

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

CASTLE HILLS FIRST BAPTIST CHURCH,

Plaintiff,

v.

CITY OF CASTLE HILLS,

Defendant.

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NO. SA-01-CA-1149 HG

**PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION
FOR PARTIAL SUMMARY JUDGMENT**

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Plaintiff, Castle Hills First Baptist Church (the “Church”), files this Response to Defendant’s Motion for Partial Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and, in support hereof, further relies upon the Appendix with attached Statement of Facts (“SOF”), affidavits, deposition excerpts, and exhibits filed herewith pursuant to Local Rule CV-7(b) and would respectfully show the following:

INTRODUCTION

Abusing its limited authority to regulate land use, Defendant, the City of Castle Hills (“the “City”), has declared war on Castle Hills First Baptist Church. The City describes the Church as

“a church which seems to grow like a cancer, feeding on homes in much the same way as a cancerous tumor feeds on healthy cells.”

Defendants’ Motion for Partial Summary Judgment [“Def. Motion.”] at 7-8 (emphasis added). The City apparently views, and has been abusing its limited power to enact and enforce zoning laws as its “chemotherapy.” Not only is the City’s policy repugnant to the Constitutions of

Texas and the United States, but also to the Texas Legislature's and Congress' recent reaffirmations of the protections of those two documents enacted in the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq.* ("RLUIPA"), and the Texas Religious Freedom Restoration Act, Tex. Civ. Prac. & Rem. Code Ann. §110.001 *et seq.* ("Texas RFRA").

Given this clearly hostile attitude towards the Church, the lack of any rational—much less compelling—basis for the City's actions, the lack of any factual basis—much less an undisputed one—for the City's arguments, and for the reasons described below, the Church respectfully requests that this Court deny the City's Motion.

STATEMENT OF THE CASE: THE CITY'S MOTION COMPLETELY MISCHARACTERIZES THE NATURE OF THIS SUIT, THE CHURCH'S CLAIMS, AND THE FACTS AND HISTORY INVOLVED IN THIS LITIGATION.

This case is about a war against church growth. The City would have this Court believe that this case was simply about the denial of a permit for a parking lot. This is not true. This case is about a campaign¹ waged by the City against large churches in general, and against Plaintiff in particular to control the growth of religious exercise. Simply put, the Church views its mission to serve its members and visitors, to evangelize, and to grow, spreading the word of the Gospel. The City has deemed that this mission is not allowed within its jurisdiction, and is attempting to use the limited power of its land use regulations to prevent it. Such official governmental action aimed directly at a central religious practice violates many different provisions of the state and federal constitutions and their statutes.

Such discrimination against large churches is illegal. If there was any doubt at all that the Defendant loathes large churches in general—and detests Plaintiff in particular—its latest

¹ While this war against the Church has manifested itself perhaps most notably in prohibiting the Church from using its property to accommodate its members' parking needs during worship services, many other examples exist, such as denying the Church the ability to use its own fourth floor for a youth ministry, running other churches out of town, prohibiting churches from bidding on city-owned property in Castle Hills, and passing an ordinance and resolution directly targeting the Church in order to prevent its future growth. *See infra.*

salvo in its fight against religious exercise erases it completely. Not only should this Court deny the City's Motion, but the evidence clearly supports a finding that the City harbors discriminatory animus against the Church to a degree that far surpasses the standard required by the First and Fourteenth Amendments, the Texas Constitution, RLUIPA, and the Texas RFRA for a finding of illegal discrimination, and thus, if anything, summary judgment in favor of the Church is appropriate. As the Fifth Circuit has held in a directly controlling opinion:

As the Supreme Court observed in *City of Cleburne v. Cleburne Living Center*, an equal protection case, neighbors' negative attitudes or fears, unsubstantiated by factors properly cognizable in a zoning proceeding, are not a permissible basis for treating a home for the mentally retarded differently from other group or multi-unit housing institutions. . . . "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."

Islamic Center of Mississippi v. City of Starkville, Miss., 840 F.2d 293, 302 (5th Cir. 1988) (footnote omitted, emphasis added) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

Islamic Center is on all fours with the case at bar and should be followed.

Substantially burdening religious exercise is illegal absent a compelling governmental interest. As a separate and distinct matter, even absent this illegal prejudice against the Church, the City's actions substantially burden the Church's religious exercise, speech and association. Fortunately, the Fifth Circuit² has also held that land use regulation that impacts the driving accessibility of churchgoers burdens their religious exercise:

[T]he City's brief both suggest that application of the zoning ordinance to the [place of worship] places no burden on it or its members because they can establish a mosque within walking distance of the campus outside the city limits or buy cars and ride to more distant places within the City. . . . Laws that make churches, synagogues, and mosques accessible only to those affluent enough to travel by private automobile obviously burden

² The City's hostility also extends to several misleading and incorrect legal statements made in their Brief, including perhaps most alarmingly, a claim that a negative church-zoning case (albeit one whose facts are completely different than the case at bar) **was decided by the Fifth Circuit**, and thus directly controlling over this Court. See Def. Motion at 21 ("*Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, states, based on *Braunfeld*, 699 F.2d 303, 306 (5th Cir. 1983) that . . ."). *Lakewood* was a **Sixth Circuit** case, the relevant holding of which was **rejected by the Fifth Circuit**. See *Islamic Center of Mississippi*, 840 F.2d at 299 and n.6. This Court should not be persuaded by such arguments.

the exercise of religion by the poor, a class that includes many students. . . . By making a [place of worship] relatively inaccessible within the city limits to Muslims who lack automobile transportation, the City burdens their exercise of their religion.

Islamic Center of Mississippi, 840 F.2d at 298-99 (footnotes omitted). Furthermore, courts are unanimous in their holdings that parking lots are integral parts of a church, and that denial of adequate parking facilities constitutes a burden on religious exercise. *See infra*. For all of the reasons described *infra*, the City's actions in denying the Church's parking lot permit, and denying its ability to occupy its building, passing an ordinance and resolution targeting the Church, and otherwise attacking its growth and existence inhibit the Church's current and future religious exercise, expression and association, and must therefore be subject to strict scrutiny.

The City lacks any rational, much less compelling, interest for burdening the Church's religious exercise, association and expression. The excuses provided by the City for its illegal actions range from the deceptive to the phony to the surreal.³ The City accuses the Church of "unclean hands," when the Church has *never* misled *any* City official. *See infra*. They assert that they are acting to "protect[] an existing neighborhood from eradication," an argument that fails both as a matter of law and as a matter of fact. *See infra; see also* SOF ¶ 46, Ex. "A" to Appendix ("App."). The City's rationalizations should be seen for what they truly are, a smokescreen designed to prevent the Court from seeing the City's hostility, irrationality and bad acts.

SUMMARY OF APPARENT CLAIMS FOR WHICH THE CITY SEEKS SUMMARY JUDGMENT

It is unclear exactly on which of the Church's claims the City seeks summary judgment.

It appears that the City *might* be seeking summary judgment on the Church's:

³ As just one example among many, the Church was required by the City to use "non-impervious surface material" for the parking lot, and then was denied the permit *based on its compliance with those conditions*. *See* Deposition of Helen Glass 78, Ex. "47" to Prince Aff. (denying application on "public safety" grounds because non-impervious surface would be "bumpy—bumpy-bumpy-bumpy-bump, I think would be awful.").

- Abuse of Municipal Discretion claim (TAC Count XIV), Def. Motion at 9-20;
- Claims under RLUIPA (although their arguments center on a prior statute previously held unconstitutional as applied to the States, the federal RFRA), Def. Motion at 20-29;
- Claims under the Texas RFRA, *id.*;
- Free Exercise Clause Claims, Def. Motion. at 32-36;
- Claims under Freedom of Association principles, Def. Motion at 36;
- Due Process Claims, Def. Motion at 37-39;
- Equal Protection Claims, Def. Motion at 39; and
- Claims under the Takings Clause, Def. Motion at 50-53.
- Claims under RLUIPA and the Texas RFRA, as the City believes those statutes are unconstitutional, Def. Motion at 29-32.

It does not appear that the City is requesting summary judgment on the Church's

- Freedom of religious exercise claims under the Texas Constitution, Def. Motion at 35 (arguing that "Parking is not 'Free Exercise' Entitled to First Amendment Protection." (emphasis added));

It is unclear whether the City is seeking summary judgment on the Church's

- claims that the City *discriminates* against (as opposed to *burdens*) religious uses generally and the Church specifically, in violation of the Free Exercise, Free Speech, Due Process and Equal Protection Clauses, and RLUIPA, Def. Motion at 3, 5, 52, 55.

It is important to also note that the true facts are much different than the City portrays them.⁴ The City is virulently anti-church. Although conflicts such as this "ha[ve] only very rarely been presented . . . because legislatures and administrative bodies have generally accorded *great respect* to religious organizations," *Yonkers Racing Corp. and St. Joseph's Seminary v. City of Yonkers*, 858 F.2d 855, 869 (2d Cir. 1988) (citation omitted, emphasis in original), by designating Castle Hills First Baptist Church as *church non grata* the City has failed to afford the Church this traditional "great respect" and has violated its constitutional and statutory rights. As a result, summary judgment against the Church should be denied on all grounds sought by the City.

⁴ Perhaps this is why the City has not issued a "Statement of Facts." Cf. Plaintiff's SOF, Ex. "A" to App..

ARGUMENT AND AUTHORITIES

For the reasons set forth herein below, the City is not entitled to summary judgment on any of the grounds set forth in its Motion for Partial Summary Judgment.

A. The City Is Not Entitled to Summary Judgment on the Church’s Claims of Religion-Based Hostility or Other Forms of Irrationality.

The City moves for summary judgment on the Church’s rational basis claim under the federal Equal Protection Clause. Def. Motion 38-39. The City also moves for summary disposition of the Church’s substantially similar claim under the Federal Due Process Clause and that the City’s decisions were arbitrary or otherwise irrational under Texas law. *Id.* 9-20; *see id.* at 11 (describing Texas and federal standards of review for irrationality as “fully consistent”). The City apparently seeks a declaration that “unlawful motivation requires an unlawful majority,” Def. Motion 53-55, but expressly disavows moving for summary judgment on any other aspect of the Church’s “hostile motive” claim. *Id.* 5. Nonetheless, the City appears to bury just such a motion in the middle of its brief. *Id.* 28-29.

As will be demonstrated more fully below, the last thing this Court should conclude – especially before the close of discovery – is that the City’s decisions have been rational or nondiscriminatory as a matter of law.⁵ *See, e.g., Mont Belvieu Square, Ltd. v. City of Mont Belvieu*, 27 F. Supp. 2d 935, 943-44 (S.D. Tex. 1998). In fact, as detailed in the Church’s Appendix, the still-emerging evidence conclusively points toward the opposite.

In short, the evidence shows that the particular decisions challenged in this suit are part of the City’s broader campaign to drive this Church out of Castle Hills, just as it has driven others out in the past. That campaign is animated by a bizarre combination of madness and malice – including hostility to religious uses – which the Church will demonstrate both directly (by a

⁵ Indeed, the City seems to acknowledge the impropriety of this conclusion by its (at least nominal) reluctance to seek summary judgment on the Church’s discrimination claim. Def. Motion 5.

series of statements) and indirectly (by a pattern of conduct). Moreover, as the still-incomplete record already shows, the City’s asserted interests of traffic flow and “neighborhood destruction” are pretexts that cloak its purpose of driving the Church out by making its life in Castle Hills intolerable. Even if discovery were not ongoing, these facts would suffice not only to preclude summary judgment on Defendant’s claims but, on the contrary, to support summary judgment for the Church.

1. The Federal Constitution Forbids Governmental Action on Any Arbitrary or Irrational Basis, Including Religion-Based Hostility.

Numerous overlapping constitutional and statutory protections – both federal and state – forbid government action that is based on hostility to religion or is otherwise irrational.

All government action, no matter how local, is subject to federal constitutional requirement of rationality, which is enshrined primarily in the Due Process and Equal Protection Clauses of the Fourteenth Amendment.⁶ From virtually the dawn of zoning law, the Supreme Court has made clear that local zoning laws – no less than other government actions – must have a rational basis.⁷ Indeed, the Supreme Court has struck down zoning actions on several occasions for failure to satisfy even this modest demand.⁸ But the Court has also made clear that zoning ordinances will be subjected to even more demanding constitutional scrutiny if they

⁶ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (Equal Protection Clause ordinarily requires laws to be “rationally related to a legitimate state interest”); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1034 (3d Cir. 1987) (noting same rational basis standard under Due Process Clause, including for zoning regulations). See *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (“[t]he purpose of the equal protection clause ... is to secure every person ... against intentional and arbitrary discrimination....”) (internal quotations omitted); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (“The touchstone of due process is protection of the individual against arbitrary action of government, *Dent v. West Virginia*, 129 U.S. 114, 123 (1889).”).

⁷ *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928) (zoning “restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.”) (quoting *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928)); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

⁸ See, e.g., *Cleburne*, 473 U.S. at 440; *Moore v. East Cleveland*, 431 U.S. 494, 520 (1977); *Nectow*, 277 U.S. at 188-89; *Seattle Title Trust Co.*, 278 U.S. at 121. See also *Village of Willowbrook*, 120 S. Ct. at 1075 (affirming denial of motion to dismiss rational basis challenge to zoning requirement).

employ suspect classifications or trample fundamental rights. *See Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68-69 (1981); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

Zoning laws are not “rationally related to a legitimate state interest” when a plaintiff demonstrates *either* that the asserted interest (*i.e.*, the government end) is illegitimate, *or* that the chosen classification (*i.e.*, the government means) is not rationally related to even a legitimate interest. *Cleburne*, 473 U.S. at 440, 446-47. Thus, for example, passing or enforcing zoning laws out of “a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”⁹ “[M]ere negative attitudes, or fear” are also illegitimate government interests. *Cleburne*, 473 U.S. at 448. Similarly, government action based on “speculation, prejudice, self interest, or ignorance is arbitrary and irrational,” and therefore unconstitutional.¹⁰

Most relevantly here, it is an illegitimate government purpose to act out of negative attitudes or prejudice against some or all religions, or out of desire to harm some or all religious groups – purposes that additionally offend the First Amendment.¹¹ Thus, religious prejudice and racial prejudice are equally irrational bases for government action, and so equally offensive to the constitution.¹² Government action that is based on hostility to religion but cloaked by

⁹ *Romer v. Evans*, 517 U.S. 620, 634 (1996) (quoting *Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)); *Cleburne*, 473 U.S. at 446-47.

¹⁰ *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 685 (3d Cir. 1991); *see also Marks v. City of Chesapeake*, 883 F.2d 308, 311 (4th Cir. 1989) (“government officials simply cannot act solely in reliance on public distaste for certain activities”) (internal quotations omitted).

¹¹ *See, e.g., Marks*, 883 F.2d at 312 (“[I]f, as alleged, the City Council denied Marks’ permit application solely in an effort to placate those members of the public who expressed “religious” objections to the plaintiff’s proposed use of his property, it thereby acted “arbitrarily” and “capriciously.”); *Islamic Center of Mississippi v. City of Starkville*, 840 F.2d 293, 302 (5th Cir. 1988) (citing *Cleburne* and concluding that “neighbors’ negative attitudes” toward Islamic Center were impermissible “justification for differentiating between familiar and unfamiliar religions”). *See also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (“[T]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general.”).

¹² *See Employment Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990) (“Just as we subject to the most exacting scrutiny laws that make classifications based on race, or on the content of speech, so too we strictly scrutinize governmental classifications based on religion.”) (citations omitted); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (finding classification presumptively unconstitutional if “drawn upon inherently suspect distinctions such as race, religion, or alienage”); *see, e.g., Mont Belvieu Square*, 27 F. Supp. 2d at 944 (“Certainly if [plaintiff] can prove that a discriminatory motive underlie the actions surrounding the denial of its permit application, the City’s actions are were irrational, arbitrary, and capricious.”).

facially legitimate, but actually pretextual, asserted government interests fails *both* rational-basis scrutiny *and* strict scrutiny. It fails rational basis scrutiny because it serves an illegitimate government purpose. It triggers strict scrutiny because it employs the suspect classification of religion and tramples the fundamental right of religious exercise, and then fails that scrutiny because the asserted governmental interests, even if not pretextual, are merely legitimate and not compelling. Finally, the provisions of RLUIPA Section 2(b) were designed precisely to codify – and so facilitate the enforcement of – these already-overlapping constitutional protections.¹³

When applying these well-established, mutually-reinforcing legal principles, courts will scrutinize even the facially legitimate purposes that a government asserts in order to assess whether they are actually pretexts that conceal an illegitimate purpose.¹⁴ Thus, courts will not limit their inquiry to verbal expressions of motive by individual officials or the express language of a regulation.¹⁵ “Relevant evidence includes, among other things, the historical background of the decision under challenge, the series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.”¹⁶ Also, where a plaintiff claims that

¹³ See RLUIPA § 2(b)(1) (prohibiting “land use regulation ... that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution”); § 2(b)(2) (prohibiting “land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination”); § 2(b)(3)(B) (prohibiting “land use regulation that ... unreasonably limits religious assemblies, institutions, or structures within a jurisdiction”).

