress has not provided for an exhaustion requirement in cases such as this, Plaintiffs’ claims are ripe.

Because use of the Grand Bowl Property as a place of worship is flatly illegal under Franklin Park’s Zoning Code, Calvary Chapel has not completed its signed contract to purchase the Grand Bowl Property for use as a church, fearing criminal sanctions. *Deane Aff.* ¶ 44. Such fear is well-founded as the Franklin Park’s Zoning Code provides for penalties for violating the Code. *See Franklin Park Zoning Code § 9-10-10.* The Administration and Enforcement Code provides that,

Any person, firm, corporation or agent, or any employee or contractor of same, who violates . . . neglects or refuses to comply with, or who resists enforcement of any provisions of this Title, shall be subject to a fine of not more than five hundred dollars (\$500.00), plus costs for each offense. An offense is deemed committed on each day during, or on, which a violation is permitted to occur.

*Id.* Fear of such sanctions not only suffices to provide standing, but also provides a ground for enjoining enforcement of the Village’s Code. *See, e.g., Murphy v. Zoning Comm’n of the Town of New Milford*, No. 00-2297 slip op. at 15-16 (D. Conn. 2001) (granting preliminary injunction under RLUIPA to home prayer group, where “plaintiffs presented testimony that some participants in the prayer group meetings stopped attending the sessions out of fear that they would be arrested by town officials.”).

In addition to these grounds that establish standing, in light of the fact that Calvary Chapel expressly seeks to use the Grand Bowl Property as a church, *see Deane Aff.* ¶¶ 24, 25,

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<sup>11</sup> *See also Mid-American Waste Systems, Inc. v. City of Gary, Ind.*, 49 F.3d 286, 291 (7<sup>th</sup> Cir. 1995) (“Exhaustion is unnecessary under Sec. 1983. *Felder v. Casey*, 487 U.S. 131, 147-48, 108 S. Ct. 2302, 2311-12, 101 L. Ed. 2d 123 (1988); *Patsy v. Board of Regents*, 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982).”).

and that the Code forbids such a use, any argument that Calvary Chapel lacks standing to challenge the Zoning Code is also foreclosed by binding Seventh Circuit precedent. The Seventh Circuit has held that a church has standing to facially challenge a zoning ordinance, without having to apply for a permit, where the church has actually acquired property for its ministry and is prevented from so using it because of zoning restrictions. *See Love Church v. City of Evanston*, 896 F.2d 1082 (7<sup>th</sup> Cir. 1990). The plaintiffs in *Love Church* filed a facial challenge to Evanston’s zoning ordinance requiring special use permits for a place of worship, but not for other assembly uses.<sup>12</sup> *Because the Love Church had not been able to locate property for its ministry*, the Seventh Circuit held that “[s]uch speculative claims cannot constitute distinct and palpable injury for purposes of standing.” *Id.* at 1086.

Love Church has failed to demonstrate that the alleged injury “is likely to be redressed by a favorable decision.” . . . . The possibility that Love Church would be better able to locate rental property absent the special use requirements of the Ordinance is wholly conjectural.

*Id.*

Here, by contrast, Calvary Chapel not only has a specific location in mind for its ministry, but has a signed contract to purchase that Property. *See Deane Aff.* ¶¶ 36, 37; *Krieter Aff.* ¶¶ 5, 12. Thus, both the injury and redressability of that injury sufficient to confer Article III standing is clear. The Zoning Code’s prohibition against places of worship in the C-3 District causes Calvary Chapel a distinct and palpable injury: but for the prohibition against places of worship in the Zoning Code, Calvary Chapel would complete the purchase of the Grand Bowl Property and would begin using it for worship. And that injury is redressable by this Court: enjoining the enforcement of the illegal injury will directly redress the violation of Calvary Chapel’s constitutional and statutory rights.

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<sup>12</sup> Before the Seventh Circuit vacated this case based on standing, this Court held in *Love Church* on the merits that Evanston had a “heavy burden” to meet under the Equal Protection Clause in justifying its requirement

That Calvary Chapel has standing is also confirmed by recent Supreme Court cases dealing with First Amendment Free Exercise and Free Speech facial challenges to local ordinances. For example, in the Supreme Court’s latest Free Exercise decision, the plaintiffs brought a facial challenge to a local ordinance which was discriminatory on its face—similar to the case at bar—immediately after its passage. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (“Following enactment of these ordinances, the Church and Pichardo filed this action pursuant to 42 U.S.C. 1983 in the United States District Court for the Southern District of Florida.”). Just as in *Lukumi*, where the city’s ordinance unlawfully permitted nearly any animal killing except those with a religious motivation, the Village of Franklin Park unlawfully permits nearly any assembly of people, except those with a religious motivation.<sup>13</sup> Although the plaintiffs in *Lukumi* “ha[d] not been prosecuted by Defendant for any violations or intended violations of these ordinances,” 723 F. Supp. 1467, 1477 (S.D. Fla. 1989), that did not prevent the Supreme Court from ruling in the Plaintiffs’ favor and striking down the facially discriminatory ordinance. So too here; the absence of any administrative action by Franklin Park poses no standing barrier to this Court granting relief to redress the injury Calvary Chapel suffers as a result of the facially discriminatory ordinance. *See also Watchtower Bible and Tract Soc. of New York v. Village of Stratton*, No. 00-1737 (June 17, 2002) (upholding facial challenge to permit requirement in order to engage in religious solicitation).

