

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OTTAWA

FILE NO. 03-45966-AA

GREAT LAKES SOCIETY  
Plaintiff

JUL 20 2007

Vs.

NOTICE OF OPINION AND ORDER

GEORGETOWN CHARTER TOWNSHIP ET AL  
Defendants

FILE NO. 05-51308-AA

GREAT LAKES SOCIETY  
Plaintiff

Vs.

NOTICE OF OPINION AND ORDER

GEORGETOWN CHARTER TOWNSHIP ET AL  
Defendants

Please take notice on the 20TH day of July, 2007 an Opinion and Order was filed in this cause:

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I hereby certify that copies of the Opinion and Order were mailed to the parties/attorneys of record in this cause on the 20th of July, 2007.

DANIEL C. KRUEGER  
OTTAWA COUNTY CLERK

By:   
Deputy Clerk of the Court

DCK/sac

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OTTAWA

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GREAT LAKES SOCIETY, a Michigan  
Ecclesiastical Non-Profit  
Corporation,

Plaintiff,

v

OPINION  
and  
ORDER

File No. 03-45966-AA

GEORGETOWN CHARTER TOWNSHIP;  
MANETTE MINIER, in her  
official capacity as Zoning  
Administrator of Georgetown  
Township; JAMES JANSMA, WILLIAM  
KOTSIFAS, JAMES HOLTVLUWER,  
RICHARD LOTTERMAN, DONALD UPP,  
in their official capacities as  
members of the Georgetown  
Township Zoning Board of  
Appeals,

Defendants.

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GREAT LAKES SOCIETY, a Michigan  
Ecclesiastical Non-Profit  
Corporation,

Plaintiff,

v

File No. 05-51308-AA

GEORGETOWN CHARTER TOWNSHIP;  
GEORGETOWN CHARTER TOWNSHIP  
ZONING BOARD OF APPEALS,

Defendants.

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These two cases come before the Court once again. The cases have been consolidated for all purposes. Case 03-45966-AA (the 03 case) is both an appeal and an original civil action. Case 05-51308-AA (the 05 case) is also an appeal and an original civil action. The 03 case is pled in 16<sup>1</sup> counts. The 05 case is pled in 16 counts. These 32 counts raise claims under our state and federal constitutions and under the Religious Land Use and Institutionalized Persons Act, 42 USC 2000cc et seq (RLUIPA).

Count I of the 03 case is an appeal from a decision of the Georgetown Charter Township Zoning Board of Appeals (ZBA) denying the application of plaintiff Great Lakes Society (GLS) for a special use permit. Count I of the 05 case is an appeal from the final decision of the ZBA denying GLS's request for a variance. In an opinion and order filed April 12, 2006, this Court affirmed the decision of the ZBA on each of these counts.

Before the Court at this time are the parties' cross-motions for summary disposition to the 30 remaining counts.

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<sup>1</sup> The 03 case erroneously contains two count IIs. The Court will treat the second count II as count III and will renumber each successive count, yielding 16 counts total.

The motions are brought pursuant to MCR 2.116(C)(10).<sup>2</sup> The material facts are familiar and are not in dispute.<sup>3</sup>

GLS is a Christian ecclesiastical corporation pursuant to MCL 450.178 *et seq* and MCL 211.7s. GLS is also recognized by the Internal Revenue Service as a 501(c)(3) religious non-profit corporation. GLS's purpose is set forth in Article IV of GLS's Mission Articles:

The members of this corporation shall worship and labor together according to the life and sacrifice of Christ as revealed in the Holy Scriptures . . .

Members of GLS share a common problem: they suffer from extreme sensitivity to the odors generated by the chemicals that pervade our modern environment- chemicals such as perfume, hydrocarbon-based fuels, petrochemicals, paint, cleaning fluids, and the myriad of chemicals employed in the construction industry. Exposure to the odors generated by such chemicals causes members to suffer a variety of symptoms, such as nausea, migraine headaches,

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<sup>2</sup> MCR 2.116(C)(10) provides: "Except as to the amount of damages, there is no genuine dispute as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." Therefore, the question of damages is not before the Court at this time.