¹⁴ See *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 308 (2000) (“[I]t is nonetheless the duty of the courts to ‘distinguis[h] a sham secular purpose from a sincere one.’”) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O’Connor, J., concurring); *Lukumi*, 508 U.S. at 534 (“The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.”); see, e.g., *Mont Belvieu Square*, 27 F. Supp. 2d at 943 (“If in fact the [asserted governmental interest] was a pretext to hide a discriminatory motive for denying [plaintiff’s] permit, the City’s actions were unrelated to a legitimate state interest and thus unconstitutional.”).

¹⁵ See *Lukumi*, 508 U.S. at 534 (“The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination.”); *Cottonwood Christian Center v. City of Cypress*, 218 F. Supp. 2d 1203, 1225 (C.D. Cal. 2002) (“The government’s motive may be determined both from direct and circumstantial evidence.”).

¹⁶ *Id.* (quoting *Lukumi*, 508 U.S. at 540). See also *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266-67 (1977) (listing factors to consider in assessing racially discriminatory purpose).

government action enforces the discrimination of private actors, evidence of those discriminatory inputs is also relevant.¹⁷

In this case, the Church claims that it is the prime target in the City's broader campaign against houses of worship, a campaign to suppress their growth and otherwise make their lives in Castle Hills so miserable that they will pack up and leave. As a matter of law, this purpose is religiously discriminatory or otherwise irrational, and the Court should so find.¹⁸

2. The Evidence Gathered to Date Precludes Any Finding That, As a Matter of Law, the City Has Behaved in a Rational, Nondiscriminatory Manner.

As seen in the documented facts in Plaintiff's Appendix, although discovery is not yet complete, the Church has already amassed sufficient evidence to defeat the City's claim that, as a matter of law, its actions are rational, Def. Motion 9-20, 38-39, and do not represent religion-based discrimination. *Id.* at 28-29. In fact, established facts conclusively show the opposite to be true.

a. *The City has expressed its hostility to the Church explicitly, directly, and repeatedly.*

Although government actors usually take pains to hide any discriminatory motives they may harbor, the City and its representatives have freely expressed their hostility to this Church over and over again. The most recent expression comes in the City's Motion, comparing the Church and its growth to "a cancer, feeding on homes in much the same way as a cancerous tumor feeds on healthy cells." Def. Motion 7-8. This statement is hardly anomalous, but instead

¹⁷ See *Islamic Center*, 840 F.2d at 302 ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.") (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)); see, e.g., *Marks*, 883 F.2d at 309-10 (considering evidence of neighborhood opposition including religion-based hostility); *United States v. City of Chicago Heights*, 161 F. Supp. 2d 819, 831 (N.D.Ill. 2001) ("Evidence of community opposition voiced to the [government defendants] is, of course, relevant to the ... [plaintiff's] intentional discrimination claim.").

¹⁸ The Church hereby requests that the Court treat the preceding section not only as in opposition to the City's Motion for Partial Summary Judgment, but also as an affirmative motion for partial summary judgment on the legal propositions set forth therein.

reflects the consistent position of the City throughout. For example, former Councilman Danny Mills has described the Church as a “fast growing malignancy that we need to try to do something about” and another City official, former Mayor Anderson, has engaged in highly questionable conduct on and adjacent to Church property. *See* SOF ¶¶ 27, 35, 36, Ex. “A” to Appendix. In addition, some neighbors have been similarly brazen in conveying their anti-church hostility. *See* SOF ¶¶ 35, 36.

City officials have also expressed an irrational fear of the Church that borders on paranoia and that at least partially animates the City’s effort to drive the Church out. For example, the City takes the position in its brief that, unless the City stops the incremental growth of the Church, “it can devour all of Castle Hills, one bite at a time.” Def. Motion 19. When asked whether it was possible for the Church to “devour all of Castle Hills,” former City Manager McLaughlin agreed. McLaughlin Depo. 58, Ex. “44” to Prince Aff., Ex. “C” to App. Other City officials similarly refused to dismiss this absurd possibility. Medbury Depo. 74-75, Ex. “45” to Prince Aff.; Wynn Depo. 25-26, Ex. “48” to Prince Aff.

Whether or not these statements of hostility and fear are sufficient evidence *alone* to prove the existence of an impermissible policy,¹⁹ they are unmistakably reprehensible and constitutionally problematic in a nation committed to religious liberty. *See Lukumi*, 508 U.S. at

¹⁹ Notwithstanding the City’s suggestion, the Church’s claim does not depend on whether the Church can provide evidence of the state of mind of a majority of City legislators. *See* Def. Motion 53-55. The numerous statements attributable to the City – from legislative and executive officials, from neighbors who influence City decisions, and from attorneys representing the City as a whole – amount to only a small portion of the evidence tending to show the existence of the City’s discriminatory and irrational anti-church policy. As will be detailed below, that policy has found expression in many ways, and so there are many forms of evidence to support its existence. *Cottonwood Christian Center*, 218 F. Supp. 2d at 1225 (“Relevant evidence includes, among other things, the historical background of the decision under challenge, the series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.”) (quoting *Lukumi*, 508 U.S. at 540). In any event, the City has yet to produce for deposition a majority of the City Council.

532 (“[T]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general.”).

b. The City has engaged in a broader pattern of hostility to churches.

The City’s hostility to religious uses extends well beyond this Church. Indeed, the City’s battle against this Church is merely part of a broader war against churches throughout the jurisdiction, especially those that are flourishing.

For example, the City successfully chased Cornerstone Church out of Castle Hills. This incident was specifically cited to the City Council as “precedent” that should inform its decisionmaking regarding this Church:

“I would cite you one precedent. About ten years ago Reverend Hagee came before this Council.... He wanted to increase the size of his church to three or four stories.... He was given due process by our committees and our City Council and his request was disapproved. *Hagee saw the light*. He did a very smart thing that benefited all of us. He moved north. He bought a lot of land in an uninhabited (almost) area. He did not continue to destroy, gobble up neighborhoods.”

Videotape II of January 6, 2000 City Council Special Meeting at 0:16:50 (emphasis added). *See* Videotape I of June 13, 2000 City Council Meeting at 1:12:10 (telling Church to “sell their property and move to somewhere where they can expand as Pastor Hagee did.”) *See also* Videotape of Zoning Comm’n Hearing, June 1, 1999 at 1:22:20 (“It’s a big church. It’s on the order of a mega-church that you read about. Mega-churches have gone elsewhere.”)²⁰

Similarly, the City drove Castle Hills United Pentecostal Church out by a series of delays in permitting decisions and other behavior communicating the fact that the Church was not welcomed in Castle Hills. Ultimately, the Church gave up and left the City, which then

²⁰ The Church is having these videotapes transcribed, and will provide the Court with a transcript of these statements.

proceeded to convert the Church's former home into the present City Hall. See Minutes, 11/2/98 City Council Meeting, Ex. "5" to Allison Aff.²¹

Even where the City has not driven churches out entirely, it has often taken steps to make their lives in Castle Hills as difficult as possible, so that they might also "see the light," as Pastor Hagee did. For example, the City has adopted an ordinance that prohibits parking on a street that lies immediately between two churches *only* during prime time for worship services, *i.e.*, Sunday morning and early afternoon. See Exs. A-108 & A-109 to Heinz Aff., Ex. "D" to App. Prohibiting parking only when it is undertaken for religious purposes is a classic form of religion-based targeting that the First Amendment squarely prohibits. See *Lukumi*, 508 U.S. at 542-43 (unconstitutional "inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation"); see, e.g., *Cottonwood*, 218 F. Supp. 2d at 1225 (proposing redevelopment and condemnation only after Church proposed religious use for land).

- c. *The City prejudged the permitting decisions here at issue against the Church in accordance with its anti-church policy.*

The evidence further reflects that the City will stop at nothing to force the outcome of these permitting decisions against the Church. When the City received legal advice from its long-standing outside counsel to grant the permits at issue, the City fired the attorney and publicly sought another opinion. See SOF ¶¶ 26, 27. Similarly, when the City's own traffic expert concluded that the Church's proposal for parking expansion would actually *improve* traffic flow conditions in the area, the City simply ignored him. See *id.* ¶ 25. The City's second-

²¹ The minutes are unsigned because those are the only minutes produced by the City in document production. The Church has requested a complete set of official minutes for the relevant time periods and will supplement as necessary.

string expert reached a different conclusion in his draft report. *See* Tab “12” to Def. Motion. Notably, the City has yet to produce either traffic expert for deposition.

Not content to trifle with the factual and legal inputs that should govern their decision, the City also took the extra step of changing, midstream, the rule of decision governing the Church’s permit requests. Thus, the City passed Ordinance No. 884, which changed the standard for permitting the types of uses at issue in this case, so that the City would have discretion to deny the permit, even if the applicant had met all objective requirements. *See* Ex. “25” to Prince Aff.; Glass Depo. 15. Indeed, the City Council went ever farther, passing an Ordinance directed *exclusively* at the Church’s properties across Winston Lane in order to declare its policy that those particular parcels not be used for the religious purposes proposed by the Church (or any religious purpose). *See* SOF ¶ 34.

Moreover, in order to assure that common sense and the facts would not interfere with its prejudicial decision-making, key City policymakers drove those who did not share their anti-Church bias out of the decision-making process. Former Mayor Bob Anderson, often working through surrogates, manufactured baseless claims of conflict of interest against those decision-makers who might go where the facts and law would lead, rather than where their own and the neighbors’ anti-Church biases would. *See* SOF ¶¶ 40, 42. Specifically, Mayor Seyfarth and Councilman Wynn were both subjected to intense pressure, public and private, to recuse themselves from participating in these decisions, even though neither believed that their capacity for objective decision-making would be compromised. *See id.*

Indeed, according to the City’s own manual of procedures, Seyfarth’s and Wynn’s relationships to the Church are not the kind that would trigger recusal. *See* City of Castle Hills Board and Commission Handbook at 10, Ex. “51” to Prince Aff.; *see also* Exs. “46” & “48” to

Prince Aff.; Seyfarth Depo. 42-46. Nonetheless, Mayor Anderson and his allies applied pressure to force these two out of any decision-making process regarding the Church. SOF ¶ 40; Seyfarth Depo. 46. By this carefully orchestrated campaign, Anderson and company succeeded in excluding these two – without any basis in law – not only from the original permitting decisions, but from any subsequent attempts at settlement of this dispute. *See* SOF ¶ 42. Indeed, just last week, Mayor Seyfarth resigned in disgust at the continued antics of Anderson and his cronies. *See* Ex. “6” to Allison Aff.

In sum, this is not simply a question of whether reasonable people could disagree over the City’s ultimate permitting decisions, as the City would have it. Def. Motion 9-20.²² Instead, it is a question of whether those decisions were *prejudged* according to the City’s policy to hinder the Church’s use of its own property and drive this and other growing churches out of Castle Hills. Even the evidence to date shows that, at every turn, the City predetermined its decision against the Church, and then *used any means necessary* – including cooking the data, changing the rules of decision, and changing the composition of the decision-making body – to force that outcome and paper over its prejudicial character.

- d. *The City has repeatedly imposed contradictory parking requirements on the Church, making compliance impossible and sanctions inevitable.*

The City has applied its parking regulations in a manner best described as Kafkaesque. On the one hand, the City claims that the Church has violated City law because it has not supplied enough parking spaces even for its existing uses. Def. Motion 44-45. On the other, the City purports to know that the Church does not really “need” more spaces, *see id.* 8, 13, and that

²² Indeed, under the standard of review that the City proposes, it is difficult to imagine any zoning action that would fail. In other words, the City’s argument for judicial deference proves too much. In fact, the constitutional protections against arbitrary zoning actions are the same under both state and federal law. *See, e.g., Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998).

“the Church has the full parking capacity it was designed for.”²³ *Id.* 27; *see also id.* 23. Similarly, although the Zoning Commission required a non-impervious surface to promote drainage as part of proposed settlement, *see* Exs. “37”, “39” & “40” to Prince Aff., Councilwoman Glass has made clear that she would vote against any lot with a non-impervious surface because it would be difficult for those in high heels or wheelchairs to cross. Glass Depo. 78. These inconsistencies represent a classic case of unconstitutional arbitrariness, not simply because of the irrationality inherent in self-contradiction, but because they leave the Church constantly subject to penalty.

In other words, the City has created a constant threat of enforcement for failure to have enough parking spots, while thwarting the Church’s various attempts to comply by adding more spots. For the City, continuing to require the Church to undertake futile efforts at compliance has the added benefit of gradually draining Church resources – purchasing additional property, demolishing the existing structures, filing repeated permit applications and lawsuits, and responding in good faith to repeated bad faith settlement proposals all cost dearly in time and treasure. The Church’s efforts also present City officials with vote-getting opportunities to vilify the Church as a spreading cancer, as a many-tentacled octopus, as undertaking a “crusade for parking,” or the like. *See* Def. Motion 5, 7-8. Moreover, by keeping the Church hungry for parking, the City retains arbitrary power over the Church in the form of its standardless, discretionary decisions to permit or deny requests for parking on the Winston Properties on special occasions. *See* Tab “13” to Def. Motion.

²³ It is important to note here an especially intense and material factual dispute over whether the Church “needs” the parking to carry out its ministry fully. Plainly, the Church believes so, the City believes not, and the parties have presented conflicting testimony on this issue. *Compare* Def. Motion 13 *with* Heintz Aff. ¶ 4; Coe Aff. ¶¶ 7-12; Harris Aff. ¶¶ 5-6; *see also* SOF ¶¶ 8-12. The Church also notes here the City’s facially implausible (and certainly contested) factual claim that the Church has, at some unspecified point in time and through some unspecified representative, claimed that it has all the parking it could ever need for any purpose, now or in the future. *See* Def. Motion 43; SOF 46; Heintz Aff. ¶ 9; Harris Aff. ¶ 3; Slayden Aff. ¶ 6.

Thus, this ongoing Catch-22 represents further evidence of the City's policy of wearing the Church down, so that it might "see the light" and leave Castle Hills, just as Pastor Hagee and Cornerstone Church did years ago and Pastor Chance and the Pentecostal Church did more recently.

- e. *The City has used its regulatory power to inflict harm on the Church at every turn.*

Separate and apart from these inconsistencies, the City has repeatedly used its power to regulate the Church's land to maximize harm to the Church and its interests.

For example, once the Church demolished the existing residences on its Winston Properties, the City declared its policy that those properties (and only those properties) be used as a residence or a park. *See* Ordinance No. 0007-01, Ex. "30" to Prince Aff. Whether the City had the policy in mind before granting the demolition permits and waited to express it until after the demolition was complete, or imposed the limitation in response to the Church's demolition of the residences, the policy and its timing support an inference that the City intended to inflict economic harm on the Church by prohibiting all structures on its Winston Properties except for the kind the Church had just demolished.²⁴ For if the City were genuinely concerned about preserving residential uses on that property, why didn't the City declare that policy before the existing residences were demolished?

Similarly, although the City allowed the Church to build out the fourth floor of the Victory Building – and specifically contemplated the possibility that the Church could later apply for classroom or similar use, *see* SOF ¶ 5 – the City has repeatedly refused *even to accept*

²⁴ The City attempts to distract from this inference by mischaracterizing the Church's claim. *See* Def. Motion 16. The Church does *not* argue that the grant of a demolition permit requires the City to grant a permit to allow parking. Instead, it argues that the City's decision to prohibit all structures but residences on the Church's (and only the Church's) property – especially with knowledge that the Church had just demolished the existing residences – is further suggestive of the City's policy of hostility to this Church.

the Church's application for those additional purposes. *See id.* ¶ 44; Heintz Aff. ¶ 10. As a result, the fourth floor has remained mostly empty and vastly underutilized, even though the Church needs the space for youth ministry. *See id.* ¶¶ 43, 45. Here again, the City has shown its determination to apply its land-use regulations in order to render the Church's own property as useless as possible for church purposes.

f. *The City has targeted the uses proposed by this Church for special disfavor.*

The City claims that the Church must show that it has been treated differently and worse than others "similarly situated" before the Church may prevail on its claims under the Equal Protection Clause. *See, e.g.,* Def. Motion 28-29, 39. Although this showing may be useful to support an inference of irrationality, it is unnecessary where direct evidence of hostile motive is available. *See Village of Willowbrook*, 528 U.S. at 565 (distinguishing equal protection claim based on "subjective ill will" from "traditional" equal protection claim based on showing that similarly situated entities have been treated differently). Moreover, such a showing is plainly unnecessary to establish arbitrariness under the Due Process Clause or Texas law. *See, e.g., Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998). In any event, that evidence is abundantly present here even though discovery is incomplete.