**B. The issue is ripe for adjudication.**

The Supreme Court has held that a threat of prosecution is credible when (1) a plaintiff’s intended conduct runs afoul of a criminal statute and (2) the Government fails to indicate affirmatively that it will not enforce the statute. *See Virginia v. American Booksellers Ass’n*,

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for churches, but not other assembly uses, to obtain special use permits. 671 F. Supp. 515 (N.D. Ill. 1987); *See infra* §II(D)(1).

*Inc.*, 484 U.S. 383, 393. (1988). Both of these conditions exist in the present case.

First, Plaintiffs intend to use the Grand Bowl Property as a place of worship. Deane Aff. ¶¶ 24, 25. Indeed, the Church has a signed contract to purchase the Property, Deane Aff. ¶¶ 36, 37; Krieter Aff. ¶¶ 5, 12 and intend to use the Property for protected expressive activity, a place of worship. As described above, Calvary Chapel’s intended conduct—the operation of a church at the Grand Bowl Property—unmistakably runs afoul of Franklin Park’s Zoning Code. *See* Franklin Park Zoning Code §§ 9-5A *et seq.* (not allowing a place of worship under any condition in the C-3 District); § 9-10-10 (prescribing penalties for violating the Code).

Second, Franklin Park has not indicated affirmatively that it will not enforce its Code should Calvary Chapel seek to use the Property for worship. Deane Aff. ¶¶ 40, 42, 43. Although not a necessary element for Plaintiffs to prove—it is Defendant’s burden to show that they will not enforce their statute, not Plaintiffs’ to prove that they will, *see American Booksellers Ass’n*, 484 U.S. at 393—representatives of Franklin Park have repeatedly told Plaintiffs that Calvary Chapel would not be able to use the Grand Bowl Property for worship. Deane Aff. ¶¶ 40, 42, 43.

C. Exhaustion of legislative remedies is not required.

Recognizing that no administrative remedy is available to Plaintiffs, Defendant apparently argues that in order to seek relief from this Court, Plaintiffs must first seek some form of an amendment to their Zoning Code. Transcript at 8 and 13. However, both *the Seventh Circuit and this Court have clearly held that such action is legislative in nature*. *See Biblia Abierta v. Banks*, 129 F.3d 899, 905 (7<sup>th</sup> Cir. 1997) (“We believe that rezoning (including participation in the introduction and passage of a rezoning ordinance) is a legitimate *legislative* activity.”) (emphasis added); *Pelfresne v. Stephens*, 35 F. Supp. 2d 1064, 1071 (N.D. Ill. 1999)

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<sup>13</sup> As detailed below, such a scheme violates the First and Fourteenth Amendments and RLUIPA on its face, and must be struck down.

(the “Seventh Circuit has held [rezoning ordinances] to be *legislative* in character even though they affected particular individuals.”) (emphasis added).<sup>14</sup>

Because a zoning amendment is a legislative action, Defendant’s claim that seeking such legislative action is a prerequisite to bringing a facially constitutional challenge to the Zoning Code fails. It is simply beyond reasonable dispute that a plaintiff need not first seek legislative action prior to challenging an unconstitutional law. Indeed, to require that a plaintiff attempt to change an unconstitutional statute through the political process before seeking a judicial remedy would turn the principle of separation of powers on its head. *See Lucas v. 44th Gen. Ass. of State of Colo.*, 377 U.S. 713, 736-37 (1964) (“[W]e find no significance in the fact that a nonjudicial, political remedy may be available for the effectuation of asserted rights to equal representation in a state legislature. Courts sit to adjudicate controversies involving alleged denials of constitutional rights. . . . [I]ndividual constitutional rights cannot be deprived, or denied judicial effectuation, because of the existence of a nonjudicial remedy through which relief . . . might be achieved.” (footnotes omitted)). Plaintiffs are thus entitled to seek judicial relief immediately.

## **II. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF**

Plaintiffs are entitled to a preliminary injunction if they demonstrate: (1) that they have no adequate remedy at law and will suffer irreparable harm if the preliminary injunction does not issue; (2) that the irreparable harm Plaintiffs will suffer if the preliminary injunction is not granted is greater than the harm the Defendant will suffer if it is granted; (3) that the injunction will not harm the public interest; and (4) that the Plaintiffs have a reasonable likelihood of success on the merits. *See Roland Machinery Co. v. Dresser Indust., Inc.*, 749 F.2d 380 (7<sup>th</sup> Cir. 1984); *Brunswick Corp. v. Jones*, 784 F.2d 271 (7<sup>th</sup> Cir. 1986); *Curtis v. Thompson*, 840 F.2d 1291 (7<sup>th</sup>

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<sup>14</sup> *See also Night Clubs, Inc. v. City of Fort Smith, Ark.*, 163 F.3d 475, 479-80 (8<sup>th</sup> Cir. 1998); *Acierno v. Cloutier*, 40 F.3d 597, 612 (3d Cir. 1994); *Orange Lake Associates, Inc. v. Kirkpatrick*, 21 F.3d 1214, 1224 (2d Cir. 1994).