<sup>3</sup> Subsequent to the Court's opinion and order filed April 12, 2006, the parties submitted numerous affidavits and other documents in support of their cross-motions. The Court has reviewed this material and concluded that the matter contained therein is irrelevant or, at best, collateral to the claims pled in the remaining counts.

loss of sleep, dizziness, rashes, heart irregularities, and respiratory difficulties. As a consequence of their sensitivity to these odors, members of GLS are physically unable to attend worship services in any church that has been built or that is maintained using common chemicals.

There are seven aspects to GLS's mission: worship services, biblical research, a "health ministry," a "counseling ministry," a "tape ministry," a "youth ministry," and "minister training." The function of the health ministry is to permit members of GLS to order chemical-free food and other products through GLS. The counseling ministry offers biblically-based counseling. The tape ministry produces and distributes audio tapes of sermons by GLS's spiritual leader, Pastor John Cheetham. The ministerial training ministry works to prepare prospective ministers for ordination.

GLS wishes to build a church on a parcel of property located in defendant Georgetown Charter Township (Township). The parcel is zoned "LDR" (low-density residential). Under the Township's zoning ordinance, churches are permitted as a special land use in an LDR district.

GLS submitted a site plan for the church to the Township. The plan called for the construction of a 9,700 square-foot two-story structure. GLS represented to the Township that the principal use of the structure would be the worship of God. GLS's stated goal was to build a church free from chemical odors where GLS could hold worship services. The site plan indicated that the lion's share of the proposed structure would be devoted to a 2,400 square-foot sanctuary with seating for 60 people. GLS also represented that the health ministry, counseling ministry, tape ministry, youth ministry, and ministerial training would all operate out of the proposed structure.

Though a church is a permitted use in an area zoned LDR, pursuant to the Township's zoning ordinance, before a property owner may construct a church, the property owner must first obtain a "special use permit" (SUP) from the Township. GLS applied to the ZBA for an SUP. However, the ZBA refused to act on GLS's application. The ZBA concluded that the proposed structure was not a "church" and, therefore, that GLS was not eligible to apply for an

SUP.<sup>4</sup>

"Church" is not a defined term in the Township's zoning ordinance. Under Michigan law, a "church" is a building set apart whose principal use is for public worship. *Portage Twp v Full Salvation Union*, 318 Mich 693; 29 NW2d 297 (1947). Though the ZBA refused to act on GLS's application, the ZBA did adopt a resolution addressing the application. This resolution states, in pertinent part:

In summary . . . the proposed use appears commercial, fraternal, health-related services, and product-oriented in nature . . .

\* \* \*

[T]he ZBA concludes that the principal use of the proposed facility, as determined by the activities that are proposed to take place inside the building, is not for public worship. Therefore, the ZBA . . . [finds] that the Facility proposed by the GLS is not a Church . . . . Resolution of the ZBA of December 14, 2005.

This Court has previously held that the foregoing resolution is the functional equivalent of a denial of GLS's application for an SUP.<sup>5</sup>

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<sup>4</sup> Defendants have never maintained that GLS as an organization is not a "church." Instead, it is defendants' position that the structure that GLS proposes to build is not a "church" as that term is defined under Michigan law.

<sup>5</sup> See Opinion and Order filed April 12, 2006, p 8, n2.

Though the ZBA refused to act on GLS's application for an SUP, the ZBA did act on GLS's application for a variance. Subsection 20.4(E)(2) of the Township's zoning ordinance, as amended,<sup>6</sup> governs the location of a church building on a lot: "The property location shall be such that at least one (1) property line with a minimum lot width of two hundred (200) feet abuts and has access to a collector, major arterial, or minor arterial street."

The proposed structure would have a lot width of only 66 feet that abuts and has access to a collector, major arterial, or minor arterial street. GLS filed a request for a variance from this requirement. The ZBA denied GLS's request.