For example, the nearby Antonian High School was recently permitted to expand its parking lot into areas formerly occupied by houses. McLaughlin Depo 52-53, Ex. "44" to Prince Aff. *See also* McLaughlin Depo. 54 (stating that a house located at the corner of S. Winston and NW Military was converted from a residence to a commercial business). Similarly, the City has allowed other religious and non-religious uses immediately adjacent to residential areas to build to a height of four stories, *see* SOF ¶ 7; Heintz Aff. ¶ 13; 12/7/95, Memo from H. Hardy and A. Jacobson to David McLaughlin, Ex. "2" to Prince Aff., notwithstanding the

alleged invasion of the privacy that, on the City's view, would unavoidably result. Def. Motion 42; *but see* Heintz Aff. ¶ 11 (describing willingness to take measures to block any view of residences). Thus, the City's actions fail the relevant inquiry identified by the Supreme Court in *Cleburne*, because the Church does not "threaten legitimate interests of the city in a way that other permitted uses ... would not." *Cleburne*, 473 U.S. at 450; *see, e.g., Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 471-72 (8th Cir. 1991).

Finally, and most explicitly, the City has singled out the Church's Winston Lane properties for special regulatory burdens – burdens not imposed on any other property on Winston Lane, anywhere else in the same zone, or anywhere else in the City. SOF ¶¶ 14, 34. Similarly, the City changed the standard for granting permits specifically to make it more difficult for the Church to obtain its permits. Glass Depo. 15; Ord. No. 884, Ex. "25" to Prince Aff. This is the height of impermissible differential treatment, of singling out land for special regulatory burdens because it was slated for church use.²⁵ *See Lukumi*, 508 U.S. at 532 (First Amendment prohibits law that "regulates or prohibits conduct because it is undertaken for religious reasons"); *see, e.g., Islamic Center*, 840 F.2d at 302; *Cottonwood*, 218 F. Supp. 2d at 1225-26.

For the foregoing reasons, the Court should deny summary judgment against the Church's claims of religion-based hostility and other forms of irrationality.

²⁵ The Church intends to discover still further evidence of City actions designed to impose special burdens on the Church, including a prohibition on the Church's bidding on the former City Hall, which is now an Eckerd Drug Store.

B. The City Is Not Entitled To Summary Judgment On The Church’s Claims That The City’s Actions Substantially Burden Its First Amendment Rights Without Any Reasonable, Much Less Compelling, Governmental Interest.

1. The Appropriate Standard of Review for the City’s Laws and Actions is Strict Scrutiny.

The City appears to acknowledge that the strict scrutiny test is applicable to governmental action that substantially burdens religious exercise. *See* Def. Motion at 27 (acknowledging that substantial burdens on religious exercise must “satisfy the compelling interest/least restrictive means test”). However, out of an abundance of caution, the Church will briefly recite²⁶ the several reasons why strict scrutiny is appropriate:

- i) The City’s actions took place within a system of “individualized assessments.” *See Employment Division v. Smith*, 494 U.S. 872 (1990) (upholding previous Supreme Court cases in which strict scrutiny was applied to a law that entailed individualized assessments); *Freedom Baptist Church v. Township of Middletown*, 2002 WL 927804 at *9 (E.D. Pa. May 8, 2002) (“No one contests that zoning ordinances must by their nature impose individual assessment regimes.”); *Keeler, supra* (holding that enforcement of a historic preservation ordinance was not neutral and generally applicable); *First Covenant Church v. Seattle*, 840 P.2d 174, 218 (1992) (“City’s preservation ordinances . . . are not neutral and generally applicable.”); *Cam v. Marion County*, 987 F. Supp. 854, 861-62 (D. Or. 1997) (holding that a zoning scheme was not neutral and generally applicable); *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 953 P.2d 1315, 1345 n.31 (Haw. 1998) (“In the case at bar, the City’s variance law clearly creates a ‘system of individualized exemptions’ from the general zoning law.”);
- ii) The City’s actions were not “neutral” toward religion in general and this Church in particular. *See Smith*, 494 U.S. 872 (1990) (holding that a law that was not “neutral” was subject to strict scrutiny under the Free Exercise Clause); *Kickapoo Traditional Tribe of Texas v. Chacon*, 46 F. Supp. 2d 644, 653-54 (W.D. Tex. 1999) (“even a facially neutral law may not withstand scrutiny if interpreted or applied in a discriminatory manner”);
- iii) This case involves a situation of “hybrid rights”: free exercise rights couple with free speech, freedom of association, and property rights. *See Smith*, 492 U.S. at 881-82 (“the First Amendment bars application of a neutral, generally applicable law to religiously motivated action [in cases that] have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other

²⁶ The City describes these principles and their legal support in greater detail in its own Motion for Summary Judgment, filed concurrently with this Response.

constitutional protections, such as *freedom of speech* And it is easy to envision a case in which a challenge on *freedom of association*);

- iv) the Fifth Circuit and the Texas Supreme Court have required the application of the strict scrutiny standard in Free Exercise challenges to land use laws;
- v) the Texas Constitution mandates strict scrutiny review. *See Howell v. State*, 723 S.W.2d 755 (Tex. App.--Texarkana 1986), no writ (“The Texas Constitution grants greater religious freedom than is provided for in the United States Constitution.”); *See Tilton v. Marshall*, 925 S.W.2d 672, 678 (1996) (“government must show to the court that granting the [religious] exemption [from burdensome regulation] would significantly hinder a compelling state interest”);
- vi) RLUIPA’s text requires it. 42 U.S.C. § 2000cc(a)(2)(B)-(C); and
- vii) the Texas RFRA requires it. Tex. Civ. Prac. & Rem. Code Ann. § 110.003.

2. The City’s Official Actions have Substantially Burdened the Church’s Religious Exercise.

Contrary to the City’s assertions, its campaign against the religious exercise and growth of Castle Hills First Baptist Church has constituted an enormous burden on activities that are central²⁷ to its religious exercise. As an initial matter, the Church does not claim (as the City suggests, Def. Motion at 24, 31-32, 35-36) that “parking”²⁸ itself is necessarily a religious activity that the City has burdened. The Church’s claim is not that “every Church member gets their own parking space next to the Church.” *Id.* Instead, the City has burdened the Church’s ability to serve its members and visitors, to worship together as a congregation, to use the fourth floor of its Victory Building to engage in a number of youth ministries and other ministries and

²⁷ "Centrality," while present in this case, is not required. *See* RLUIPA § 8(7)(A) ("Definitions": "[t]he term religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."); *Smith*, 494 U.S. 872, 886-87 (1990) ("It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field.").

²⁸ Defendant also argues that the issue of church parking is a “conceptual foreigner to the entire concept of determining how the law interfaces with religion.” Def. Motion at 24. Again, this is simply not true. Courts across the country, including courts in Texas, have discussed this issue. *See infra.* The Fifth Circuit has ruled in favor of a religious organization denied the ability to operate a place of worship that was accessible to those “who lack automobile transportation.” *Islamic Center of Mississippi v. City of Starkville, Miss.*, 840 F.2d 293, 298-99 (5th Cir. 1988).

services offered by the Church that it deems important for its religious exercise, to grow as a Church, to have *accessible* parking (especially for the handicapped and members with small children),²⁹ and by doing so based on *irrational and discriminatory motives*. See *supra*, § A. The religious exercises at issue here are religious worship services, youth and other ministries, and church growth, *and not simply parking*. The City’s regulation substantially burdens those practices.³⁰

In addition, the prohibition on engaging in religious activities on the fourth floor, the campaign (including official proclamations) against the Church’s growth through other means, and the economic and other burdens on the Church are likewise direct burdens on its religious exercise. In a directly controlling decision, the Fifth Circuit has held that:

[A] city may not escape the constitutional protection afforded against its actions by protesting that those who seek an activity it forbids may find it elsewhere. By making a mosque relatively inaccessible within the city limits to Muslims who lack automobile transportation, the City burdens their exercise of their religion.

Islamic Center of Mississippi v. City of Starkville, Miss., 840 F.2d 293, 298-99 (5th Cir. 1988).

The City here has, among many other burdens, made accessible parking impossible to develop.

- a. *None of The City’s Arguments Are Persuasive, and Are, In Fact, Contradicted By City Officials Themselves.*

The City cites only a few cases—none of them within the Fifth Circuit—for a few unremarkable propositions about substantial burdens that have absolutely no bearing whatsoever on this case. Def. Motion at 24-27 (discussing regulations on t-shirt sales and taxes).

²⁹ If the City prohibited the Church from building any doors in its facility (and thereby preventing members from entering the sanctuary), it could not be heard to argue that there is no burden because “opening doors” is not religious exercise.

³⁰ The City’s response is to argue that a religious practice must be “central” in order to receive First Amendment protection. Although not necessary in order to find a Free Exercise violation, the Church’s ability to congregate (include the ability to drive to services, which requires adequate parking) is, of course, “central.”

Inexplicably, the City also refers in great part to legislative history of the federal Religious Freedom Restoration Act, which, likewise, is irrelevant, particularly in view of RLUIPA.

The City also argues repeatedly that “building and owning a church, while a desirable accessory of worship, was not a fundamental tenet of the Congregation’s religious beliefs.” Def. Motion at 22. However, City policy makers *themselves believe otherwise*, and agree that the physical facilities of a church are a fundamental part of that church’s religious beliefs and exercise. *See* SOF ¶ 43. Thus, the City’s argument is simply contradicted by City officials themselves.

The City next argues (without citation) that “the regulation at issue must attack a fundamental principal [sic] or tenet [sic] of the belief in order to implicate the protection of the First Amendment.” Def. Motion at 34. That is not the standard. In addition to *Islamic Center, supra*, the following standards for what truly does constitutes a “substantial burden” can be elicited from cases within this jurisdiction. Governmental regulation constitutes a substantial burden on religious exercise if it “meaningfully curtail[s] [an individual’s] ability to express adherence to his or her faith;,” *Hicks v. Garner*, 69 F.3d 22, 26 n.22 (5th Cir. 1995); “den[ies] [an individual] reasonable opportunities to engage in those activities that are fundamental to a[n individual’s] religion,” *id.*; “interferes with Plaintiffs’ right to believe and profess whatever religious doctrine they desire,,” *Jesuit College Preparatory School v. Judy*, 2002 WL 107264, *12 (N.D. Tex. 2002); “imposes special disabilities on the basis of religious view or religious status,,” *id.*; or “prohibits Plaintiffs from performing *any* act associated with the practice of their religious beliefs,” *Id.* This is a far cry from the standard that the City proposes. As will be discussed herein, the Church meets these standards.

Furthermore, none of the cases cited by the City run contrary to the Church's position.³¹ The only cases cited in the City's brief that rejected Free Exercise challenges to zoning laws (3 of them) were cases involving the ability of a church to move to a new location. See *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983)³²; *Christian Gospel Church, Inc. v. City and County of San Francisco*, 896 F.2d 1221 (9th Cir. 1990); *C.L.U.B. v. City of Chicago*, 157 F. Supp. 903 (N.D. Ill. 2001).³³ The fact that the churches involved in those cases did not already exist at those locations (as does Castle Hills First Baptist), *but rather desired to move there*, was determinative. See *Lakewood*, 699 F.2d at 307 ("In short, the burdens of the ordinance are the increased cost of purchasing land and the violation of the Congregation's aesthetic senses, if the Congregation chooses to *build a new church* in Lakewood." (emphasis added)); *Christian Gospel Church*, 896 F.2d at 1224 ("It is difficult for us to find a significant burden on religious practice if the Church *had not previously been practicing home worship*." (emphasis added)); *C.L.U.B.*, 2001 WL 321056 at *9 (N.D. Ill. 2001) ("Plaintiffs maintain they have suffered hardship and inconvenience in their attempts to *secure a location* in which to celebrate their faith." (emphasis added)). The City's actions do not prevent the Church from moving to a new location,³⁴ they prevent its congregation from being

³¹ The City also relies in great part on the legislative history of the federal RFRA, Def. Motion at 26-27, a statute that is completely irrelevant to, and not raised by, the case at bar.

³² Again, the City's brief is misleading: the *Lakewood* case was decided by the Sixth Circuit, not the Fifth Circuit as Defendant claims at page 22 of its brief. In fact, the Fifth Circuit has explicitly disagreed with this holding. See *Islamic Center of Mississippi*, 840 F.2d at 299 and n.6 ("Laws that make churches, synagogues, and mosques accessible only to those affluent enough to travel by private automobile obviously burden the exercise of religion by the poor, a class that includes many students. [FN6 *But see Lakewood Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 307 (6th Cir.), *cert. denied*, 464 U.S. 815, 104 S. Ct. 72, 78 L.Ed.2d 85 (1983).] And a city may not escape the constitutional protection afforded against its actions by protesting that those who seek an activity it forbids may find it elsewhere.").

³³ The City also fails to mention that *C.L.U.B.* is currently on appeal to the Seventh Circuit, and another court in the same District has refused to follow one of its main holdings. *C.L.U.B. v. City of Chicago*, App. No. 01-4030 (7th Cir. appeal docketed Nov. 20, 2001).

³⁴ While the City argues that "[d]enial of a permit for a particular property is not enough to establish a claim if there are other options or locations"—an inaccurate description of the law in *any* context, see, e.g., *Islamic Center of Mississippi*—the support cited for this proposition only deals with cases involving the *relocation* of places of

able to use its *current* property. “[R]equiring applicant to find another home or another forum for worship,” Def. Motion at 26 (quoting *Christian Gospel Church*) is not an option, nor is such an option mandated by the First Amendment.

Likewise, the City simply misstates the law by claiming that “Denial of a permit for a particular property is not enough to establish a claim if there are other options or locations.” Def. Motion at 22. This statement might be true in other jurisdictions (not in the Fifth Circuit) for another type of case (only where a church tries to move into a new location). However, the Fifth Circuit and the Supreme Court have rightly rejected this argument wholesale:

“[One] is not to have the exercise of his liberty of expression [and, we add, his freedom of religion] in appropriate places abridged on the plea that it may be exercised in some other place.”

Islamic Center of Mississippi, 840 F.2d at 300 (quoting *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981) (addition in original, emphasis added)).³⁵ This argument has not prevailed in the Supreme Court or in the Fifth Circuit, and should not do so here.

b. *The Growing Church’s Inability to Use Its Fourth Floor For Its Youth Ministry Is a Substantial Burden on Its Religious Exercise.*

The City does not deny that it has prohibited the Church’s use of the fourth floor³⁶ of its property.³⁷ See Def. Motion at 39 (discussing “[t]he City’s actions in recognizing and enforcing .

worship to a new site, and *not* the church’s use of its own land. See *Islamic Center of Miss., Christian Gospel Church, City of Lakewood*. The Church is not attempting to purchase property and locate somewhere else. Its location here for five decades and centrality to its congregation as a place of worship serves to underscore the importance of this site. Individual religious sites may take on constitutional significance. See, e.g., *Storm v. Town of Woodstock, N.Y.*, 32 F. Supp. 2d 520 (N.D.N.Y. 1998) (discussing the “religious and spiritual significance of communing at Magic Meadow in view of its beauty, its location on a mountain top and its former use as a Native American ceremonial ground.”).

³⁵ Other courts agree. See, e.g., *Int’l Society for Krishna Consciousness v. Rochford*, 585 F.2d 263, 272 (7th Cir. 1978) (“The City . . . suggests that denial of use of the airport facilities would not prevent the Krishna Society from presenting its views anywhere else in Chicago or even on the sidewalks outside the airport terminals. This type of argument has been soundly rejected.” (emphasis added)); *McCurry v. Tesch*, 738 F.2d 271, 275 (8th Cir. 1984), *cert. den.*, 469 U.S. 1211 (1985) (“The defendants’ argument that these rights would not be burdened by an order restricting the times that the plaintiffs could hold religious services in the church to weekends and Wednesday evenings, because the plaintiffs would be free to congregate and worship elsewhere, misses the mark This principle applies with particular force to places, such as church buildings, which have a special spiritual significance to the persons who wish to worship there.” (citing *Schad*)).

. . . the non-occupancy” of the fourth floor.). Neither does the City contest the Church’s need for the use of that floor space. In fact, the City admits that the Church’s “real intended use [for the space is] occupancy.” *Id.* ¶ 97. Although self-evident, courts have held that use of church buildings for church group functions is religious exercise:

However, the case law is clear that “[s]trictly religious uses . . . are more than prayer and sacrifice Churches have always developed social groups for adults and youth where the fellowship of the congregation is strengthened with the result that the parent church is strengthened. . . . It is a religious activity for the church to provide a place for these social groups to meet, since the church by doing so is developing into a stronger and closer knit religious unit.”