Cir. 1988). Each of these elements is easily met here.

A. Plaintiffs have no adequate remedy at law and will suffer irreparable harm if this Court does not issue an injunction.

Plaintiffs here seek to enjoin the application of a facially unlawful Zoning Code that prevents them from engaging in religious activities protected by the First and Fourteenth Amendments and RLUIPA and effectively halts the culmination of a real estate transaction to obtain a property uniquely suited for Plaintiffs' religious exercise. The Supreme Court has affirmed this Circuit's holding that injunctive relief is appropriate in cases involving the infringement of First Amendment freedoms. *See Burns v. Elrod*, 509 F.2d 1133 (7<sup>th</sup> Cir. 1975), *aff'd*, 427 U.S. 347 (1976). Pastor Deane's Affidavit outlines the specific injuries to Plaintiffs' religious exercise they have suffered as a result of Defendant denying Plaintiffs the ability to use the Grand Bowl Property through enactment of its Zoning Code. Deane Aff. ¶¶ 24-30, 45, 46 (*e.g.*, inability to increase size of the congregation; inability to expand any ministries; inability to offer any youth ministry activities; inability to expand spiritual activities for children, inability to perform weddings and other religious sacraments; lost members of the congregation). From the time Plaintiffs have been effectively barred from closing on the Property, these injuries have resulted directly from the facial unconstitutionality of Defendant's Zoning Code. "[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The months during which Calvary Chapel has been unable to engage fully in its congregants' assembly and exercise rights readily satisfy the Supreme Court's "minimal periods of time" requirement. Moreover, it is impossible to calculate damages for the time during which Plaintiffs have been unable to carry out activities of their faith. *Roland*, 749 F.2d at 386 (plaintiffs have no adequate remedy at law where the "nature of the plaintiff's loss may make damages very difficult to calculate"). Money

is simply an insufficient means to compensate for the loss of religious exercise. *See id.* (in considering whether an award of damages is insufficient, the court does not mean “wholly ineffectual” but rather “seriously deficient as a remedy for the harm suffered.”).

In a similar case under RLUIPA, *Murphy v. Zoning Commission of the Town of New Milford*, 148 F. Supp. 2d 173 (D. Conn. 2001), another federal court held that “in the context of a motion for preliminary injunction, violations of First Amendment rights are commonly considered irreparable injuries.” 148 F. Supp. 2d at 180 (citation omitted). The Court continued,

The federal statute [RLUIPA] under which plaintiffs bring their claims was passed by Congress to “protect the free exercise of religious from unnecessary *government* interference” in the context of land use regulation. [citations omitted.] Since the statute was enacted for the express purpose of protecting the First Amendment rights of individuals, the allegation that defendants have violated this statute also triggers the same concerns that led the courts to hold that these violations result in a presumption of irreparable harm.

*Murphy*, 148 F. Supp. 2d at 180-81 (emphasis added).

Furthermore, injunctive relief is appropriate here because the Defendant’s unlawful Zoning Code threatens Plaintiffs’ ability to complete the purchase of land uniquely suited for Plaintiffs’ religious exercise. Because one parcel simply will not substitute for another parcel, issues involving land represent the quintessential example of where damages are an inadequate remedy. *See Miguel v. Belzeski*, 70 F.3d 1274 (7<sup>th</sup> Cir. 1995) (holding that the plaintiffs had no adequate remedy at law where the subject matter is real estate); *United Church of the Medical Center v. Medical Center Com’n.*, 689 F.2d 693, 701 (7<sup>th</sup> Cir. 1982) (“it is settled beyond the need for citation that a given piece of property is considered to be unique.”). The Grand Bowl Property is uniquely suited to meet Calvary Chapel’s religious needs. Deane Aff. ¶ 24. Without being able to close the transaction to purchase the Grand Bowl Property, Calvary Chapel will lose this unique Property and will be without adequate worship facilities and unable to expand its ministry. *Id.* ¶¶ 45, 46. It is the existence of the unlawful Zoning Code precluding places of

worship in a C-3 District that prevents Calvary Chapel from completing the purchase of this Property that is uniquely suited to its needs. *Deane Aff.* ¶ 44 (stating that Chapel fears penalties for violating zoning laws if it purchases the property and uses it for religious worship). In the event the Village is not enjoined from enforcing its Zoning Code as to religious uses within the C-3 District, Plaintiffs will lose their interest in the unique piece of real estate. *See Krieter Aff.* ¶ 13 (Plaintiffs' contract with the Grand Bowl Property owner expires on September 2, 2002). Thus, injunctive relief is necessary to protect Plaintiffs' rights to purchase and use Property uniquely suited for their religious exercise. *See Miguel; United Church, supra; see also Roland*, 749 F.2d at 386 (no adequate remedy where damage award may come "too late.").