Having set forth the undisputed facts necessary for a resolution of the parties' motions, the Court will now address the parties' motions as they bear on the remaining counts.

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<sup>6</sup> GLS challenges the manner in which the Township amended section 20.4(E)(2). The nature of the Court's decision on the parties' cross-motions renders this issue moot. The general rule, subject to two exceptions, is that the version of a zoning ordinance that is in effect at the time that the court renders its decision is the version that the court must apply. See *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 161; 667 NW2d 93 (2003).

We begin with defendants' motion for summary disposition on behalf of the individual defendants. Mannette Minier has been named as a defendant "in her official capacity as Zoning Administrator of Georgetown Township." James Jansma, William Kotsifas, James Holtvluwer, Richard Lotterman, and Donald Upp have been named as defendants "in their official capacities as members of the Georgetown Township Zoning Board of Appeals."

In *Will v Michigan Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989), the United States Supreme Court held: "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Will, supra*, p 58 L Ed 2d. Pursuant to MCR 2.116(C)(8) and (C)(10), summary disposition is granted in favor of Ms. Minier, Mr. Jansma, Mr. Kotsifas, Mr. Holtvluwer, Mr. Lotterman, and Mr. Upp and they are hereby dismissed from these consolidated cases. Hereinafter, the term "defendants" shall refer solely to Georgetown Charter Township and the Georgetown Charter Township Zoning Board of Appeals.

Count II of the 03 case and count II of the 05 case allege violation of the "nondiscrimination" provision of RLUIPA.<sup>7</sup> 42 USC 2000cc(b)(2) provides, in pertinent part: "No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." This Court has already held that religious animus<sup>8</sup> played no role in the ZBA's action.<sup>9</sup> Pursuant to MCR 2.116(C)(10), summary disposition is granted in favor of defendants to count II of the 03 case and count II of the 05 case.

Count III of the 03 case and count III of the 05 case allege violation of the "equal terms" provision of RLUIPA. 42 USC 2000cc(b)(1) provides, in pertinent part: "No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less equal terms with a nonreligious assembly or institution." The undisputed facts in the case at bar

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<sup>7</sup> The Court will assume without deciding that the nondiscrimination provision of RLUIPA, the "equal terms" provision (42 USC 2000cc(b)(1)), the "total exclusion/unreasonable limitation" provision (42 USC 2000cc(b)(3)), and the "substantial burden" provision (42 USC 2000cc(a)(1)) each constitute a separate and independent cause of action. See *Civil Liberties for Urban Believers v City of Chicago*, 342 F3d 752, 761 (CA 7, 2003).

<sup>8</sup> See Opinion and Order filed April 12, 2006, p 10, n4.

<sup>9</sup> The Court will use the phrase "ZBA's action" to refer to both the ZBA's denial of GLS's request for an SUP and the ZBA's denial of GLS's request for a

provide no support whatsoever for a claim brought under this section of RLUIPA. Pursuant to MCR 2.116(C)(10), summary disposition is granted in favor of defendants to count III of the 03 case and count III of the 05 case.

Count IV of the 03 case and count IV of the 05 case allege violation of the "substantial burden" provision of RLUIPA. 42 USC 2000cc(a)(1) provides, in pertinent part: "No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a . . . religious assembly or institution, unless the government demonstrates that imposition of the burden . . . (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest."

The purpose of the land use provisions of RLUIPA is to remedy " . . . the well documented discriminatory and abusive treatment suffered by religious individuals and organizations in the land use context." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 325; 675 NW2d 271 (2003) (*Shepherd I*) (quoting from

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variance. Both an SUP and a variance would be necessary to permit GLS to build the proposed structure.

146 Cong Rec E 1234, 1235 (July 14, 2000). RLUIPA is to be  
" . . . construed in favor of a broad protection of  
religious exercise, to the maximum extent permitted by the  
terms of . . . the Constitution." 42 USC 2000cc-3(g).