In re Covenant Comm’y Church, 444 N.Y.S.2d 415, 422 (Sup. Ct. 1981) (emphasis added) (quoting *Matter of Comm’y Synagogue v. Bates*, 136 N.E.2d 488 (N.Y. 1956)).

Being unable to use the fourth floor of its Victory Building has substantially burdened the Church’s religious exercise. *See, e.g.*, SOF ¶¶ 43-45; Coe Aff. ¶ 12, Ex. “B” to App. *See also* Anthony Aff. ¶ 4, Ex. “K” to App.. Being able to use the fourth floor would allow the Church to have capacity for their ministry to reach 300 high school students and 300 middle school students, twice as many as they are currently able to serve. Anthony Aff. ¶ 8. However, the lack of space not only affects how many children are being ministered to, but also the quality of that ministry. *Id.* ¶ 10 (describing impact on “ability to properly teach the Word of God”). *See also id.* ¶¶ 11-12 (describing other burdens).

³⁶ The City mischaracterizes the nature of the Church’s facility by describing it alternatively as a “roof” or “attic space.” The City also mischaracterizes Church’s building as a “three-story building.” In fact, the facility is a four-story building, and the fourth floor is a standard floor. *See* SOF ¶¶ 3-5.

³⁷ *See* SOF ¶ 44.

Because it is undisputed that the Church intends to use the fourth floor³⁸ for needed Student Ministry activities, and because Student Ministry activities are part of the religious exercise of the Church, the denial of such use is a substantial burden on religious exercise:

[T]he right to erect and use a modern church building may in a proper case, such as the one before us, include . . . any meetings held by the church, and all such rooms and facilities under one roof as ordinarily form and constitute a part of the building, equipment, are deemed necessary, or useful, in connection with a modern church of the particular denomination involved.

Keeling v. Bd. of Zoning Appeals of City of Indianapolis, 69 N.E.2d 613 (Ind. App. 1946) (emphasis added). The fourth floor space is just such a space “under one roof as ordinarily form and constitute a part of the building,” and thus denial of use of that space for religious activities is a burden on those religious activities.

- c. *The Denial of The Church’s Special Use Permit for a Parking Lot Prohibits the Church From Adequately Accommodating Its Congregation for Religious Services, and Therefore Substantially Burdens Its Religious Exercise.*

The City argues that “[t]his case is not about the right to build or use a church.” Def. Motion 2. It most certainly is! The denial of a permit for a parking lot—necessary to accommodate churchgoers—both currently limits the amount and type of religious exercise it can engage in, and limits its future ability to grow and to “promulgat[e] the Gospel of the Lord Jesus Christ.” CASTLE HILLS FIRST BAPTIST CHURCH CONSTITUTION Art. I, § 2. As the foremost expert in the field of church health and growth states:

In my experience, parking is probably the most critical facility issue faced by churches in the United States today. The lack of sufficient parking may be the single greatest hindrance to church growth.

³⁸ The City’s contention that the Church somehow has “unclean hands” and is therefore unable to raise this claim, Def. Motion ¶¶ 79-98, is neither true nor relevant. The Church had never represented that it would never seek the City’s permission to occupy the Fourth Floor. See SOF ¶ 46.

Affidavit of Dr. Thom Rainer ¶ 7, Ex. “E” to App. Growth through evangelizing is a fundamental tenet of Castle Hills First Baptist Church. The published mission statement of the Church is

To bring people to Christ, to enlist them as members, to educate them to maturity, to equip them for a meaningful ministry in the church and a life mission in the world, in order to magnify God.

Coe Aff. ¶ 4. *See also id.* ¶¶ 5-7 (describing necessity of increasing size of congregation as part of religious mission).

A parking lot, as the Texas Supreme Court has found, is “necessary for the use and enjoyment of the church.” *City of Austin v. University Christian Church*, 768 S.W.2d 718, 719 (Tex. 1989). The government’s argument fails, the Court held, when it argues that “suggest[s] that by definition a parking lot cannot be a place of religious worship because no actual acts of worship occur on the parking lot.” *Id.* The same arguments fail both as a matter of fact and law.

- i. The Church has demonstrated that additional parking space is necessary both for its current congregation and for its ability to grow, a central tenet of its religious faith.

In order for the Church to be able to fulfill its mission to evangelize, it needs adequate physical facilities for its congregation:

It is the mission of Castle Hills First Baptist Church to be a good steward and in faith, to plan and prepare for the “many things” God will provide. As such, we have planned for numerical growth in our congregation and acquired property and built physical facilities which are necessary for this growth.

Coe Aff. ¶ 8. The City has attempted to constrain the Church’s growth in several ways. For example, had the City granted the special use permit for the parking lot, it would have conditioned the permit on a “15-year moratorium on building expansion.” *See Minutes*, July 10, 2001, City Council Meeting, Ex. “38” to Prince Aff. *See also* Tr. Zoning Comm’n Hearing, June

1, 1999, at 13 (“Would the Church consider a limitation . . . that they would not further build on the site?”), Ex. “1” to Earl Aff., Ex. “H” to Appendix; Res. No. 0007-01, Ex. “30” to Prince Aff.

The City at least acknowledges that the parking lot is necessary for “future church growth.” Def. Motion at 17. This confirms Pastor Coe’s statement that his Church’s “growth has leveled off and even deteriorated because of the lack of parking and adequate physical facilities.” Coe Aff. ¶ 11. The issue can therefore be reduced to the following legal question, the answer to which relies on no disputed material facts: Do churches have a Free Exercise right to grow, to evangelize, to increase the size of their congregation? The Church respectfully submits that the answer to this question must be “yes.”

The City’s actions and laws both target and hinder this growth, as they readily admit. The City fears that if the First Amendment, RLUIPA and the Texas RFRA applies to their actions, “there would be nothing a City could do to stop the impact” of a church that “intended to grow their congregation.” Def. Motion ¶ 36. Other than describing the Church as a “cancer,” Def. Motion at 7-8, the City describes the Church as a “threat of urbanization and destruction,” “treat[ing] this neighborhood, which it is dismantling purchase by purchase, as already nonexistent,” “looking to expand onto Castle Lane behind it,” and “devour[ing] Castle Hills, one bite at a time.” *Id.* ¶¶ 5, 20, 34. The City further mischaracterizes the Church as forcing its way into (and “destroying”) an existing residential community:

Prior to the Church’s decision to buy up a block of houses, this was an essentially rural, residential environment. This mega-church (not a neighborhood church, like those that were the vision when the original Zoning Ordinances were written) is a high intensity semi-commercial activity,

Def. Motion ¶ 34. This is simply not true. *See* Linehan Aff. ¶¶ 4,5, 8 & 9, Ex. “J” to App. The fact that the City detests large churches is also supported by the record. *See supra*, § A.

However, the parking lot is not simply needed for the Church's future growth,³⁹ but is necessary for its *current* membership:

Members of [the] Church that have served as traffic directors and greeters have observed that prospective guests have driven away after seeing that parking space at the Church is nearly, but not completely, depleted. This has happened on Sundays during worship services, and during special events.

Coe Aff. ¶ 10. This observation is confirmed by the Church's former Pastor, as well. Harris Aff. ¶ 5; Heinz Aff. ¶ 4. Fair and accurate photographs depicting the crowded parking conditions in that the Church's existing parking lot during Sunday services are attached to Hal Heinz' Affidavit as Exhibit B-1—B-20. These clearly demonstrate that the parking lot is experiencing full or near-full capacity, and additional space is needed.

Of particular note is the fact that the Church is not even in compliance with the City's own code provisions requiring a certain amount of off-street parking for worship use. *See* City Code § 1004.(A)(a) & (b), Ex. "20" to Prince Aff.; 1/18/96 Letter from David McLaughlin to Overland Partners, Ex. "3" to Prince Aff. Additional parking is also needed to provide adequate access for the Church's handicapped members. Slayden Aff. ¶ 5, Ex. "F" to Appendix. Although some members of the congregation park across the heavily trafficked and dangerous (*See* Mills Depo. 16:6-12) Northwest Military Highway in a commercial center, the owners of that lot have denied permission for the Church to use it in the past. *Id.* ¶ 4. This has caused a large disruption to Church services. *Id.* Contrary to the City's assertions, the Church does not now have, nor ever had any written agreement with the Winston Hills Shopping Center to provide off-site parking for the Church's use, and other shopping centers near the Church have

³⁹ The Church currently must also beg the City to allow it to use its own property for special function parking. On at least one occasion, permission for such use has been denied. *See* Medbury Letter to Slayden, Nov. 13, 2000 (attached to Defendant's Motion as Tab 13). Being subject to the whims of a municipal government, coupled with the risk of denial, also constitutes a substantial burden on the Church's free exercise, speech and association rights. *See* Medbury Letter to Slayden, Nov. 14, 2000 (attached to Defendant's Motion as Tab 13) (threatening police citations for such use).

denied the Church the use of their lots. *Id.* ¶¶ 3, 5. In fact, “[t]he management company has refused to enter into any long-term agreement to give the Church use of the parking lot, and the informal agreement can be revoked at any time.” *Id.* ¶ 4. *See also* Harris Aff. ¶ 5 (describing arrangements). This places the Church in both an unacceptable and precarious position⁴⁰ regarding adequate facilities for its congregation and visitors.⁴¹

The City, of course, disagrees that the Church needs additional parking space for its current membership.⁴² Def. Motion at 3 (opining about “the absence of any current need or demand”). However, the Church notes that this is not even a relevant factor in the City’s analysis for a Special Use Permit, therefore such a justification for the denial is arbitrary and capricious. Seyfarth Depo. 13 (“Q: Do you believe that [the need for parking] is a proper element in the decision-making process of the city council . . . ? A: No.”).⁴³

⁴⁰ The precariousness of the Church’s position is compounded by the fact that it is out of compliance with the City Code provisions regarding off-street parking. The City Code permits the City to revoke a church’s Certificate of Occupancy and issue citation to a church if it is out of compliance with the off-site parking requirements. The City has considered doing precisely that to another church in the very recent past. Thus, in 1997, the City Council permitted the Castle Hills United Pentecostal Church to build a new sanctuary with the explicit condition that it must maintain adequate agreements for off-site parking to meet the City’s off-street code requirements or the Church would lose its Certificate of Occupancy and start receiving citations on a daily basis for code violation. (*See* Ex. “6” to Prince Aff.). Castle Hills First Baptist Church, which remains out of code compliance even counting its temporary off-site parking (which the City Code does not permit), is in the precarious position of having the City revoke its Certificate of Occupancy and begin issuing citations at any time. The requested parking lot facility on South Winston Lane is, at a minimum, necessary to remedy this situation.

⁴¹ The City counters with perhaps the weakest argument offered in their brief: “They knew from direct observation that the Church’s current needs did not justify 488 new spaces.” Def. Motion at 15. In light of the evidence discussed above, such a false speculative and conclusory statement cannot support a summary judgment holding.

⁴² The City also argues that because the Church has not attempted every possible combination of proposals that the City may or may not accept, there is no substantial burden. Def. Motion ¶¶ 42, 43. Again, such an argument fails as a matter of fact and as a matter of law. The Church has spent years in negotiations with the City, ameliorating every single one of the City’s legitimate concerns. However, under the Federal and State Constitutions and statutes, it is the City, and not the Church, that has the burden of demonstrating that the means used to achieve its objectives are the least restrictive on religious exercise, and not the other way around.

⁴³ Mayor David R. Seyfarth was City Manager from 1975 to 1995 and Mayor from May 2001 to November 8, 2002. *Id.* 6:24-7:1; Ex. “6” to Allison Aff. As such, he is “familiar with the general policies of The City of Castle Hills regarding land use issues.” *Id.* 7:10-13.

Even if “need” were a factor, the City can hardly support its contention. The City merely offers the affidavit of Mark Medbury. However, under oath, Mr. Medbury stated that he visited the site only “a few times,” and only noticed “things in passing.” Medbury Depo. 17:16; 18:2. Even so, he noticed that the Church had to use the Winston properties for overflow parking at least once. *Id.* 20:23-25. Similarly, the City’s argument that alternative commercial property is available for Church parking is merely speculation based on looking at a map printed off the Internet. *Id.* 23:6-25:25 (“Q: But you didn’t . . . go out there and count the spaces or anything? A: No, sir—”). Such facts cannot demonstrate no “need.”

The City’s contention that the Church has no need for parking space is irrational on its face: Why would the Church attempt to secure parking space if it has no need? There is only one reason why the Church wants additional parking space: Because it needs it! *See* SOF ¶¶ 8-11.

- ii. Courts have unanimously held that a parking lot is integral to a place of worship, that they are related to religious exercise, and that the inability to secure adequate parking space is a substantial burden on religious exercise.

As courts throughout the country have unanimously held—including recently the Texas Supreme Court—a parking lot is an integral part of a place of worship. The support for this proposition is overwhelming. A facility to house worship is simply meaningless if people cannot travel to it (and park). *Islamic Center of Miss.*, 840 F.2d at 299 (“By making a mosque relatively inaccessible . . . , the City burdens their exercise of their religion.”). The City’s logic would extend to a prohibition on building a roof, having pews, or even being able to maintain a driveway or sidewalk to access the church:

To view each element, each section of a “structure,” as requiring an independent “religious” use leads to impossible results: Is a church kitchen or a church parking lot a “religious” use? We have not formulated the test so narrowly.

Martin v. Corp., of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 747 N.E.2d 131, 138 (Mass. 2001). The Texas courts have recognized the importance of parking lots to religious worship:

Indeed, it is an undeniable reality that in our automobile oriented society, urban located institutions require parking facilities of some kind to ensure their existence.

. . . .
. . . . All evidence in the record before us indicates the primary use of the church property as a whole, including both the [parking] lots and sanctuary, was regular religious worship. Although no actual worship occurred on the lots, the primary purpose for which they were acquired and retained by the church was to provide access to the church for the members. There was also evidence clearly establishing that these lots were reasonably necessary for engaging in religious worship.

University Christian Church v. City of Austin, 724 S.W.2d 94, 96-97 (Tex. App. 1987) (emphasis added). The Texas Supreme Court has held, in the context of a tax exemption case, that a church's parking lot—even one used as a commercial lot—is “used primarily for religious purposes.” *First Baptist Church of San Antonio v. Bexar Cy. Appraisal Rev. Bd.*, 833 S.W.2d 108, 111 (Tex. 1992).⁴⁴ “[A] place of religious worship includes not only the sanctuary, but also the grounds and structures surrounding the sanctuary which are necessary for the use and enjoyment of the church.’ . . . Thus, a parking lot may qualify as a place of religious worship.” *Id.* (quoting *City of Austin v. University Christian Church*, 768 S.W.2d 718, 719 (Tex. 1988)). Plaintiff's parking lot will only be used for church services. *See also New Creation Fellowship of Buffalo v. Bd. of Assessment Rev.*, 735 N.Y.S.2d 291 (N.Y. App. Div. 2001) (“In support of the motion, petitioner established that the parcel has been used for religious purposes, *i.e.*, as an additional parking area during church services,”); *Carlsen v. Carter*, 36 N.E.2d 740, 487 (Ill. 1941) (“[R]easonable sized plots of ground, which are so conveniently used in connection with a church building for hitching horses or parking cars . . . are as much devoted to religious

⁴⁴ *See also Diffenderfer v. Central Baptist Church of Miami*, 316 F. Supp. 1116, 1119 (S.D. Fla. 1970) (holding that commercial use of parking lot, where funds are used for church projects, is a “religious use”).

uses, and are as much a place of public divine worship, as that soil which is actually covered by the roof of the church building itself.”); *Immanuel Presbyterian Church v. Payne*, 256 P. 547 (Cal. App. 1928) (“[T]he finding of the trial court that the property on which the parking space is established and maintained, which is immediately adjacent to the said church, was necessary and required for the convenient use and occupation of the said building, is the only finding the trial court could have made.”).

The same reasoning applied by the Fifth Circuit in *Islamic Center* applies with equal force here.⁴⁵ That Court ruled that when the government-through application of its land use laws-makes attendance at places of worship inaccessible to congregants, it substantially burdens their religious exercise. *Id.* at 299. The circumstances of that case involve an application of laws to make parking-and thus, attending services-much more difficult should be treated no differently. The major zoning treatise also recognizes that “The accessory uses which are nonexcludable in such jurisdictions where churches themselves are nonexcludable are: . . . parking lots” 2 RATHKOPF & RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 20.03 at 20-53, 20-54 (4th ed. 1985).