A. If the preliminary injunction is not granted, then greater harm will result to Plaintiffs than to Defendants.

The harm to Plaintiffs involves the most fundamental constitutional rights of the Chapel's congregants. As previously stated, Plaintiffs have missed many opportunities for worship and ministry, all because the Village forbids houses of worship within the C-3 District. Conversely, the Village has no legitimate interest in enforcing a Zoning Code that is facially unlawful under the Constitution and RLUIPA. The irreparable harm that Plaintiffs have experienced and will continue to experience absent this Court's entry of the injunction outweighs any harm suffered by the Defendant. *See Brunswick*, 784 F.2d at 273-74. Moreover, the degree of harm to any potential Village interest arising from enjoining its Code excluding places of worship from the C-3 District is severely undermined by the existence of other churches in the C-3 District, *see Deane Aff.* ¶ 48. *See Schad v. Mt. Ephraim*, 452 U.S. 61, 73 n.14 (1981) (city's interest in excluding a particular land use from a zoning district is undermined where city allows other instances of that same land use to operate as nonconforming uses).

B. The injunction benefits the public interest.

The “public interest” requirement “takes on special importance in constitutional cases . . . where the outcome will undoubtedly affect countless persons.” *Darryl v. Coler* 801 F.2d 893, 898 (7<sup>th</sup> Cir. 1986). “[I]t is in the public interest not to perpetuate the unconstitutional application of a statute.” *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6<sup>th</sup> Cir. 1982); *American Motorcyclist Ass’n v. Watt*, 714 F.2d 962, 967 (9<sup>th</sup> Cir. 1983) (holding that implementing Congress’ intent is in the public interest). *See also Florida Businessmen for Free Enterprise v. City of Hollywood*, 648 F.2d 956, 959 (5<sup>th</sup> Cir. 1981) (“the public interest does not support the city’s expenditure of time, money and effort in attempting to enforce an ordinance that may well be held unconstitutional.”).

The public interest favors the protection of religious freedom and free exercise—Calvary Chapel will not be alone in benefiting from an order of this Court that restores constitutionally protected religious exercise rights in the Village. Furthermore, the Defendant should not be allowed to substitute its own judgment for that of the Framers and Congress by continuing to enforce a code that infringes on the protections afforded to religious exercise under the First and Fourteenth Amendments and RLUIPA. *See Native Village of Quinhagak v. United States*, 35 F.3d 388, 395 (9<sup>th</sup> Cir. 1994) (“No policy reasons support allowing the [government] to continue their potentially unlawful regulatory programs until trial.”). In sum, preventing enforcement of the unlawful Zoning Code to the Chapel’s use of the Grand Bowl Property for worship weighs heavily in the public interest.

C. Plaintiffs have a reasonable likelihood of success on the merits.

The Zoning Code’s facial discrimination against places of worship unquestionably violates the Constitution and RLUIPA. However, a plaintiff need not demonstrate such a high likelihood of success on the merits; the plaintiff must demonstrate only a “negligible” chance of

success. *Curtis v. Thompson*, 840 F.2d at 1296. The Seventh Circuit employs a “sliding scale” approach in deciding whether to grant or deny injunctive relief. *Id.* Thus, even a plaintiff with a less than 50 percent chance of prevailing may merit an injunction when the balance of harms would weigh heavily in plaintiff’s favor. *Id.* Here, Plaintiffs have not just a negligible, but a strong likelihood of demonstrating that the Village’s Zoning Code is illegal under the Constitution and RLUIPA.

1. *The zoning code discriminates against religious assemblies and violates Plaintiffs’ rights under RLUIPA’s “Equal Terms” provision and corresponding constitutional protections.*

RLUIPA. The plain text of RLUIPA’s “Equal Terms” section sets forth a clear standard:

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.

42 U.S.C. § 2000cc(b)(1). This provision prohibits a municipality from imposing requirements on a religious assembly that are not imposed on otherwise similar, non-religious assemblies. The Defendant’s Zoning Code<sup>15</sup> violates this provision by completely prohibiting places of worship from a C-3 District, while allowing nearly every other nonreligious assembly, including meeting halls, public baths, clubs, lodges, or theaters, in such districts.<sup>16</sup> These myriad uses are

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<sup>15</sup> Chapter 5 (“Commercial Districts”) of Franklin Park’s Zoning Code is a “land use regulation.” 42 U.S.C. § 2000cc-5(5) (“The term ‘land use regulation’ means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant’s use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.”). Defendants are “government” actors subject to RLUIPA’s provisions. *Id.* at 2000cc-5(4) (“The term ‘government’-- (A) means-- (i) a State, county, municipality, or other governmental entity created under the authority of a State; (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and (iii) any other person acting under color of State law; . . .”). Plaintiffs have a signed contract to purchase the Grand Bowl Property and therefore, have a property interest under RLUIPA. 42 U.S.C. §2000cc-5(5). (Plaintiff under RLUIPA has a property interest if “the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.”).