The threshold question is whether RLUIPA applies to  
the specific dispute before the Court. *Greater Bible Way  
of Jackson v City of Jackson*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_;  
2007 Mich LEXIS 1346, p 12 (slip op) (2007). "The burden  
is on plaintiff to prove that RLUIPA is applicable."  
*Greater Bible Way*, *supra* (citing 42 USC 2000cc-2(b).  
RLUIPA is applicable only if one of the three  
jurisdictional tests set forth in the statute is satisfied.  
*Greater Bible Way*, *supra*, p 12 (slip op). The third of the  
three jurisdictional tests is as follows: " . . . [a]  
substantial burden is imposed in the implementation of a  
land use regulation . . . under which a government makes .  
. . individualized assessments of the proposed uses for the  
property involved." *Greater Bible Way*, *supra*, quoting 42  
USC 2000cc(a)(2)(C).<sup>10</sup>

RLUIPA defines "land use regulation" as including

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<sup>10</sup> RLUIPA defines "government" to include " . . . a . . . governmental entity  
created under the authority of a State." 42 USC 2000cc-5(4)(i). Defendants  
meet this definition.

" . . . the application of a law, that limits or restricts the claimant's use . . . of land . . . ." 42 USC 2000cc-5(5). At first blush, it would appear that RLUIPA does not apply to land use regulations such as zoning ordinances, " . . . which are typically written in general and neutral terms." *Guru Nanak Sikh Society of Yuba City v Sutter Co*, 456 F3d 978, 987 (CA 9, 2006). However, when a zoning ordinance " . . . is applied to grant or deny a certain use to a particular parcel of land, that application is an 'implementation' under 42 USC 2000cc(a)(2)(C)" of RLUIPA. *Guru Nanak, supra* (citing *Kaahumanu v County of Maui*, 315 F 3d 1215, 1220-1223 (CA 9, 2003)). This Court finds that the ZBA's action constitutes an "implementation" under RLUIPA. Therefore, the ZBA's action is a "land use regulation." The next question is whether or not the ZBA's action is an "individualized assessment."

An individualized assessment " . . . is an assessment based on one's particular circumstances." *Greater Bible Way, supra*, p 15 (slip op). "Accordingly, RLUIPA applies when the government makes an assessment based on one's particular or specific circumstances." *Greater Bible Way, supra*. "RLUIPA applies when the government may take into account the particular details of an applicant's proposed

use of land when deciding to permit or deny that use." *Greater Bible Way, supra*, (quoting from *Guru Nanak, supra*, p 986.

In the case at bar, the ZBA took into account the particular details of GLS's proposed use of the land. The ZBA reviewed a detailed site plan prepared by GLS. Extensive testimony was taken regarding the uses that GLS planned to make of the proposed structure. The ZBA's action applied to GLS and to no one else. By contrast, in *Greater Bible Way*, plaintiff did not present a site plan.<sup>11</sup> Furthermore, *Greater Bible Way* involved a request for rezoning rather than a request for an SUP or a request for a variance. The *Greater Bible Way* Court found that a decision to rezone property is "generally applicable" and "religion-neutral," since rezoning applies ". . . to the entire community, not just to plaintiff." *Greater Bible Way, supra*, p 15 (slip op). "A decision whether to rezone property does not involve consideration of only a particular or specific user or only a particular or specific project; rather, it involves the enactment of a new rule of general applicability, a new rule that governs all persons and all projects." *Greater Bible Way, supra*,

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<sup>11</sup> See *Greater Bible Way, supra*, pp 16-17, n13 (slip op).

p 16 (slip op).

In the case at bar, the ZBA's action did not involve a request for rezoning and thus did not involve "a new rule of general applicability." *Greater Bible Way, supra*, p 16 (slip op). Instead, the ZBA's action involved consideration of a specific user and a specific project. Therefore, this Court finds that the ZBA's action constitutes an "individualized assessment."<sup>12</sup> Thus, this Court finds that RLUIPA applies to the specific dispute before the Court.