Other courts agree. The Maryland federal District Court, in a case similar to that at bar, held that being unable to build a parking lot for parishioners in a Catholic church substantially burdened their Free Exercise rights:

. . . . Sister Rita, a member of the Parish Restoration Committee, stated that the Committee had determined that “the mission of the Parish could only be fulfilled through . . . the demolition of the Monastery and construction of a church annex, gardens and

⁴⁵ The City again mischaracterizes the holding of *Islamic Center*: “In the Muslim Students case, the Plaintiffs prevailed not because they were denied, but because every other religious user was approved.” Def. Motion at 22. In fact, the plaintiffs in that case did prevail because they were denied a permit: “By making a mosque relatively inaccessible within the city limits to Muslims who lack automobile transportation, the City burdens their exercise of religion.” The court additionally held this burden was not justified by the government’s proffered rationalization of an “overriding interest” because they had treated other religious groups more favorably: “The record compels the conclusion that the Board of Aldermen denied an exception to the Islamic Center for reasons other than considerations of traffic control and public safety”).

parking.” . . . Numerous parishioners also submitted affidavits explaining that the existing buildings fail to satisfy the needs of the congregation, and that the new construction is crucial to the spiritual growth of the parish. See, e.g., . . . affidavit of Elizabeth Ann Dyer, Exh. 8 to same (lack of parking facilities decreases participation in worship services); . . .

Keeler v. Mayor and City of Cumberland, 940 F. Supp. 879 (D. Md. 1996). That court held that the denial of a certificate of appropriateness to demolish a monastery and to build a parking lot and other facilities violated the church’s Free Exercise rights under the First Amendment. Likewise, a Pennsylvania appellate court recently agreed:

The lack of parking restricts the activities of the Church and deters some worshipers from attending services. When the parking lot is full, worshippers park on neighborhood streets, at the school’s parking lot across the street and at nearby businesses.

Daley v. Zoning Hrg. Bd. of Upper Moreland Tp., 770 A.2d 815, 817-18 (Pa. Cmwlth. 2001).

That court held that such conditions constitute “a serious hardship to [the church’s] congregation and has prevented it from reasonable use of its property,” and therefore upheld the grant of a variance—on an adjacent lot with single family dwellings that had been demolished—to alleviate such hardship. *Id.* In a similar case, a New York court recently ruled that the denial of a special use permit for a church parking lot was subject to strict scrutiny:

[A] proposal for the establishment *or expansion* of a religious use—which encompasses not only buildings designed for worship, but also ancillary and accessory uses such as schools, playgrounds, related housing, and parking lots (*see, Matter of Diocese of Rochester v. Planning Bd. of Town of Brighton*, 1 N.Y.2d 508, 525-526, 154 N.Y.S.2d 849, 136 N.E.2d 827)—may be rejected, on zoning grounds, only if it is found that the proposed change “will have a direct and immediate adverse effect upon the health, safety or welfare of the community.”

High Street Unified Methodist Church v. City of Binghamton Planning Comm’n, 715 N.Y.S.2d 279 (Sup. Ct. 2000) (second and third emphases added).

An Illinois appellate court ruled that the denial of a conditional use permit for expansion of parking facilities was an unconstitutional infringement on a church’s free exercise rights. *Our*

Saviour's Evangelical Lutheran Church of Naperville v. City of Naperville, 542 N.E.2d 1158 (Ill. App. 1989), *appeal den.*, 548 N.E.2d 1071 (Ill.). That case is on all fours with the case at bar, involving a church in a residential district that needed to expand its parking lot for a church and religious school after expanding its physical facilities:

The trial court determined here that even though the need for a [CUP] for the subject premises arose from the intent of persons parking there to attend the church, the denial of parking did not limit the Church members from the practice of their religion in this location and did not serve to limit the free exercise of religion, [F]irst amendment rights and freedoms outweigh considerations of public inconvenience, annoyance, or unrest. We find that the trial court erred in its conclusion that the denial of a [CUP] at this location was not an infringement of the Church's right to freedom of religion

Id. at 1162 (citation omitted). The city in that case tried to justify its decision on the same grounds as Defendant does here: "the property values . . . would be diminished; the granting of the [CUP] would be injurious to the use and enjoyment of the surrounding property; and . . . the parking lot would be an intrusion into a well-established residential neighborhood." *Id.* at 1161. The court rejected those arguments, holding instead that "public inconvenience, annoyance, or unrest" is outweighed by a church's Free Exercise rights. *Id.* at 1162-63. And in the context of a variance application, an Indiana appellate court held that:

[T]he right to erect and use a modern church building may in a proper case, such as the one before us, include a parking lot for the use of members in attending church services and any meetings held by the church, and all such rooms and facilities under one roof as ordinarily form and constitute a part of the building, equipment, are deemed necessary, or useful, in connection with a modern church of the particular denomination involved.

Keeling v. Bd. of Zoning Appeals of City of Indianapolis, 69 N.E.2d 613 (Ind. App. 1946). The weight of authority is strongly opposed to the City's contention.

- iii. The City's Own Ordinances Require the Church to Add Additional Parking.

According to the City itself, the Castle Hills First Baptist Church requires 1126 parking spaces.⁴⁶ McLaughlin Letter to Overland Partners, Jan. 18, 1996, Ex. “3” to Prince Aff. (also attached to Defendant’s Motion at Tab “7”). Even assuming that the Church can use parking space in nearby commercial lots, the Church is *still* short of the total number of spaces necessary to comply with the City’s calculations, according to the Defendant. *Id.* The City is therefore taking the Orwellian position that the Church both has too few parking spots and it has too many parking spots at the same time.⁴⁷ See also Glass Depo. 32-33, Ex. “47” to Prince Aff.

When asked how much parking is adequate for a church, the City’s former Manager David McLaughlin himself stated that his “basis for knowing what the adequate parking would be would be based on the formulas in the ordinances on what they were required to have in connection with what they told us their parishioner population was, I’d have to go back to it, but there were formulas in the ordinances that spell out how many parking spots there has to be for whatever.” McLaughlin Depo. 47:18-48:2. See also McLaughlin Aff. ¶ 5, attached to Def. Motion as Tab 29. (“the Church was 36 spaces short of compliance”). The City’s weak response is simply that “the City did not aggressively pursue the violation.” Medbury Aff. ¶ 3, attached to Def. Motion as Tab 30. Since the Church itself is not in compliance with the City’s

⁴⁶ Churches are urged to follow such requirements. See CHURCH ADMINISTRATION HANDBOOK, EDITED BY BRUCE P. POWERS at 168 (1997) (“The city zoning codes must be examined and followed in determining the amount of parking to be provided.”).

⁴⁷ Another “down-the-rabbit-hole”-like aspect of this case is that municipalities often prohibit or require special use permits for churches in residential districts because of lack of parking space. See, e.g., *Love Church v. City of Evanston*, 671 F. Supp. 508, 514 (N.D. Ill. 1987) (“The general thrust of these cases was that churches affected the character of a residential neighborhood—by . . . making parking more difficult, and so forth—and that permitting churches only as special uses was rationally related to the municipality’s exercise of its police power.”). Allowing cities to prohibit churches because of concerns about parking, and then allowing them to forbid the construction of parking lots that would alleviate that problem would go a long way to ensure the eradication of churches from residential districts altogether—a result that is clearly contrary to law, as the Fifth Circuit has recognized. See *Islamic Center of Mississippi*, 840 F.2d at 300 (“Many state courts have therefore held that a zoning ordinance that prohibits the construction of church buildings or the use of all existing buildings for public worship in virtually all residential districts violates the free exercise clause.”).

own requirements—not even counting future planned growth—the City cannot be heard to complain that the Church has no need for additional parking.

- iv. Expert testimony demonstrates that lack of adequate parking facilities in general, and at Castle Hills First Baptist Church in particular, may burden religious exercise.

Dr. Thom Rainer, the preeminent expert on church health and growth, and the Dean of the Billy Graham School of Missions, Evangelism, and Church Growth at the Southern Baptist Theological Seminary in Louisville, Kentucky, states that “[t]he lack of sufficient parking may be the single greatest hindrance to church growth.” Rainer Aff. ¶ 7. His opinion is based on his academic experience, his work with “over 400 church and denominational consultations,” *id.* ¶ 3, and research that went into 13 published books on this subject. *Id.* ¶ 4.

There is widespread agreement among all experts on church growth that adequate parking is an essential ingredient in the ability of a church to grow, or, at the very least, to avoid decline. Churches that lack adequate parking must fear both that existing members will consider attending other churches (or simply stop attending church), and that the unchurched and other visitors will be less inclined to make an initial visit. As Dr. Rainer states, “[t]he need for adequate parking for churches is essentially an *a priori* assumption in” the literature of church growth, health, and architecture. *Id.* ¶ 4.⁴⁸

⁴⁸ In *The Church Growth Handbook* (1990), author William B. Easum offers 20 key growth principles, one of which is “Growth is encouraged when parking is adequate.” *Id.* at 82. In the *Church Administration Handbook* (1997) (B. Powers, ed.), William G. Caldwell lists parking as one of nine key factors in the design of a church facility: “Adequate parking is a must for most churches. . . . The parking should be within a reasonable walking distance of the building, and it should be integrated with the landscaping to provide an attractive appearance.” *Id.* at 155. See also KENNON L. CALLAHAN, TWELVE KEYS TO AN EFFECTIVE CHURCH (1983) (citing importance of anticipating future parking needs to ensure continued growth); John W. Ellas, *Measuring Church Growth* 58, 109 (1997) (“Leaders might discover that the church is inadequately staffed to serve the present membership size or they might discover they are short of parking and classroom space. It is important to realize that the decline trend can be reversed or even prevented if the causes are quickly identified and properly addressed,” “Leaders must monitor three areas carefully: parking, classroom space, and auditorium seating. If any one of them becomes crowded, all growth is blocked. For example, a church cannot seat any more people than it can park in a comfortable walking distance from the facilities.”).

Inadequacy of parking facilities begins having a detrimental effect on a church's religious exercise when use reaches 80% of capacity.⁴⁹ As Dr. Rainer states, "there is an 80 percent rule that applies to the relationship between church growth and church parking. As a general rule, when a church parking lot reaches 80 percent of its capacity, it is time to make provisions for more room or the church will suffer a severe reduction in its ability to grow." Rainer Aff. ¶ 9. And while "approaches such as shuttle parking, valet parking, and intentional car pooling may be effective in the short-term," they "are not effective as a long-term solution to parking shortages and the barrier that shortage poses to church growth and health." *Id.* ¶ 13.

d. *The City's Actions Have Caused a Severe Financial Strain on the Church, and Thus Substantially Burdens Its Religious Exercise.*

Not only have the City's actions negatively impacted the Church's current membership, and prevented the Church from growing, but they have also resulted in a severe economic burden to the Church. The Court should not be persuaded by the City's statement that "Prior case law holds there is no substantial burden where the impact on religious claimants is only economic." Def. Motion at 21; *see id.* at 22 ("Even substantial additional costs will not create a substantial burden."). In fact, the Fifth Circuit held only that "The Constitution does not . . . forbid all governmental regulation that imposes an incidental burden on worship by making the free exercise of religion more expensive." *Islamic Center of Mississippi*, 840, F.2d at 299 (emphasis added). It did not rule that the Constitution does not forbid any such regulation.

⁴⁹ The "80% Rule" is generally accepted:

Some researchers suggest that it is important for a church to have approximately 20 percent of its parking area empty on a given Sunday so that the large hidden sign that is hung out front says 'come on in; there is room in the inn for you.' The further point is made that when the parking is full it has the same net effect as a sanctuary that is uncomfortably crowded. That is, when the parking lot or lots are full, the big hidden sign hung out front is 'there is no room in this inn for you.'

CALLAHAN, TWELVE KEYS TO AN EFFECTIVE CHURCH 89; EASUM, CHURCH GROWTH HANDBOOK 79 ("When 80 percent of any space is in use, it is time to start making plans for more").

In fact, the Supreme Court has held that the First Amendment does preclude such regulation, so long as the economic burden reaches the level of a “substantial” burden on religious exercise. See *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 391 (1990) (Warning that an “onerous” financial burden “even if generally applicable, might effectively choke off an adherent’s religious practices. . . .”). This principle has been extended to land use regulation that imposes economic burdens on religious exercise. See *First Covenant Church*, 840 P.2d 174, 183 (Wash. 1992) (“[A] financial burden on religious activity, if too gross, may unconstitutionally infringe on free exercise.”); *City of Sumner v. First Baptist Church*, 639 P.2d 1358, 1362 (Wash. 1982) (“[A]lthough there is no fundamental tenet against compliance with building codes or zoning ordinances, the practical effect of their uncompromising enforcement would be to close down the church-operated school.”).

To date, the Church has expended hundreds of thousands of dollars related to these matters that could have been put to its religious ministry activities. Municipalities should not be permitted to simply outspend places of worship, preventing them from fully achieving their religious missions.

3. The City Has No Rational, Much Less Compelling, Interest in Preventing the Church’s Growth and Use of Its Property.

Land use laws and actions that substantially burden religious practice must meet the most rigorous scrutiny:⁵⁰

To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance “interests of the highest order” and must be narrowly tailored in pursuit of those interests. The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not ‘water[ed] . . . down’ but ‘really means what it says.’

⁵⁰ Again, the City misstates the law by arguing that substantial burdens can be justified by merely “reasonable” regulation. Def. Motion at 27 (“Even if this Court finds a substantial burden, the RLUIPA prohibitions do not apply on these facts, because: No unreasonable limitations are present.”). Strict scrutiny analysis requires the governmental justifications to be “compelling,” not simply “reasonable.”

City of Hialeah, 508 U.S. at 546 (citations omitted). Compelling governmental interests are those that protect public safety and order.⁵¹ *Wisconsin v. Yoder*, 406 U.S. at 230; *Sherbert v. Verner*, 374 U.S. at 403. This Court has held that the governmental has a “compelling interest in ensuring that the particular death is not the result of foul play.” *Kickapoo Traditional Tribe of Texas v. Chacon*, 46 F. Supp. 2d 644, 653 n.9 (W.D. Tex. 1999). The compelling interest standard has been defined by several courts in the land use context:

As a ‘law restrictive of religious practice,’ the City of Cumberland’s Historic Preservation Ordinance must instead ‘advance interests of the highest order’ and be narrowly tailored in pursuit of those interests. *City of Hialeah, supra*, 508 U.S. 520, 546 (1993).

Keeler, supra, 940 F. Supp. at 886; *see also First Covenant Church*, 840 P.2d at 187 (“clear and present, grave and immediate danger to public health peace and welfare”); *Congregation Beth Yitzchok of Rockland, Inc. v. Town of Ramapo*, 593 F. Supp. 655, 663 (S.D.N.Y. 1984) (fire safety);, *St. John’s Evangelical Lutheran Church v. City of Hoboken*, 479 A.2d 935, 939 (N.J. Super. Ct. Law Div. 1983) (occupancy limitations). And the interests asserted by the city in *Keeler*—very similar to those claims here by Defendant—failed to meet that strict scrutiny. *Keeler*, 940 F. Supp. at 886. (“safeguarding the heritage of the City . . .; stabilizing and improving property values . . .; fostering civic beauty; strengthening the local economy; and promoting the use and preservation of historic districts and/or sites for the education, welfare and pleasure of the residents of the City.” (emphasis added)). Examining the City’s assertions in turn, it is clear that it lacks such an interest.

- a. *Preventing the “Destruction of a Neighborhood” Is Simply an Irrational Fear That Cannot Rise to the Level of a “Compelling Governmental Interest.”*

⁵¹ This compelling government interest standard that must be met to justify the substantial burden posed on the Church’s religious exercise is the same “standard that must be met before the government may account for [discrimination] on the basis of race.” *Smith*, 494 U.S. at 885. *See also* RLUIPA § 2(a)(1) (codifying compelling interest requirement).

The City's sole⁵² “compelling governmental interest”—preventing the “destruction of the neighborhood,” *see also id.* at 30 (“To confer the right to destroy neighborhoods”), by this “cancer”—is neither rational, nor even actually held by the City Council or the Mayor.⁵³ Nor is there any real possibility that the Church “can devour all of Castle Hills.” *Id.* at 19.

The Fifth Circuit has rejected such irrational⁵⁴ motivations as justification for zoning practices targeting religious organizations, noting that the Supreme Court has observed that “negative attitudes or fears, unsubstantiated by factors properly cognizable in a zoning proceeding, are not a permissible basis” *Islamic Center of Mississippi*, 840 F.2d at 302. In a land use case with similar official justifications, another federal court has held that religious use of land “ought not be arbitrarily restricted . . . because of the unfounded or irrational fears of certain residents.” *Western Presbyterian Church v. Board of Zoning Adjustment*, 849 F. Supp. 77, 79 (D.D.C. 1994). Likewise, the Ninth Circuit has held that the government “has a compelling interest not in protecting students from all fears, but rather only those which are reasonably related to a real threat,” *Cheema v. Thompson*, 36 F.3d 1102 (9th Cir. 1994).