<sup>16</sup> A nonexhaustive list of assembly uses permitted either as of right or subject to a conditional use permit are identified *supra* at pp. 2-3.

“nonreligious assemblies and institutions”<sup>17</sup> within the meaning of the Act, as its legislative history makes clear.<sup>18</sup> Places of worship are undoubtedly “religious assemblies and institutions” within the meaning of the Act. Thus, a plain reading of the statute indicates that the Village’s Zoning Code, by excluding places of worship from C-3 Districts while allowing a host of nonreligious assembly uses in such districts, treats a religious assembly on “less than equal terms” with many nonreligious assembly uses. As described more fully below, RLUIPA’s “Equal Terms” provision merely restates long-accepted principles of Free Exercise, Free Speech, and Equal Protection.<sup>19</sup> The Defendant’s Zoning Code violates those constitutional provisions also.

The Free Exercise Clause. RLUIPA’s “Equal Terms” rule, which prohibits disfavored treatment of religious assemblies, reflects the Supreme Court’s Free Exercise requirement of “neutrality.” *Employment Div. v. Smith*, 494 U.S. 872, 877-80 (1990) (describing bans on “assembling with others . . . only when they are engaged in for religious reasons” as unconstitutional). In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Court held that a law “lacks facial neutrality if it refers to a religious practice *without a secular meaning discernable from the language or context.*” *Id.* at 533. The Court also stated that:

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<sup>17</sup> See, e.g., CITY OF CHICAGO BLDG. CODE § 13-56-070 (listing “banquet halls,” “community houses,” “concert halls,” “museums,” and “theaters” as assembly uses, among many others).

<sup>18</sup> Examples of nonreligious assemblies that the legislative history identifies as comparable to religious assemblies include “banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, places of amusement, recreation centers, lodges, libraries, museums, municipal buildings, meeting halls, and theaters,” H. REP. 106-219 at 19 (July 1, 1999), and “recreation centers, health clubs, backyard barbeques and banquet halls.” 146 CONG. REC. S7774-01, \*S7776. Other federal courts have also provided examples of nonreligious assembly uses. The Supreme Court has listed as examples of “any place of assembly”: a “theater, town hall, opera house, as well as a public market place.” *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). See also *Love Church v. City of Evanston*, 671 F. Supp. 515, 517-19 (N.D. Ill. 1987) (identifying community centers, schools, meeting halls, and theatres).

<sup>19</sup> See *Freedom Baptist Church v. Township of Middletown*, No. 01-5345, 2002 WL 927804 at \*10 (E.D. Pa. May 8, 2002) (“2(b)(1) and (2) of the RLUIPA . . . codify existing Free Exercise, Establishment Clause and Equal Protection rights against states and municipalities that treat religious assemblies or institutions “on less than equal terms” than secular institutions or which “discriminate[]” against them based on their religious affiliation.”).

the “exercise of religion” often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, . . . . It would be true . . . that a State would be “prohibiting the free exercise [of religion]” if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.

*Smith*, 494 U.S. at 877-78 (emphasis added). These decisions clearly forbid treating land uses involving assembly for religious purposes differently than land uses involving assembly for nonreligious purposes. But that is precisely what the Defendant’s Zoning Code does: the Code expressly allows a host of nonreligious, secular assembly uses in C-3 Districts, but just as noticeably categorically excludes religious assemblies like Calvary Chapel. Such adverse, differential treatment of religious assemblies violates the principle of neutrality that is so firmly established in Free Exercise jurisprudence.

The Third Circuit’s decision in *F.O.P. Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir.), *cert. denied*, 528 U.S. 817 (1999), also explicates the controlling *Lukumi/Smith* standard and reinforces the impermissible nature of the Village’s non-neutral treatment of religious assemblies in this case. *F.O.P.* presented the question of whether a government employer’s prohibition on beards that made exceptions for medical reasons triggered heightened scrutiny for failure to make exceptions for religious reasons. *Id.* at 365-66. The court applied strict scrutiny because it found the law to target conduct based on its religious motivation:

[I]t is clear from [*Smith* and *Lukumi*] that the Court’s concern was the prospect of the government’s deciding that *secular motivations are more important than religious motivations*. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection. . . . Therefore, we conclude that the Department’s decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*.

*Id.* (emphasis added). Here, as in *F.O.P.*, the Village’s categorical judgment to allow a host of secular assembly uses to locate in C-3 Districts, but to completely exclude places of worship,

violates the Free Exercise Clause by treating places of worship categorically worse than secular assembly uses.