Having found that GLS has carried the burden of demonstrating that the instant dispute satisfies one of the three jurisdictional requirements of RLUIPA, the next question is whether or not construction of the proposed structure constitutes "religious exercise." *Greater Bible Way, supra*, p 18 (slip op). The United States Supreme Court has held that religious exercise " . . . often involves not only belief and profession but the performance of . . . physical acts such as assembling with others for a

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<sup>12</sup> In *Greater Bible Way*, the Michigan Supreme Court suggested that a variance might well constitute an individualized assessment. See *Greater Bible Way, supra*, p 17, n14 (slip op). See also *Cottonwood Christian Ctr v Cypress Redevelopment Agency*, 218 F Supp 2d 1203 (CD Cal, 2002) and *Guru Nanak, supra*, p 987, n9, holding that a "conditional use permit" (CUP)- which is the functional equivalent of an SUP- constitutes an "individualized assessment" for the purposes of RLUIPA.

worship service . . . ." *Greater Bible Way, supra*, p 19 (slip op) (quoting from *Cutter v Wilkinson*, 544 US 709, 720; 125 S Ct 2113; 161 L Ed 2d 1020 (2005) (internal quotation marks and brackets deleted). Assembling with others for worship services is precisely what the members of GLS wish to do in the proposed structure.

Defendants maintain that the principal use of the proposed structure will be "commercial, fraternal, health-related services, and product-oriented."<sup>13</sup> The ZBA concluded that the principal use of the structure would not be "public worship."<sup>14</sup> However, there is no dispute that the proposed structure would include a large sanctuary where worship services would be held on a regular basis. This stands in stark contrast to the facts in *Greater Bible Way*, in which the Michigan Supreme Court observed: "No evidence has been presented to establish that the proposed apartment complex would be used for religious worship or for any other religious activity." *Greater Bible Way, supra*, p 21 (slip op). While the principal use/accessory use distinction has significance under the Township's

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<sup>13</sup> Resolution of the ZBA of December 14, 2005, *supra*.

<sup>14</sup> Resolution, *supra*.

zoning ordinance and under Michigan law<sup>15</sup>, under RLUIPA, this distinction is irrelevant:

If a commercial enterprise builds a chapel in one wing of the building, the chapel is protected if the owner is sincere about its religious purposes, but the commercial enterprise is not protected. Similarly, if religious services are conducted once a week in a building otherwise devoted to secular commerce, the religious services may be protected, but the secular commerce is not. *Shepherd I, supra*, p 326 (quoting from 146 Cong Rec E 1563, 1564 (September 22, 2000)).

This Court finds that the construction of the proposed structure constitutes "religious exercise."<sup>16</sup>

The next step in the analysis is to determine whether or not the ZBA's action amounts to a "substantial burden" on GLS's religious exercise. See *Greater Bible Way, supra*, p 22 (slip op). "A substantial burden on one's religious exercise exists where there is governmental action that coerces one into acting contrary to one's religious beliefs by way of doing something that one's religion prohibits or refraining from doing something that one's religion requires." *Greater Bible Way, supra*, p 38 (slip op) (internal quotation marks and emphasis deleted). "A mere inconvenience or irritation does not constitute a

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<sup>15</sup> See Georgetown Township Zoning Ordinance, sections 2.96 & 2.1 and *Portage Twp v Full Salvation Union, supra*.

<sup>16</sup> The Court further notes that the building of a structure on real property expressly constitutes "religious exercise" as this phrase is defined in RLUIPA. See 42 USC 2000cc-5(7)(B).

substantial burden; similarly, something that simply makes it more difficult in some respect to practice one's religion does not constitute a substantial burden." *Greater Bible Way, supra*.

Article IV of GLS's Mission Articles provides, in pertinent part: "The members of this corporation shall worship . . . together . . . according to the life and sacrifice of Christ . . ." (emphasis added). Therefore, GLS's religion requires that members of GLS worship together, as a group.