⁵² The City offers no other “compelling” justification. Councilmember Helen Glass states in her affidavit that the parking lot “was not going to comport with the considerations of health, safety and the general welfare of the citizens of the City of Castle Hills,” apparently because she is concerned that “heavy traffic would slow or prevent public safety vehicles.” Glass Aff. ¶ 5. However, as she herself admits, these concerns are related to present conditions—with or without the parking lot, and thus this interest is irrelevant. Glass Depo. 54:18-20; 59:16-18. Moreover, David Steitle, the City’s traffic expert, testified before the City Council that emergency vehicles would not be delayed by traffic exiting the proposed parking lot from accessing the neighborhood. Tr. City Council Meeting, July 13, 1999, at 32-33, Ex. “2” to Earl Aff.

Equally bizarre is Councilmember Glass’ contention that the parking lot “could not be safe.” Glass Aff. ¶ 5. When asked what she meant by that statement, her answer was the type of material plan for the parking lot surface: “I walked on it over there at Shades of Green on Tuxedo, and I’ve had high heels on, and your heel goes down in there where the soil is, and it’s very difficult for a woman to walk on it. . . . I’ve heard other women say that. And then to push a wheelchair over that bumpy—bumpy-bumpy-bumpy-bump, I think would be awful.” Glass Depo. 78:13-25. Later, she admits that “that’s not one of the big things in this parking thing,” and should be dismissed completely. Glass Depo. 81:11-12.

⁵³ The City occasionally refers to a “drainage issue.” This is another straw man argument. The revised plans clearly solve any such problem, as the City Council admits. *See* Buie Depo. 13:24-14:2.

⁵⁴ *See* Seyfarth Depo. 24:15-18 (“Q: [A]re you aware of any neighborhood—any residential neighborhood which has been destroyed by church use? A. No, I’m not aware of—No, I am not aware.”).

As is amply demonstrated by City officials themselves, the City's purported compelling governmental interest is not reasonably related to a real threat. The depositions of City officials demonstrate that they do not agree with, and explicitly reject, their counsel's stated "governmental interest." *See, e.g.*, Buie Depo. 19:18-25; Seyfarth Depo. 20:20-21:7; Wynn Depo. 26:24-27:3; McLaughlin Depo. 57:12-16. And while Mr. McLaughlin states that the "City is permitted to protect . . . their communities from the threat of . . . destruction," McLaughlin Aff. ¶ 15, he cannot cite any situation in which such "destruction" occurred. McLaughlin Depo. 57:12-16. Although former City Manager Mark Medbury also recites exactly the same words as Mr. McLaughlin, Medbury Aff. ¶ 11, he admits that the only "destruction" has occurred in the past, when the Church removed the structures on the Winston properties, with permits granted by the City itself! Medbury Depo. 34:19-21 ("Q: So they showed destruction that had already happened, not future destruction-- A: Yes, sir."). The same view is held by David McLaughlin. McLaughlin Depo. 57:2-21. As a matter of law and common sense, the removal of any residential structure cannot possibly be deemed "destruction of a neighborhood".⁵⁵ Plus, see Linehan Aff. ¶4, addressing the actual present status of Winston Lane and the good transitional use of the requested parking lot.

"Devour[ing] all of Castle Hills" is not a rational fear of City officials, *as they themselves admit*, and the City's only justification for their actions must therefore be rejected wholesale.

- b. *Regulating Aesthetic Matters and Preventing Minor Traffic Increases Are Not "Compelling Governmental Interests" As a Matter of Law.*

⁵⁵ Similarly, the City's offensive description of the church as a "cancer" that assumedly must be excised is not held by members of the City Council. *See, e.g.*, Wynn Depo. 30:17-20 ("Q: And you wouldn't describe [the Church] as a cancer, would you? A: In the context of a cancer being a bad thing, no.").

Although the City does not argue—with good reason—that the aesthetic and traffic interests which have in part⁵⁶ motivated their actions could constitute a compelling governmental interest, out of an abundance of caution, the Church will describe how such interests must fail. The Fifth Circuit and other federal courts within this jurisdiction have clearly described what types of interests may be viewed as actually “compelling.”

This court found that only in rare instances where a compelling state interest in regulation of the subject within the state's constitutional power to regulate is shown can a court uphold a state action which imposes even an incidental burden on the free exercise of religion.

Starkman v. Evans, 198 F.3d 173, 175 (5th Cir. 1999). The City’s aesthetic interests should be compared with examples of actual compelling governmental interests found by courts within the Fifth Circuit: maintaining prison security, *Diaz v. Collins*, 114 F.3d 69, 73 (5th Cir. 1997); “increasing juvenile safety and decreasing juvenile crime,” *Qutb v. Strauss*, 11 F.3d 488, 493 (5th Cir. 1993); the “state’s interest in procuring every person’s testimony for the thorough investigation of the crime of homicide,” *Port v. Heard*, 764 F.2d 423, 432 (5th Cir. 1985); “restraining the trafficking of illegal contraband on our nation's highways,” *U.S. v. Ramon*, 86 F. Supp. 2d 665, 677 (W.D. Tex. 2000); and “ensuring that [a] particular death is not the result of foul play,” *Kickapoo Traditional Tribe of Texas v. Chacon*, 46 F.Supp.2d 644 (W.D. Tex. 1999).

As described above, it is patently clear that the City is concerned with a parking lot being “ugly,” or otherwise out of character within this residential neighborhood:

- Q: Could you please describe what that negative effect [of a parking lot] is?
A: I think they are ugly. . . . Of course, you are generating traffic. You have—may have an adverse effect on the value of properties.
. . . .
Q: Are there any other reasons other than the ones that you described?
A: No. I can’t— No.

⁵⁶ These interests are most likely simply pretext for their true discriminatory attitudes toward churches in general and this Church in particular. See *supra*. However, even taking the City at its word, such statements cannot justify burdens on religious exercise, as discussed *infra*.

Seyfarth Depo. 16:23-17:4; 18:13-15. When Councilmember Helen Glass was asked why she voted against the Church, her reasoning was that “[t]he City of Castle Hills was built for residents to live in and to enjoy the rest of their lives while they’re there because it had a country atmosphere.” Glass Depo. 43:10-13 (emphasis added). These are “aesthetic” interests.

Aesthetic and traffic interests are not “compelling” as a matter of law. Every court that has examined this question agrees. In fact, in the context of a free speech decision, the Supreme Court has held that the government’s interest in protecting “traffic safety and esthetics” cannot justify a content-based restriction on speech (which, like substantial burdens on religious exercise, requires a compelling governmental interest). *Metromedia v. City of San Diego*, 453 U.S. 490, 511-12 (1981). *See also City of Ladue v. Gilleo*, 512 U.S. 43, 49 (1994) (noting same). Courts have clearly understood *Metromedia* and *City of Ladue* to mean that “[w]hile the Supreme Court has determined that ‘safety’ and ‘aesthetics’ are ‘substantial’ interests, . . . the Court has never determined that these interests are compelling” *North Olmstead Chamber of Commerce v. City of North Olmstead*, 86 F. Supp. 2d 755, 767 (N.D. Ohio 2000).⁵⁷

⁵⁷ *See also Outdoor Systems, Inc. v. City of Merriam, Kan.*, 67 F. Supp. 2d 1258 (D. Kan. 1999) (“Nearly every court to address the issue has held that the government interest in aesthetics and safety is insufficient to justify a durational restriction on political signs in residential districts.”); *Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (8th Cir. 1995) (“[A] municipality’s asserted interests in traffic safety and aesthetics, while significant, have never been held to be compelling.”); *Curry v. Prince George’s County, Md.*, 33 F. Supp. 2d 447, 452 (D. Md. 1999) (“Again, while recognizing aesthetics and traffic safety to be ‘significant government interests,’ none of these courts found those interests sufficiently compelling to pass the applicable strict scrutiny test.”); *McCormack v. Township of Clinton*, 872 F. Supp. 1320, 1325 n.2 (D.N.J.1994) (“[N]o court has ever held that [aesthetics and traffic safety] form a compelling justification for a content-based restriction on political speech”); *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1572 (11th Cir. 1993) (holding, in the context of a facial over-breadth challenge, that a regulation supported by aesthetic concerns is not supported by sufficient government interests to validate content-based regulation); *Village of Schaumburg v. Jeep Eagle Sales Corp.*, 676 N.E.2d 200, 204 (Ill. App. 1996) (finding that “[t]raffic safety and visual aesthetics are not the sort of compelling state interest required to justify a content-based restriction on expression”); *National Advertising Co. v. City of Orange*, 861 F.2d 246, 249 (9th Cir. 1988) (“interests in traffic safety and aesthetics, while ‘substantial,’ fell shy of ‘compelling.’”); *Loftus v. Township of Lawrence Park*, 764 F. Supp. 354, 361 (W.D. Pa. 1991) (“we doubt that aesthetics or residential quietude is sufficiently compelling to ever justify a content-based restriction . . . on freedom of expression”).

In the Free Exercise context, courts have likewise held that such interests do not rise to the level of “compelling.” In annulling a planning commission’s denial of a special use permit for a church parking lot in New York, that court held that such action could not be justified by reference to “traffic congestion, noise, diminution in property values.” *High Street United Methodist Church*, 715 N.Y.S.2d at 283. Similarly, another court has held that

increased traffic and noise, effect on use and enjoyment of the neighboring properties, aesthetics, change in character of the neighborhood and diminished property values . . . are clearly impermissible under the case law to justify outright denial of petitioner’s application.

In re Covenant Comm’y Church, 444 N.Y.S.2d 415, 422 (Sup. Ct. 1981). See also *Christ Church Parish Soc’y of Tashua v. Zoning Bd. of Appeals of the Town of Trumbull*, 1993 WL 108128 (Conn. Super. 1993) (“Moreover, ‘[t]he courts have been reluctant to uphold the strict enforcement, against religious uses, of regulations that require special exception uses to be in architectural harmony with the surrounding neighborhood.’” (quoting *Daughters of St. Paul v. Zoning Bd. of Appeals*, 17 Conn. App. 53, 67 (1988))).

The question has been asked and answered many times: The City cannot prevent the Church’s land use for the reasons offered. In a case that dealt with the denial of a zoning exception, building permit and certificate of occupancy for a church property, the Texas Court of Civil Appeals rejected arguments nearly identical⁵⁸ to those made by the City in the case at bar. *Congregation Committee, North Fort Worth Congregation, Jehovah’s Witnesses v. City Council of Haltom City*, 287 S.W.2d 700 (Tex. App. 1956). As in this case, “[t]he zoning ordinance of Haltom City expressly permits the erection, construction, etc., of churches in the district in which appellants’ church building is located.” *Id.* at 703. Rejecting the city’s stated interests, the court held that:

⁵⁸ The application was denied because of “(1) size of the lot, (2) parking conditions, (3) inconvenience to neighbors, (4) possible depreciation in market value of surrounding property, (5) traffic safety, and (6) noise.” *Id.* at 702.

Refusal of a permit to erect a church in a residential district, there being no adequate showing that the exclusion of the church was in furtherance of public health, safety, morals or the public welfare, is arbitrary and unreasonable. . . .

“* * * the power to establish zones is a police power and its exercise cannot be extended beyond the accomplishment of purposes rightly within the scope of that power. To exclude churches from residential districts does not promote the health, the safety, the morals or the general welfare of the community, * * *”

Id. at 704 (quoting *City of Sherman v. Simms*, 183 S.W.2d 416 (Tex. 1944) (quoting *Synod of Ohio v. Joseph*, 39 N.E.2d 515, 524 (Ohio 1942))) (emphasis added). Moreover, because a “city cannot legally exclude a church from a residential district by a zoning ordinance, it cannot legally accomplish the same result by *denying permits . . .*” *Id.* (emphasis added). The arguments made in support of the denied permits failed:

Neither is mere inconvenience to neighbors . . . a valid reason to deny a church the right to exist in a residential district. It is hard to visualize a church being constructed in a residential district without inconveniencing someone. To restrict churches to areas where no one will be inconvenienced would be, in effect, excluding churches from residential districts. The maintenance of churches is such a valuable right that their existence will not be denied because of mere inconvenience to neighbors.

. . . . Accepting as true the testimony that the presence of the church will decrease the value of surrounding property ‘in a measure,’ yet this would apply with equal force to any other residential district. To deny a church the right to exist in a residential district because ‘possible depreciation’ to surrounding property might result could conceivably keep churches out of all zoned residential districts.

Id. at 704-05. The court easily rejected the other bases for the denial, including traffic, noise, parking and size of lot, *id.*, demonstrated that any such regulation must truly be in furtherance of the “safety, health, morals and general welfare of the public,” *id.* at 705, and recognized that

The church in our American community has traditionally occupied the role of both teacher and guardian of morals. Restrictions against churches could therefore scarcely be predicated upon a purpose to protect public morals.

Id. The right of Castle Hills First Baptist Church to flourish must likewise be protected from such restrictions.

c. *Any Such Aesthetic or Traffic Interests Do Not Even Exist in This Case as a Matter of Fact.*

The City cannot claim that any interest is “compelling” unless it acts to serve that interest throughout its jurisdiction. *City of Hialeah*, 508 U.S. at 546-47 (“[A] law cannot be regarded as protecting an interest ‘of the highest order’ when it leaves appreciable damage to that supposedly vital interest unprohibited.”) (internal quotations and omitted). If parking lots posed such an immediate threat to public health and safety, the City would not tolerate them anywhere. Since they are permitted at the discretion of the City Council, the interest in prohibiting the Church from using its property cannot be seen as compelling.

Q: Is it The City of Castle Hills’ Policy, as far as you understand it, to always prohibit such uses in residential [areas]?

A: I’m not . . . aware of a city policy to that—that effect, no.

Seyfarth Depo. 20:4-10. And although David McLaughlin described the Church in his affidavit—an affidavit he does not remember signing, McLaughlin Depo. 33:1-9—as a “mega-church, which is not a neighborhood church, similar to those which were envisioned when the original zoning ordinances were written,” McLaughlin Aff. ¶ 7—he admitted that he had no knowledge of the considerations that informed the original zoning ordinance when it was written. McLaughlin Depo. 40:20-23. Finally, the City admits that at least one other property owner, the Antonian High School, received permission to do exactly what the Church is seeking to do: replace former residences with a parking lot. *See id.* 52:5-53:5; *supra* § A.

In addition to the legal insufficiency of the City’s arguments, their interests simply do not exist here, *as the City has itself admitted*. The City-hired traffic engineer David C. Steitle, P.E., conducted a thorough traffic analysis on South Winston Lane as part of the consideration of the

Church's application.⁵⁹ See City of Castle Hills City Council Meeting Minutes of July 13, 1999 at 2 (attached to Defendant's Motion as Tab 4). The City's expert then proceeded to inform the City that out of three possible traffic operation alternatives at the target properties, Alternatives #2 and #3

would both result in improved overall operating conditions on Winston Lane and at the signalized intersection during two-way and during one-way operation of West Avenue.

Traffic Analysis Report of David C. Steitle at 2 (July 9, 1999) (emphasis added). The City, of course, ignored this report and simply argues that "[r]easonable people could agree with . . . David Steitle, but reasonable people could also disagree."⁶⁰ It is difficult to imagine what possible circumstances could actually lead to a finding of irrationality on the part of a municipality, given the City's proposed standard.

Placed in its proper context, it is clear that the traffic argument is a red herring. Initially, the City may have been concerned about the "West Avenue Project." Def. Motion at 2-3; 9; Glass Aff. ¶ 4, attached to Def. Motion as Tab 1. However, it is now complete and does not create any conflict with the Church's plans.⁶¹ Moreover, the latest SUP applications and Mediated Settlement Agreement were all denied subsequent to its completion. See SOF ¶¶ 38-42.

Perhaps more importantly is the fact that any traffic issues currently exist in the area, regardless of whether the parking lot is built. Although Councilmember Glass states in her affidavit that she "found the traffic plan was not reasonable," Glass Aff. ¶ 4, she admits that

⁵⁹ A Traffic Impact Analysis was also conducted by Vickrey & Associates, hired by the Church, with similar results to the City's study (attached to Defendant's Motion as Tab 10).

⁶⁰ To its credit, the City acknowledges that such a "traffic interest" could only possibly support a defense to a rational basis review claim, and not strict scrutiny.