In a closely analogous religious land-use case, a federal court similarly questioned the prohibition on a church's homeless feeding program when restaurants are permitted in the same district. The court stated that "[i]t seems rather incongruous that no objection could be raised if a needy person can buy his or her food, but it becomes inappropriate if that needy individual can obtain food at no cost from a benevolent source. The Court wonders what position authorities would take if instead of providing the meal on its premises, the Church provided the needy with funds and sent them to the nearby restaurant to be fed." *W. Presbyterian Church v. Bd. of Zoning Adjustment*, 862 F. Supp. 538, 546 (D.D.C. 1994). The same incongruity operates here, where the laws raise no barrier to people assembling in a C-3 District for a wedding or meal in many of the permitted secular assembly uses permitted in the Village, but people could not assemble for a wedding or a communion meal in a church because of the Village's exclusion of places of worship from C-3 Districts.

The Free Speech Clause. Defendants' discriminatory Code also violates the Free Speech Clause. The Supreme Court has repeatedly held that land use regulations that restrict expressive activity implicate the Free Speech Clause,<sup>20</sup> and that the government may not favor nonreligious speech over equivalent religious speech.<sup>21</sup> The Supreme Court has also unequivocally stated that

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<sup>20</sup> The Supreme Court has frequently recognized that while nude dancing is protected by the First Amendment, *see, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991) (plurality opinion), *see also id.* at 581 (opinion of Souter, J.) and *id.* at 593 (opinion of White, J.), local governments may use their zoning powers to limit the location of adult establishments. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54-55 (1986), and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63 (1976). However, in upholding the zoning ordinance in *Renton*, the Court concluded that an ordinance limiting the location of adult establishments is proper (1) *so long as it is constructed without reference to content*, *Renton*, 475 U.S. at 48; and (2) *is designed to promote a substantial governmental interest and allows reasonable alternative avenues for communication*. *Id.* at 50. The religious expression inherent in a place of worship is certainly of at least equivalent value as protected adult expression, and thus is entitled to at least equivalent protection under the Free Speech Clause.

<sup>21</sup> The Supreme Court has repeatedly held that discrimination against religious speech—especially distinctions between equivalent religious and nonreligious speech—constitutes viewpoint discrimination in violation

“religious expression holds a place at the core of the type of speech that the First Amendment was designed to protect. *See Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995). In *DeBoer v. Village of Oak Park*, 267 F.3d 558 (7<sup>th</sup> Cir. 2001), the Seventh Circuit applied the Supreme Court’s holdings, stating that the Village’s prohibition on the use of a hall by a prayer group when the hall could be used for a “civic program or activity” was impermissible viewpoint-based restriction on speech.

The facts of this case, the cogency of the Seventh Circuit’s opinion on this issue and the unequivocal disposition of the law on this matter by the Supreme Court demand that this Court apply the same reasoning under the facts of this case toward the same conclusion. The kind of speech at issue in *DeBoer*—religious expression—is at issue in this case. Accordingly, Plaintiffs’ “private religious speech” is not a “First Amendment orphan,” but rather is “fully protected under the Free Speech clause as secular private expression.” *DeBoer*, 267 F.3d at 570. To remove religious speech from the free speech protections of the First Amendment would be, according to the Supreme Court, “Hamlet without the prince.” *Capitol Sq. Rev.*, 515 U.S. at 760.

This Court will do precisely that, however, if it fails to enter this injunction and by so doing, draws the line of Free Speech protection too narrowly. To uphold Defendant’s Zoning Code’s discriminatory treatment of religious expression would be like barring the plaintiffs in *DeBoer* from access to the Village Hall. It would “discriminate[] against plaintiffs based on their religious viewpoint,” and thus constitute a “violation of the First Amendment’s mandates.” *Id.* at 571.

A review of the permitted uses in Defendant’s commercial district demonstrates the

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of the Free Speech Clause. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). A place of worship and a religious assembly such as Calvary Chapel O’Hare engages in expressive activity. *See Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (“We disagree that something that is

patent irrationality of this content-based restriction on speech. For example, a theatrical production depicting a wedding ceremony would be permissible in the C-3 District, *see* Zoning Code § 9-5B-2 (“the following uses shall be permitted: . . . Theater, indoor . . . .”), while a comparable assembly for a real religious wedding service would be prohibited. Similarly, while Calvary Chapel cannot use the Grand Bowl Property for a religious funeral service, such activity is expressly permitted in a funeral parlor. *Id.* § 9-5C-2. In both examples, the number of people involved, their outward conduct, and their potential impact on surrounding properties are substantially identical. Assembly for many other purposes, such as banquet halls, theaters, art galleries, meeting halls and clubs, is permitted but would not be permitted if undertaken for religious reasons in a church. Franklin Park Zoning Code, §§9-5A-2, et seq. The prohibitions of the Code thus turn entirely on the religious content of the expression and the religious motivation of the participants. Since (1) zoning laws which regulate expressive activity implicate the Free Speech Clause, and (2) favoring nonreligious speech over religious speech represents impermissible viewpoint discrimination, Defendants’ Code violates Plaintiffs’ Free Speech rights.