There is no dispute that the members of GLS are physically unable to attend worship services in any conventional church or, for that matter, in any building built using conventional construction methods. Therefore, the ZBA's action effectively prevents the members of GLS from worshipping at all. It would be difficult to conceive of a burden on religious exercise more substantial than this. Yet this is the burden that the ZBA has imposed on GLS.<sup>17</sup>

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<sup>17</sup> Defendants argue that GLS has failed to present any evidence that GLS attempted to locate other property on which to build the proposed structure. Defendants contend that such failure defeats GLS's RLUIPA claim. However, RLUIPA imposes no such burden. There is no " . . . dispositive requirement under RLUIPA that the particular property must itself be necessary for the plaintiff's religious exercise." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (2007) (2007 Mich App LEXIS 1298), p 5 (slip op) (*Shepherd II*). "Nothing in the text of RLUIPA requires a finding that the disputed property must be essential to religious exercise as opposed to other property . . ." *Shepherd II, supra*. See also *Guru Nanak, supra*, p 989 F3d: "[T]o prove a substantial burden under RLUIPA, a religious group need not show that there was no other parcel of land on which it could build its church" (quoting *Saints Constantine & Helen Greek Orthodox Church, Inc v*

This Court holds as a matter of law that the ZBA's action constitutes a substantial burden on religious exercise. The case at bar cannot be distinguished from *Cottonwood Christian Ctr v Cypress Redevelopment Agency, supra*.<sup>18</sup> In *Cottonwood Christian*, the federal district court held that the zoning authority's denial of plaintiff's application for a "conditional use permit" (CUP)<sup>19</sup> to erect a building in which regular worship services would be held violated RLUIPA because the zoning authority's action constituted a substantial burden on religious exercise:

Preventing a church from building a worship site fundamentally inhibits its ability to practice its religion. Churches are central to the religious exercise of most religions. If Cottonwood could not build a church, it could not exist. *Cottonwood Christian, supra*, p 1226.<sup>20</sup>

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*City of New Berlin*, 396 F3d 895, 899-900 (CA 7, 2005) (internal quotation marks omitted).

<sup>18</sup> This Court recognizes that it is not bound by decisions from other jurisdictions regarding RLUIPA. *Shepherd II, supra*, p 7, n9 (slip op). Nevertheless, the Court is not barred from citing decisions from other jurisdictions as persuasive authority.

<sup>19</sup> A CUP is the functional equivalent of an SUP.

<sup>20</sup> "The requirement that there be a facility for religious assembly is common and fundamental to many of the world's religions." *Guru Nanak Sikh Society of Yuba City v Sutter Co*, 326 F Supp 2d 1140, 1150 (ED Cal, 2003), *aff'd* 456 F3d 978 (2006). "Indeed, Congress's decision to enact RLUIPA necessarily recognizes the fact that religious assembly buildings are needed to facilitate religious practice, and the possibility that local governments may use zoning regulations to prevent religious groups from using land for such purposes." *Guru Nanak, supra*, p 1151.

Another case that is strikingly similar to the case at bar is *Guru Nanak, supra*. In *Guru Nanak*, plaintiffs owned property zoned AG (agricultural). Churches and temples were permitted uses in an AG zone, subject to the issuance of a CUP. The Ninth Circuit held that defendant's denial of plaintiff's application for a CUP to build a temple where regular worship services would be held violated the substantial burden provision of RLUIPA.

Having concluded that GLS has satisfied one of RLUIPA's three jurisdictional requirements and having concluded that the ZBA's action constitutes a substantial burden on religious exercise, the next step is to determine whether or not the ZBA's action is "in furtherance of a compelling governmental interest." *Greater Bible Way, supra*, p 30 (slip op), quoting 42 USC 2000cc(a)(1)(A).