⁶¹ See Medbury Depo. 32:2-6; Medbury Aff. ¶ 5; Glass Depo. 47:1-3 ("Q: Would you say that the [West Avenue] project is a reason anymore in denying The Church's proposed parking lot? A: Not at the present time"); Glass Aff. ¶ 4 ("As long as that project was going on, no substantial traffic change was reasonable due to the impact that project would already burden the city with."); McLaughlin Aff. ¶ 6 ("The West Avenue project is now appears complete [sic].").

these conditions exist currently, *even if the proposed parking lot is not used*. Glass Depo. 53:9-12 (“I would assume they would.”). Equally irrelevant is her statement that some residents are “concerned” about fire and police vehicle access. Glass Aff. ¶ 5. Not only has she never received any report or concern by the fire or police departments,⁶² Glass Depo. 54:23-55:6,⁶³ but she admits again that these conditions exist *whether or not the target properties are used as a parking lot*. See, e.g., *id.* 54:13-20 (“Q: So you’re concerned about the ability of police and fire vehicles to arrive on the scene now? A: Yes”); *id.* 59:16-25. Furthermore, the additional parking lot will do nothing but improve those conditions. See *supra*.

Neither are the City’s aesthetic interests harmed by this use. The City misleads this Court by arguing that the parking lot will be “bare impervious asphalt.” Def. Motion at 21. In fact, the proposed lot will be surfaced with a *non*-impervious material, and it will not be “bare.” It will incorporate existing trees, other landscaping, and berming to ensure that it will be aesthetically pleasing. See SOF ¶ 22; see also Ex. “1” to Dumas Aff., Ex. “G” to App.; Exs “3”—“6” & “8” to Earl Aff, Ex. “H” to App.; Ex. “43” to Prince Aff. Moreover, the Church has always been, and remains willing to adjust its plans to be more visually appealing.

And although the City’s argument that the Church’s use would “eradicate” the neighborhood, *see supra*, may (more charitably) be seen as an aesthetic interest, this hyperbole is simply untrue. The City Manager admitted that the only “area” transformed from a rural or residential environment, Medbury Aff. ¶ 11, was the six homes purchased by the Church themselves. Medbury Depo. 36:8-11. Equally false is the contention that this neighborhood is “rural” at all, as common sense dictates from a review of the land uses in the area.

⁶² The former Fire Chief of Castle Hills never mentioned any such concern in his Affidavit submitted in this matter. See *generally* Medbury Aff.

⁶³ Ms. Glass asserts as “facts” things that she admits she has no memory of. Glass Depo. 56:9-18. Appropriate weight should be given to her Affidavit.

Councilmember Glass, David McLaughlin, and Mark Medbury describe as a “rural, country atmosphere” an area with “major commercial developments,” “major traffic arteries,” and an Eckerd’s and “Alamo Leasing Company” adjacent to the Church. SOF ¶ 1; Heinz Aff. ¶ 14 & Exhs. A-21–A-25, A-44, A-48 & A-75 thereto, Ex. “D” to App.; Glass Depo 68-70; McLaughlin Depo. 35-36; Medbury Depo. 37-39. The fact is that this neighborhood does not have a “rural, country atmosphere.” Linehan Aff. ¶ 4. Rather, Castle Hills is surrounded on all sides by the City of San Antonio and bisected by Northwest Military Highway, a busy state highway lined not only by the Church, but by commercial shopping centers and other commercial and retail uses. Harris Aff. ¶ 2.

Since the City cannot point to any evidence that supported such a conclusion, they merely argue that “[t]he facts do not have to be in the ‘record,’ or before the City Council in a hearing, in order to validate the City’s decision.” Def. Motion at 11.⁶⁴ Such an argument cannot be used to support the deprivation of First Amendment rights.⁶⁵ Once again, the Fifth Circuit has foreclosed The City’s argument in the context of a First Amendment challenge to land use regulation:

The mayor of Galveston testified that he saw a link between the deterioration of the downtown area and the opening up of an adult theater. In the mayor's eyes, the efforts of Galveston to restore the troubled downtown area would be thwarted by the entry of an adult theater into the heart of the zone targeted for renovation. . . .

. . . .

The assertion of a state interest, however, is not enough. *Schad v. Borough of Mt. Ephraim*, 101 S. Ct. at 2184. The city must buttress its assertion with evidence that the state interest has a basis in fact and that the factual basis was considered by the city in passing the ordinance. *Id.* at 2185 (rejecting, for want of a factual basis, asserted reasons given in support of an ordinance that restricted First Amendment rights);

⁶⁴ Again, one wonders what constitutional constraints would exist at all, if any, on irrational, discriminatory and burdensome municipal activity, given Defendant’s proposed standard.

⁶⁵ The City’s argument is further undermined by their suggestion that the permit would be granted if the Church “acquire[s] the other remaining properties between its land and the commercial zoning on Northwest Military Drive,” Def. Motion at 23. If the City is so concerned about the Church “eradicating” the neighborhood, why do they suggest it purchase more land? The argument should be seen for what it really is: a smokescreen designed to prevent the Church’s future growth.

Still limiting our inquiry at the moment to governmental interest, there is no evidence in the record that the Galveston City Council passed Ordinance 78-1 after careful consideration or study of the effects of adult theaters on urban life.

Basiardanes v. City of Galveston, 682 F.2d 1214, 1215 (5th Cir. 1982). Likewise, the City similarly offers nothing more than a bald assertion that the neighborhood will be “destroyed” and “eradicated” if the Church is allowed to use its property for parking.⁶⁶

Finally, the City’s repeated suggestion that the Church construct a multi-story parking garage on the Church’s existing property across the street from the Winston properties⁶⁷ demonstrates that the City is not acting in furtherance of any aesthetic interests.⁶⁸ Governmental action does not even pass rational basis scrutiny if it tends to subvert the governmental interest asserted in support of such action. *See, e.g., Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 619-20 (1985) (finding legislation not rationally related to purpose of encouraging Vietnam veterans to settle in New Mexico where legislation might have discouraged some of those veterans from settling there). The City has repeatedly told the Church to abandon its plans to use their target properties and that the Church should “build below or above ground on its existing lot.” Def. Motion at 27. In fact, Councilperson Helen Glass repeatedly states that a multi-story facility would be permitted. Glass Depo 16, 28, 60, Ex. “47” to Prince Aff.

Not only is such a multi-story garage prohibitively expensive and impractical,⁶⁹ but it demonstrates the City’s irrational position: A multi-level commercial-style parking lot would certainly harm any interest in the residential quality of the neighborhood more than the Church’s plan of a landscaped surface lot. *See, e.g., LOUISIANA URBAN TECHNICAL ASSISTANCE CENTER*,

⁶⁶ Even if the City had relied on such evidence, as the Fifth Circuit requires, the interest asserted—maintaining the character of a residential neighborhood—is a far cry from the compelling governmental interest that the Constitution, RLUIPA and Texas RFRA mandate. *See supra*.

⁶⁷ Glass Depo 16, 28, 60, Ex. “47” to Prince Aff.; McLaughlin Aff. ¶ 16.

⁶⁸ The City’s suggestion that the Church construct a multi-story garage also belies its principle argument—that the Church does not actually need more parking.

⁶⁹ Slayden Aff. ¶ 8.

COLLEGE OF URBAN AND PUBLIC AFFAIRS REPORT, OFF-STREET PARKING REQUIREMENTS FOR CHURCHES IN RESIDENTIAL DISTRICTS IN JEFFERSON PARISH: ANALYSIS AND RECOMMENDATIONS at 10-11 (March 1999), (available at <http://www.uno.edu/~cupa/LUTAC/jefpar10.htm>) (“Th[e ordinance] would enable churches and other permitted uses in residential areas to maximize their limited property by building multi-level parking facilities. This would profoundly alter the unique residential characteristic of these districts in a detrimental manner.”). Common sense informs us that a multi-level parking facility will impact a residential neighborhood more than a landscaped, treed, ground-level parking lot which even the City admits is a “nice design.” Def. Motion at 3.

d. *The City Does Not Even Offer, Nor Could It, Any Justification for Refusing Permission to Use the Church’s Fourth Floor.*

The City does not attempt to justify its actions in refusing an application from the Church to occupy the Fourth Floor of its Victory Building.⁷⁰ At deposition, City Officials could not come up with a reason. Buie Depo. 17:8-10. (“Q: Do you believe that there is any valid reason for denying them the ability to [occupy the fourth floor of its Family Life Building]? A: I’m not sure.”); Seyfarth Depo. 14:4-18 (“Q: Could you please describe what is the general policy reason or reasons that the City has in preventing occupied space above three floors? A: Well, I can’t—

⁷⁰ Helen Glass attempts to justify the City’s actions on the basis of preventing people from seeing into other residential structures. Glass Aff. ¶ 3. This argument is flawed for a number of reasons. First, Ms. Glass’s entire objection relates to the Church’s *third* floor, which it already occupies, not its *fourth* floor, which it cannot. *Id.* Second, it is physically impossible to look into any residence from the Church’s fourth floor because of the distance and a solid tree cover between the Church and its neighbors. Heinz Aff. ¶ 11 (“existing foliage and tree cover block any view into neighboring properties’ residences”) & Exhs. A-10-A-20 (photographs depicting view from Fourth Floor). Third, the Church is willing to block the view by covering windows or using other means to prevent any possibility at all of viewing toward residential areas. *Id.* (“the Church is willing to install devices meant to block the view from that floor to neighboring properties.”). Even Ms. Glass admits that this would solve any perceived issue. Glass Depo. 86:10-13 (“If the view can be blocked, you don’t have any windows there, I grant it that they could build the . . . Victory Building.”). Fourth, the nearest residence is approximately 200 feet away from the Victory Building, which can hardly be said to be a threat to privacy. Heinz Aff. ¶ 11. Finally, the City has already permitted at least one building to occupy a fourth floor from which occupants can look directly down onto several homes, so its interest cannot be said to be “compelling” if it allows commercial structures to do so. Heinz Aff. ¶ 13 & Exhs. A-96-A-102 (photographs depicting views to and from commercial four-story building).

I can't tell you why they were denied the use of that I could not tell you why they denied that use. I have no idea."); *id.* 15:20-16:8 (Q: Is there any reason that you know of why the Church should not be able to then—assuming that the other structure is that high, to use its current fourth floor? A: I am not aware of any reason why they couldn't use it, no."). In fact, the City has been told explicitly by its attorneys that "[u]nless substantial evidence of identifiable harm being done to the neighborhood from the erection of the gymnasium/education building, denial of this SUP on the basis of its height alone would be difficult to defend." Ex. "2" to Prince Aff. Like most of its legal advice, the City now chooses to ignore this advice as well.

Rather than argue that it has any interest in preventing the use of an existing floor, the City argues instead that the Church has "unclean hands."⁷¹ However, it is black-letter law that the "unclean hands" doctrine "is not appropriate in litigation arising under federal regulatory statutes." *Pinter v. Dahl*, 486 U.S. 622, 632 (1988). RLUIPA is a federal regulatory statute.

More importantly, the facts do not support the City's argument. While the City contends that "CHFBC intended to deceive the City" when it constructed the Fourth Floor, Def. Motion at 47, the former City Manager admitted that the Church told him that they might want use it for future occupancy. McLaughlin Depo. 19:14. *See also* Letter to Tim Blonkvist from David McLaughlin, 3/11/97, Ex. "5" to Prince Aff.; Wise Mem. to Kizer, Jan. 24, 1997 (advising Church that it "may want to try for a variance to convert this space to classroom space") (attached to Defendant's Motion as Tab "28"). In her affidavit submitted in this matter, Councilmember Helen Glass stated that the Church "assured the City that they would never request the use of the Roof level." Glass Aff. ¶ 3. This was not true. In her deposition, Glass admitted that the Church *never* suggested that it would never seek permission to eventually use

⁷¹ In nine pages of argument about Defendant's "unclean hands" theory, the City cite not one single legal precedent. Perhaps this is because the doctrine applies only in equity, and only where the claimant has acted *illegally*. Not even Defendant's assertions—which are false, *see supra*—make that claim.

the fourth floor space. Glass Depo. 36. In fact, former Pastor George Harris “never told any City official that the Church would never seek to use the fourth floor of the Family Life Center for classrooms.” Harris Aff. ¶ 4. The Church’s Director of Property Management Hal Heinz describes fully exactly what took place during the process, stating that he “never told Mr. McLaughlin or anyone else from the City that the Church would never seek to occupy the fourth floor.” Heintz Aff. ¶ 9. The entire situation is described fully in Mr. Heintz’s Affidavit. *See* Heintz Aff. ¶¶ 7-10. This hardly demonstrates “unclean hands,” as the City accuses the Church.

4. The City Has Not Employed the Means Least Restrictive On the Church’s Religious Exercise To Achieve Any Purported Governmental Interest.

Finally, even if the City's interests in promoting its interests in aesthetics and traffic were deemed “compelling,” and actually existed, it must then demonstrate that preventing the Church from having adequate facilities for its current congregation and future growth is the “least restrictive means” of achieving their objectives. This Court has acknowledged this doctrine in the context of drug trafficking:

The goal of restraining the trafficking of illegal contraband on our nation's highways is certainly compelling. However, this Court believes that there are more restrictive methods of pursuing this goal than stopping vehicles displaying religious symbols, especially in an area where such symbols are as commonly displayed as they are in West Texas. The policy of targeting vehicles displaying religious symbols imposes a substantial burden upon the faithful who wish to proclaim their beliefs on the bumper of their car. Such a policy casts too wide a net, and the Court urges the Border Patrol to concentrate on other factors more strongly corroborative of criminal activity.

U.S. v. Ramon, 86 F. Supp. 2d 665, 677 (W.D. Tex. 2000). *See also* RLUIPA § 2(a)(1) (codifying least restrictive means requirement); *Basiardanes*, 682 F.2d at 1216 (“Even assuming our conclusion was otherwise on the showing of governmental interest, we would still be unable to sustain the constitutionality of Ordinance 78-1. To survive judicial scrutiny, the City must

also show the ordinance is narrowly drawn to serve a legitimate government interest with only the minimum intrusion upon First Amendment freedoms. *Schad*, 101 S. Ct. at 2186; . . .”).

This doctrine applies with additional force in the land use context:

A court must be given an opportunity to judge whether the Authority’s plans for the specific block and the site of the church are so vital to the overall renewal plan that the petitioner’s property should be condemned and demolished.

Pillar of Fire, 509 P.2d at 1254. “If accommodation between the competing interests of church and state is possible, then it ought to be pursued no matter how compelling the state interest might be.” *Yonkers Racing Corp.*, *supra*, 858 F.2d at 872 (remanding with instructions to “determine whether the public interest in remedying discrimination can be reasonably accomplished without the taking of the Seminary’s property.”). The burden is on the City to prove that its interest cannot possibly be protected any other way. In a similar case involving a parking lot, a New York court recognized that “the municipality must make a diligent effort to accommodate the applicant, ‘while mitigating the adverse effects on the surrounding community’” *High Street United Methodist Church*, 715 N.Y.S.2d at 282.

There are several methods the City can use to protect its interests in aesthetics and traffic. In fact, the City and the Church have engaged in long, protracted settlement negotiations to accomplish this goal (which was eventually rejected by the City Council). One means of achieving any purported interest of the City would have been to grant the permit allowing less than 488 spaces, which it was certainly within its rights to do, Seyfarth Depo 18, 19, 22, 33-35, and which the Church has offered to do in its settlement proposals, which the City has elected to openly discuss in public. See Mediated Settlement Agreement, Ex. “8” to Earl Aff. Furthermore, after rejecting its own traffic expert David Steitle’s report, the City’s new expert David Pugh lists many different conditions which could be attached to the special use permit

which would address any potential concerns.⁷² See draft, “A Land Use Analysis of the Proposed Castle Hills First Baptist Church Automobile Parking Lot” at 10-11 (June 26, 2001) (attached to Def. Mem as Tab “12”).⁷³

The City itself admits that the “parking lot was a nice design.” Def. Motion at 17. This, of course, is the result of the Church being willing to work with the City to address any and all of its concerns. Any and all issues are addressable, and have, in fact, been addressed. Mayor Seyfarth explains in great detail how any City interest may be achieved while still allowing the parking lot to exist. See also Medbury Depo. 75:22-79:18 (discussing landscaping, lighting, street issues). The City Manager in office at the time of the Church’s application also admits that the parking lot could have existed in harmony with the neighborhood:

Q: Do you think it’s possible to have a parking lot in a residential neighborhood that’s consistent with residential character?

A: Yes, I do.

Q: Do you think it’s possible to protect the neighborhood that’s adjacent to this Church while permitting a parking lot on the three Winston properties that we have been discussing?

A: Yes, I think it’s possible.