Freedom of Association and Equal Protection. Both freedom of association principles and the Equal Protection Clause protect the exercise of fundamental rights, and therefore also prohibit Defendant’s unequal treatment of religious land uses. The ability of Calvary Chapel and Pastor Deane to worship together as their religious beliefs require falls within the core of this protected activity. The Supreme Court has long recognized that the First Amendment protects an independent right of freedom of association. *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958) (striking down statute requiring disclosure of group members’ names and addresses, holding that

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quintessentially religious or decidedly religious in nature cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint.”).

“it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, *religious* or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.” (emphasis added)). *See also Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (“An individual’s freedom to speak, *to worship*, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. . . . Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, *religious*, and cultural ends.” (citations omitted; emphases added)); *Amos v. McPherson*, 483 U.S. 378, 382 (1987) (“For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.”) (Brennan, J. concurring).

In *Love Church v. City of Evanston*—a case very similar to the case at bar—this Court methodically explained this principle (in the Equal Protection context) using examples of conduct protected by the First Amendment:

Other assembly uses are not subjected to the same treatment as churches. If meeting halls as well as theatres had to get special use permits, then Evanston could assert that it zoned on the basis of something other than religion.

. . . . Suppose, for example, a group of people wished to assemble on a regular basis in Evanston to discuss and hear lectures on classical literature. This group might also wish to have seminars for young people after school or on weekends to expose them to “great books.” These people could rent a building in any business or commercial zone and have their meetings. But if that same group of people wished to assemble for the purpose of religious worship and to hold classes for its young people to educate them about religion, they would have to get special permission from Evanston. The only distinguishable feature of the groups in our hypothetical is the purpose and content of the assembly. Because Evanston’s ordinance distinguishes between religious assembly uses and non-religious

assembly uses, it classifies on the basis of religion.

Having concluded that the ordinance classifies on the basis of religion, we will uphold it only if it is narrowly tailored to serve a compelling governmental interest.

671 F. Supp. 515, 518-19 (N.D. Ill. 1987) (footnote omitted, emphasis added), *vacated on other grounds*, 896 F.2d 1082 (7<sup>th</sup> Cir. 1990). Likewise, Franklin Park’s Code would permit *Love Church’s* hypothetical “Classical Literature Club” (*see* Zoning Code § 9-5C-2 (“Any use permitted in the C-2 Districts shall be permitted in the C-3 District, . . . .”); *id.* § 9-5B-2 (“[T]he following uses shall be permitted: . . . clubs . . . .”)), but not a house of worship. Such discrimination against association for religious purposes is thus a violation of the constitutional guarantees of Free Association and Equal Protection.

2. *The zoning code violates Plaintiffs’ rights under RLUIPA’s “exclusion and limits” provision and corresponding constitutional protections.*

Section 2(b)(3)(B) of RLUIPA requires that: “no government shall impose or implement a land use regulation that . . . (B) *unreasonably* limits religious assemblies, institutions, or structures within a jurisdiction.” 42 U.S.C. § 2000cc(b)(3)(B) (emphasis added). This reasonableness requirement codifies the fundamental constitutional test, enshrined in both the Due Process and Equal Protection Clauses, that all laws regulating land use must (at a minimum) be rational. *See Freedom Baptist Church*, 2002 WL 927804 at \*11. The Supreme Court has held that the Due Process Clause restrains the government from imposing “restrictions that are unnecessary and *unreasonable* upon the use of private property or the pursuit of useful activities.” *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928) (emphasis added) (striking down unreasonable zoning requirement under the Due Process Clause). *See also Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (land use restrictions violate due process if they are “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”). Similarly, the Supreme Court has held that

the Equal Protection Clause prohibits zoning ordinances that are not “rationally related to a legitimate state interest.” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

*Cleburne* lays out the inquiry a court should undertake in assessing whether a zoning regulation “unreasonably limits” religious land uses under RLUIPA’s “Exclusion and Limits” provision, 42 U.S.C. § 2000cc(b)(3)(B). *See Freedom Baptist Church*, 2002 WL 927804 at \*11 (holding that 42 U.S.C. § 2000cc(b)(3)(B) “codifies [the] existing Supreme Court Equal Protection jurisprudence” of *Cleburne*). In *Cleburne*, the Court considered a challenge to a city ordinance that required a special use permit to operate a group home for the mentally retarded in a residential district, but did not require such permits for apartment houses, boarding and lodging houses, dormitories, hospitals, nursing homes, and other similar places. *Id.* at 447. The city argued that the requirement was rational because the permit requirement was designed to alleviate certain problems it alleged were created by homes for the mentally retarded. *Id.* at 450. In assessing the rationality of the challenged land use regulation, the Court dictated that the relevant inquiry was whether the home for the mentally retarded “would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not.” *Id.* Examining each of the City’s asserted interests, the Court concluded that the permitted uses of property in the residential district posed an equal or greater threat to those interests. Accordingly, the Court held that it was irrational to allow the permitted uses to locate in the residential district, but not the home for the mentally retarded. *See id.*

In determining whether a particular land use regulation is unreasonable, courts have consistently applied the *Cleburne* test of considering whether the non-permitted use under the regulation ““would threaten legitimate interests of the [government] in a way that other permitted uses . . . would not.”” *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 471 (8<sup>th</sup> Cir. 1991) (quoting *Cleburne*, 473 U.S. at 450) (applying *Cleburne* in considering constitutionality of

ordinance allowing certain non-commercial uses, but not churches, in a particular district).