"[A] municipal body 'clearly has a compelling interest in enacting and enforcing fair and reasonable zoning regulations.'" *Greater Bible Way, supra*, p 31 (slip op) (quoting from *First Baptist Church of Perrine v Miami-Dade Co*, 768 So 2d 1114, 1118 (Fla App, 2000). "The compelling state interest . . . served by zoning regulation of land

use is promotion of health, safety, morals or general welfare." *Greater Bible Way, supra*, p 32 (slip op) (quoting from *Home Bldg Co v Kansas City*, 609 SW2d 168, 171 (Mo App, 1980). A court should defer to the zoning authorities and should overturn a zoning ordinance only if the ordinance is "arbitrary or capricious." *Greater Bible Way, supra*, p 33 (slip op).<sup>21</sup> "Arbitrary" means "founded on prejudice or preference rather than on reason or fact." Black's Law Dictionary (8<sup>th</sup> ed). "Capricious" means "contrary to the evidence or established rules of law." Black's Law Dictionary (8<sup>th</sup> ed).

The ZBA's action was premised on the ZBA's conclusion that the principal use of the proposed structure would not be public worship.<sup>22</sup> As this Court has previously noted, for the purposes of RLUIPA, the distinction between a principal use and an accessory use is irrelevant. The proposed structure would contain a sanctuary where worship services would be held on a regular basis. As our Court of Appeals has stated, if an otherwise commercial enterprise

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<sup>21</sup> *Greater Bible Way* does not indicate whether or not the "arbitrary or capricious" test applies both to facial challenges and to as applied challenges. GLS's challenge in the case at bar is an as applied challenge. This Court will assume without deciding that the arbitrary or capricious test applies both to facial challenges and to as applied challenges.

<sup>22</sup> Resolution, *supra*.

builds a chapel in one wing of a building, the chapel is protected by RLUIPA if the owner is sincere about its religious purpose; similarly, if religious services are conducted once a week in a building otherwise devoted to secular commerce, the religious services are protected by RLUIPA. See *Shepherd I, supra*, p 326.

Pursuant to *Greater Bible Way*, this Court must defer to a zoning authority such as the ZBA unless the zoning authority's action was arbitrary or capricious. A zoning authority's action is "capricious" if it is "contrary to established rules of law." Black's Law Dictionary, *supra*. The ZBA's action was premised on a distinction that is irrelevant for the purposes of RLUIPA. Therefore, the ZBA's action is capricious, since it is contrary to the rules of law established by Congress when Congress enacted RLUIPA. Because the ZBA's action is capricious, the ZBA's action was not in furtherance of a compelling governmental interest.

The next step in the Court's analysis would nominally be to determine whether or not the ZBA's action constituted the "least restrictive means" of furthering a compelling governmental interest. See *Greater Bible Way, supra*, p 35

(slip op), quoting from 42 USC 2000cc(a)(1)(B). However, having concluded that the ZBA's action was not in furtherance of a compelling governmental interest, the Court need not address whether the ZBA chose the least restrictive means available to further that interest.<sup>23</sup> Pursuant to MCR 2.116(C)(10), summary disposition is granted in favor of GLS to count IV of the 03 case and count IV of the 05 case.

Count V of the 03 case and count V of the 05 case allege violation of the "total exclusion/unreasonable limitation" provision of RLUIPA. 42 USC 2000cc(b) provides, in pertinent part: "(3) . . . No government shall impose or implement a land use regulation that . . . (B) unreasonably limits religious assemblies . . . or structures within a jurisdiction." The undisputed facts demonstrate that defendants have not implemented a land use regulation that unreasonably limits religious assemblies or structures in Georgetown Township. Pursuant to MCR 2.116(C)(8) and (C)(10), summary disposition is granted in favor of defendants to count V of the 03 case and count V

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<sup>23</sup> The record suggests that extending Royal Oak Court would satisfy the minimum lot width requirement of section 20.4(E)(2) of the Township's zoning ordinance. See letter of May 8, 2002 from Zoning Administrator Mannette Minier to Pastor John Cheetham. This would appear to be a means of accomplishing the goals of the Township's zoning ordinance that is less restrictive than the outright denial of GLS's application for a variance.

of the 05 case.