McLaughlin Depo. 58:10-18. See also Wynn Depo. 28:13-17 (“Q: Now, in deciding on special use permits, you are aware that the city council is capable of imposing conditions that are designed to protect the public health, safety, and welfare, correct? A: That’s my understanding, yes.”).

The City Council also repeatedly refused to come to an agreement with the Church—agreements that the City admitted would have addressed its concerns. Nor did it *ever* make a

⁷² It is important to note that Mr. Pugh did not expressly disagree with Mr. Steitle’s findings. See Pugh Letter to Medbury, Aug. 1, 2001 (attached to Defendant’s Motion as Tab 12).

⁷³ The City argues instead that there is no substantial burden on the Church’s religious exercise because the Church “can still apply for less than 488 spaces on the five (5) acre lot which it owns,” Def. Motion at 23. In addition to conveniently failing to note that the Church has repeatedly offered to construct a lot with as few as 300 spaces, see Ex. “8” to Earl Aff. and Ex. “43” to Prince Aff., the City misunderstands the law. It is the City’s burden to impose regulations which are the least restrictive on Plaintiff’s religious exercise, not the Church to engage in religious practice in the manner least burdensome to the City’s stated interests.

counterproposal to the church. See Glass Depo. 45:24-46:8 (“Q: [W]hen the city council receives a settlement proposal, can it respond by making a counterproposal? A: I guess it could if it wanted to. . . . Q: But you did not in this situation make a formal counterproposal? A: Not to my knowledge.”); City Council Meeting Minutes of June 13, 2000 at 2 (attached to Defendant’s Motion as Tab 4) (latest proposed mediated settlement denied). Nor did it accept subsequent applications made by the Church in order to address the City’s concerns. *Id.*

In fact, even after the Zoning Commission recommended approval of the Mediated Settlement Agreement with included modifications and conditions addressing additional City concerns, the City Council still refused to ratify it, and rejected all proposed compromise plans outright. See Minutes, 7/10/01 City Council Meeting, Ex. “38” to Prince Aff. After referring the matter with even more additional conditions, the City Council *again* rejected the recommendations of the Zoning Commission to approve the Mediated Settlement Agreement. See Minutes, 8/14/01 City Council Meeting, Ex. “40” to Prince Aff. The City cannot be said to be using the least restrictive means of achieving any interest.

5. The Court Should Reject the City’s Perfunctory Constitutional Challenges to Texas RFRA and RLUIPA.

By less than three pages of argument, the City asks this court to strike down acts of both Congress and the Texas Legislature. The City challenges the constitutionality of Texas RFRA and the federal RLUIPA on two grounds. Neither is sufficient to overcome the strong presumption of constitutionality ordinarily afforded such laws.⁷⁴

First, the City claims that both Acts violate the Establishment Clause of the First Amendment because they reflect religious “favoritism.” Def. Motion 30. Courts have rejected

⁷⁴ *United States v. Morrison*, 120 S. Ct. 1740, 1748 (2000). See also *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (“Judging the constitutionality of an Act of Congress is properly considered ‘the gravest and most delicate duty that this Court is called upon to perform.’”) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927))).

this same challenge to RLUIPA over and over again.⁷⁵ This case is no different. For the same reasons, any Establishment Clause challenge to Texas RFRA that may be gleaned from the City's motion should be rejected as well.

Second, the City claims that RLUIPA exceeds Congress' power under the Enforcement Clause of the Fourteenth Amendment where, as here, RLUIPA would apply to zoning laws that limit parking space. Def. Motion 31. But this is nothing more than the repackaging of the City's argument that zoning limitations on church parking could not possibly burden religious exercise, nor could they possibly be applied in a religiously discriminatory or otherwise irrational manner. *Compare id.* 30-32 with *id.* 20-27, 35-36. The Church has already addressed those arguments at length, and will not restate them here. *See supra.* But even if the court should reject those arguments, then RLUIPA is not unconstitutional; instead, it simply would not apply. In other words, either the Act applies constitutionally – because it covers virtually the same circumstances that the First and Fourteenth Amendments cover – or it does not apply at all. Therefore, the City's "proportionality" challenge under the Enforcement Clause should be rejected.⁷⁶

Finally, because Texas RFRA was not passed pursuant to federal Enforcement Clause authority, any constitutional challenge to the Texas RFRA for exceeding that authority should be rejected. *Cf. Scott v. State*, 80 S.W.3d 184, 193 n.4 (Tex. App.—Waco 2002, pet. rev. den'd)

⁷⁵ See, e.g., *Freedom Baptist Church v. Tp. of Middletown*, 204 F. Supp. 2d 857, 863-65 (E.D. Pa. 2002) (rejecting Establishment Clause challenge to RLUIPA § 2); *Johnson v. Martin*, Nos. 2:00-CV-75, 1:01-CV-515, ___ F. Supp. 2d ___, 2002 WL 31129589, *2-*5 (W.D. Mich. Sept. 26, 2002) (rejecting Establishment Clause challenge to RLUIPA § 3); *Charles v. Verhagen*, No. 01-C-253-C, ___ F. Supp. 2d ___, 2002 WL 2012626, *10-*13 (W.D. Wis. Aug. 28, 2002) (same); *Gerhardt v. Lazaroff*, Nos. C2-95-517, C2-97-382, C2-98-275, ___ F.Supp.2d ___, 2002 WL 2008165, at *3, *18-*22 (S.D. Ohio Feb. 25, 2002) (same); *Mayweathers v. Terhune*, No. 2:96-CV-1582, 2001 WL 804140, at *5-*7 (E.D. Ca. July 2, 2001) (same).

⁷⁶ See *Freedom Baptist Church*, 204 F. Supp. 2d at 868-74 (rejecting Enforcement Clause challenge to RLUIPA § 2). See also Storzer & Picarello, *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 978-87 (2001) (providing detailed defense of constitutionality of RLUIPA § 2 under the Enforcement Clause).

(noting that, even though the U.S. Supreme Court struck down the federal RFRA, state law may still be more protective).

C. Summary Judgment Is Inappropriate On The Church's Due Process Claims.

Whether government action violates a plaintiff's due process rights is a two-part test. A court must determine: (1) whether plaintiff possessed a constitutionally protected property interest; and (2) whether the government deprived plaintiff of that interest without providing substantive or procedural due process. *See Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047 (5th Cir. 1997). The City does not dispute that the Church has a constitutionally protected property interest.⁷⁷ Thus, the only issue is whether the deprivation of that interest satisfied both substantive and procedural due process.

1. The City Failed to Afford the Church Substantive Due Process.

The Supreme Court has long recognized that the Due Process clause bars deprivation of constitutionally protected interests by the government "regardless of the fairness of the procedures used to implement them," *Daniels v. Williams*, 474 U.S. 327, 331 (1986), and provides a right to be free of arbitrary or irrational zoning action. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263 (1977). A deprivation is "arbitrary and capricious" when a "government . . . restrict[s] land use for no reason, or for an illegitimate reason such as corruption, racial or ethnic prejudice, or for any other illegitimate motivation." *Corn v. City of Fort Lauderdale Lakes*, 997 F.2d 1369, 1374 (11th Cir. 1993). Here, the City

⁷⁷ In any event it is indisputable that the Church possessed a legitimate and protected property interest to use its land for the religious purposes of providing a parking lot for the church and to use its fourth floor for religious activities. "[P]roperty interests . . . are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by existing rules or understandings." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). "The right of [a property owner] to devote its land to any legitimate use is property within the protection of the Constitution." *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928) (emphasis added). It is well-established that a property use allowed by a special use permit constitutes a conclusive determination that such use is legitimate. *See* 3 K. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 21.13, at 126 (4th ed. 1999 Supp.). Here, both the use of the land for a parking lot and the use of the fourth floor were legitimate uses permitted by special permit.

deprived the Church of its protected property interests on the basis of the illegitimate motivation of religious hostility. As detailed above, *see supra*, § A, there is ample evidence in the record of such discriminatory motivation.⁷⁸

2. The City Failed to Afford the Church Procedural Due Process.

The fundamental requirement of due process is the opportunity to be heard “at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). In this case, disputed issues of material fact exist as to whether the City deprived the Church of its property rights without providing the constitutionally mandated “meaningful” hearing. The City deprived the Church of a “meaningful” hearing in separate, but mutually reinforcing, ways, each of which is discussed below.

a. *The City Failed to Provide a Hearing Free from Bias.*

First, the hearings the City afforded the Church prior to denying it use of its property for religious purposes were tainted by bias. “It is well-settled that the Due Process Clause prevents the state from depriving a plaintiff of a protected property interest without a fair trial in a fair tribunal.” *Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995) (internal quotation omitted). This requirement applies to any state actor that is acting in an adjudicatory capacity. *See id.* “A plaintiff may establish that he has been denied his constitutional right to a fair hearing before an impartial tribunal” by showing “actual bias” or an “appearance of partiality.” *Id.* Here, as discussed *supra* in § A, the record demonstrates that the decision-makers who acted on the

⁷⁸ Moreover, religion, like race, is a suspect classification that triggers strict scrutiny. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (suspect classifications triggering heightened scrutiny include “religion.”). The City’s denial of a SUP and deprivation of the Church’s property interest on the basis of religious hostility flies in the face of the clear and unwavering principle of neutrality toward religion that is the foundation of the Supreme Court’s religious rights jurisprudence. *See, e.g., Lukumi*, 508 U.S. at 532 (“the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general”). As discussed *supra* at § B, the City cannot survive strict scrutiny.

Church's various SUP applications were tainted by bias toward the Church. *See id.* at 741 (“[w]hether actual or apparent, bias on the part of a single member . . . violates due process.”).

b. *The City Refused to Abide By Applicable Law.*

Second, although applicable law concerning the Church's constitutional and statutory free exercise rights to use its property for uses related to its religious practice was repeatedly brought to the City's attention, the City knowingly refused to follow that law. That knowing refusal to abide by applicable law deprived the Church of a “meaningful” hearing. Mayor Bob Anderson summed up the City's decision to ignore the law governing the Church's free exercise rights: “Our job here is not to get involved in constitutional issues involving the rights of people to worship, practice their religion or anything else.” Statement of Mayor Anderson, Tr. City Council Meeting Feb. 8 2000.⁷⁹ Moreover, even after the City Attorney provided a letter to the City detailing the ways that denying a SUP to the Church could violate applicable law, *see* Ex. “12” to Prince Aff, the City denied the SUP in spite of those laws.

Determination of the specific procedures required to ensure a “meaningful” hearing and satisfy due process requires balancing: “(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.” *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Here, a balance of these factors demonstrates that failing to apply applicable law violates due process. With regard to the first factor, it is clear that the Church has at stake an important interest in the ability to use its property for purposes related to its religious practice. Second, there is an obviously high risk of an erroneous

⁷⁹ The Church is having the videotape of this meeting transcribed and will provide the Court with the record excerpts upon receipt.

deprivation of the Church's property when the City fails to apply laws protecting that very interest. Finally, there is no governmental interest in refusing to apply applicable law.

3. The City Is Not Entitled to Summary Judgment on the Church's Due Process Vagueness Claim.

Paragraph 46 of the Third Amended Complaint summarizes the Church's Due Process Vagueness claim: "The statute that controls the procedure for obtaining a special use permit is so vague and ambiguous that persons regulated by it . . . are exposed to the detriment of not obtaining a special use permit without fair warning or explanation of what is required to obtain one. The statute is so vague and ambiguous that the Church must guess at the required course of conduct to obtain a permit." The City's cursory paragraph requesting summary judgment on the Vagueness claim completely ignores the merits of that claim. Far from explaining how the City's SUP requirement, both on its face and as applied, meets well-established due process law concerning vagueness, the City offers the non-sequiter argument that "[d]enial of land use permits on the basis of incompatible adjoining land uses is not a denial of the Fourteenth Amendment." Because the City fails to address the merits of the Vagueness claim that the Church actually alleged, this Court should deny the City summary judgment.

D. The City Is Not Entitled To Summary Judgment On the Church's Claims That The City's Actions Constitute A Regulatory Taking Of the Church's Property Without Adequate Or Just Compensation.

Contrary to the City's assertions, substantial evidence exists that the City's actions in denying the Church the use and enjoyment of its properties for religious uses and purposes constitute a regulatory taking of the Church's property without adequate or just compensation, in violation of the Fifth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, and Article I, Section 17 of the Texas Constitution.

The application of the City's zoning code to the Church's properties constitutes a regulatory taking (1) if it denies the Church all "economically viable use of its land" or "unreasonably interferes" with the Church's right "to use and enjoy its property" or (2) if the application "does not substantially advance legitimate state interests." *See Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-19 & n. 8, 112 S.Ct. 2886, 2893-95 & n. 8, 120 L.Ed.2d 798 (1992); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 935 (Tex. 1998).

The City seeks summary judgment based only on the first ground (i.e., whether or not the City's actions deny the Church all economically viable use of its land or unreasonably interfere with the Church's right to use and enjoy its property). *See* Def. Motion 50. The City does not seek summary judgment on the second ground (i.e., whether or not its actions substantially advance legitimate state interests). As set forth throughout this Response, the Church's accompanying Motion for Summary Judgment, and the referred Appendix and Statement of Facts (Ex. "A" to App.), the Church believes it has established that the City did not and does not have any legitimate governmental interest in rejecting the Church's requests, but rather such rejections are discriminatory, arbitrary and capricious, and without rational basis. Therefore, Defendant's Motion should be denied and the Church's Motion granted. If not, however, at a minimum, substantial fact issues exist regarding whether the City's stated governmental interests are legitimate or merely pretexts for discrimination and arbitrary and capricious action without any rational basis. As a result, under such circumstances, it would be premature for the Court to make the ultimate determination whether or not a regulatory taking has occurred until these factual disputes are resolved. *See Bello v. Walker*, 840 F.2d 1124, 1129-30 (3rd Cir.), *cert. denied*, 488 U.S. 851, 109 S.Ct. 134, 102 L.Ed.2d 107 (1988) (reversing a grant of summary

judgment for defendant municipality on claim of denial of substantive due process by developer plaintiffs because plaintiffs “presented evidence from which a fact finder could reasonably conclude that certain council members . . . improperly interfered with the process by which the municipality issued building permits” and such actions “can have no legitimate governmental objective, and if proven, are sufficient to establish a substantive due process violation”). Accordingly, the Court should deny the City’s request for summary judgment against the Church’s regulatory taking claim.

E. The City Is Not Entitled To Summary Judgment On The Church’s Abuse Of Municipal Discretion Claim.

The Church has adduced substantial evidence that its permit applications met all the requirements of the City Code, *see* SOF ¶¶ 20-22,25, and that discriminatory motives underlie Defendant’s actions in this case. *See, supra*, §§ A & B. Denial of a zoning permit which meets all the requirements of the ordinance, when there is no valid ground for denial, is arbitrary and capricious. 101 C.J.S. Zoning § 224 (1958). Discrimination bears no substantial relationship to a legitimate governmental purpose, and zoning action motivated by a discriminatory animus is irrational, arbitrary and capricious. *Mont Belvieu Square*, 27 F. Supp. 2d at 944 (race discrimination). Moreover, under Texas law, refusal of a permit to erect a church in a residential district, there being no adequate showing that the exclusion of the church was in furtherance of public health, safety, morals or the public welfare, is arbitrary and unreasonable. *See Congregation Committee, North Fort Worth Congregation, Jehovah’s Witnesses v. City Council of Haltom City*, 287 S.W.2d at 704 (“To exclude churches from residential districts does not promote the health, the safety, the morals or the general welfare of the community”) (quoting *City of Sherman v. Simms*, 183 S.W.2d 415, 416 (Tex. 1944) (emphasis added)). The summary judgment proof submitted by Plaintiff establishes that the City was, in fact, motivated

by improper discriminatory animus in denying the Church's requests and, therefore, Defendant's Motion should be denied. At a minimum, however, factual issues exist regarding whether or not the City was motivated by improper discriminatory animus in denying the Church's permit applications, and, thus, the Court should deny summary judgment on the Church's state law abuse of discretion claims pending resolution of these underlying factual disputes. *See Mont Belvieu Square*, 27 F. Supp. 2d at 945 (denying summary judgment on plaintiff low-income housing developer's federal and state due process and equal protection claims); *see also Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1578 & n. 15 (11th Cir. 1989) (although ultimate issue of whether a zoning decision violated substantive due process is a question of law to be determined by the court, subsidiary facts necessary to make the determination are properly for the factfinder); *Bello*, 840 F.2d at 1129-30.

F. CONCLUSION.

For the reasons set forth herein, summary judgment on behalf of the City on any of the grounds contained in its Motion for Partial Summary Judgment is inappropriate and should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been delivered to the following counsel of record herein in accordance with the provisions of the Federal Rules of Civil Procedure on this 13th day of November, 2002.

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