*Cleburne* was recently applied to a religious land use in a similar factual context in *Congregation Kol Ami v. Abington Township*, 161 F. Supp. 2d 432 (E.D. Pa. 2001). In that case, the Township sought to defend an ordinance forbidding a church, but not secular entities, from locating within a certain district on the grounds that the church “would cause traffic, light pollution, and noise to increase.” *Id.* at 437. Following the inquiry laid out in *Cleburne*, the court found that those same concerns existed for permitted property uses, such as “a train station, bus shelter, municipal administration building, police barrack, library, snack bar, pro shop, club house, [or] country club.” *Id.* Accordingly, the court held that that the ordinance was unlawful because “there can be no rational reason” to forbid a church, but not the other permitted uses. *See id.* *Cf. Cam v. Marion County*, 987 F. Supp. 854, 859 (D. Or. 1997) (no “legitimate or rational . . . state interest” advanced for prohibiting regular use of building on agriculture land for religious worship, but allowing other secular assemblies on agricultural land).

Here, places of worship are categorically excluded from C-3 Districts whereas a host of nonreligious assemblies such as meeting halls, public baths, clubs, lodges, or theatres are not. In considering whether this land use regulation is unreasonable under 42 U.S.C. § 2000cc(b)(3)(B) (and the Equal Protection and Due Process standard it embodies), the relevant inquiry is the same as employed in *Cleburne*, *Cornerstone*, and *Kol Ami*. That is, does the use of Property for a place of worship threaten the Village’s interests any more than other permitted uses in the C-3 District?

An examination of the myriad of permitted uses of property in the C-3 District reveals that the answer to this inquiry is clearly “no.” Just like places of worship, the nonreligious assembly uses permitted in the C-3 District involve assemblies of people, parking requirements, periodic usage, and ceremonial activity. It is self-evident that any conceivable government

interest allegedly threatened by a place of worship would be equally threatened by any number of the nonreligious assembly uses that the Village permits in C-3 Districts.<sup>22</sup> Yet places of worship are forbidden from the commercial districts. Thus Defendant's unreasonable code violates Plaintiffs' rights under 42 U.S.C. § 2000cc(b)(3)(B) and the Equal Protection and Due Process protections the Act embodies.

**III. BECAUSE THERE ARE NO GENUINE ISSUES OF MATERIAL FACT PLAINTIFFS ARE ALSO ENTITLED TO A PERMANENT INJUNCTION.**

The material facts are undisputed, the applicable constitutional law is well established, and the statutory text is clear: the Zoning Code that excludes Calvary Chapel--but not meeting halls, public baths, clubs, lodges, or theaters--from locating in Franklin Park's C-3 District is facially unlawful. The Plaintiffs' proof reaches far beyond the standard entitling them to a preliminary injunction protecting them from the blatant and egregious discrimination inherent in the Village's Zoning Code. *Roland*, 749 F.2d at 386-88. It is undisputed that the Zoning Code permits a host of secular assembly uses in C-3 Districts, but categorically excludes places of worship. As detailed above, such facially disparate treatment violates RLUIPA and the constitution as a matter of law. On this issue, Plaintiffs are entitled to a permanent injunction to enjoin the enforcement of a clearly unlawful zoning code that prevents Plaintiffs' use of the Grand Bowl Property for religious purposes.

CONCLUSION

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<sup>22</sup> Though the point is an obvious one, it is confirmed in a decision of the Illinois Supreme Court with obvious analogies to this case. In holding that the denial of a permit to a religious organization in a business district was arbitrary and capricious, the Court reasoned:

[B]usiness continuity would likewise be interrupted by a *dance hall*, crematory, mausoleum or *trade school*, all uses permitted in this B4 district. We are unable to see how the use as a church is more harmful to adjacent stores than the aforementioned permitted uses. . . . Such arbitrary prohibition is not consonant with the constitutional guarantees of freedom of religion, nor do we believe it is consistent with the intent of the ordinance.

For the foregoing reasons, Plaintiffs' Petition for Injunctive Relief should be granted.

Respectfully submitted,

By: \_\_\_\_\_

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*Columbus Park Congregation of Jehovah's Witness, Inc. v. Board of Appeals of the City of Chicago*, 25 Ill. 2d 65, 73, 182 N.E.2d 722, 726 (1962) (emphasis added).

CERTIFICATE OF SERVICE

I hereby certify that on this \_\_\_\_ day of \_\_\_\_\_, 2002, I served on all parties the above and foregoing Memorandum in Support of Plaintiffs' Petition for Preliminary or Permanent Injunction, and the associated Petition for Preliminary Injunction and Proposed Order, by depositing same in the United States mail, with proper first-class postage affixed thereto, addressed to counsel of record as follows:

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