Count VI of the 03 case and count VI of the 05 case allege violation of the Free Exercise Clause of the First Amendment of the United States Constitution. The Free Exercise Clause provides: "Congress shall make no law . . . prohibiting the free exercise [of religion]." "The protections provided by the First Amendment, including the Free Exercise Clause, have been incorporated and extended to the states and to their political subdivisions by the Fourteenth Amendment." *Greater Bible Way, supra*, p 4 (slip op).

In enacting the land use provisions of RLUIPA, Congress was exercising its power under the Enforcement Clause of the Fourteenth Amendment.<sup>24</sup> *Cottonwood Christian, supra*, p 1221. RLUIPA merely codifies the decisions of the United States Supreme Court that extend the protection of the Free Exercise Clause to religious individuals and religious organizations who are subject to zoning regulations that involve individualized assessments. *Cottonwood Christian, supra*.

However, the Supreme Court has held that Congress may not, by means of legislation enacted under the Enforcement Clause, grant religious individuals and religious organizations greater rights than the Free Exercise Clause itself grants. See *Greater Bible Way, supra*, p 7 (slip op) (citing *City of Boerne v Flores*, 521 US 507; 117 S Ct 2157; 138 L Ed 2d 624 (1997)). Therefore, it logically follows that GLS's rights under the Free Exercise Clause are coextensive with GLS's rights under RLUIPA. Thus, pursuant to MCR 2.116(C)(8) and (C)(10), summary disposition is granted in favor of GLS to count VI of the 03 case and count VI of the 05 case.

Count VII of the 03 case and count VII of the 05 case allege violation of the Free Exercise Clause of the Michigan Constitution. Const 1963, Art I, section 4 provides, in pertinent part: "Every person shall be at liberty to worship God according to the dictates of his own conscience."

The Michigan Supreme Court has held that the Free Exercise Clause of the Michigan Constitution and the Free Exercise Clause of the Federal Constitution are subject to

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<sup>24</sup> The Enforcement Clause provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." US Const, Am XIV,

similar interpretation. See *Advisory Opinion re Constitutionality of 1970 PA 100*, 384 Mich 82, 105; 180 NW2d 265 (1970). Therefore, this Court's disposition of GLS's claim under the Free Exercise Clause of the Federal Constitution controls the Court's disposition of GLS's claim under the Free Exercise Clause of the Michigan Constitution. Pursuant to MCR 2.116(C)(10), summary disposition is granted in favor of GLS to count VII of the 03 case and count VII of the 05 case.

Count VIII of the 03 case and count VIII of the 05 case allege violation of the Free Speech Clause of the First Amendment of the United States Constitution. The Free Speech Clause provides: "Congress shall make no law . . . abridging the freedom of speech . . . ." US Const, Am I. In analyzing a claim under the Free Speech Clause, the first question is whether or not the conduct at issue may fairly be described as "expressive conduct." *Rumsfeld v FAIR, Inc*, 547 US 47; 126 S Ct 1297; 164 L Ed 2d 156, 175 (2006), citing *Texas v Johnson*, 491 US 397; 109 S Ct 2533; 105 L Ed 2d 342, 352 (1989). This Court finds that worship constitutes expressive conduct. The next question is whether the government's action regarding the expressive

conduct " . . . is related to the suppression of free expression." *Texas v Johnson, supra.*

This Court holds that the ZBA's action was not related to the suppression of free expression. The ZBA's action was related to the regulation of the use of real property. Therefore, the ZBA's action was not violative of the Free Speech Clause. Pursuant to MCR 2.116(C)(10), summary disposition is granted in favor of defendants to count VIII of the 03 case and count VIII of the 05 case.

Count IX of the 03 case and count IX of the 05 case alleges violation of the Free Speech Clause of the Michigan Constitution. Const 1963, art 1, section 5 provides, in pertinent part: ". . . no law shall be enacted to restrain or abridge the liberty of speech . . . ."

The Michigan Court of Appeals has held that the right of free speech under Michigan Constitution and the right of free speech under the Federal Constitution are "coterminous." *In re Contempt of Dudzinski (Grable v Brown)*, 257 Mich App 96, 100; 667 NW2d 68 (2003). Therefore, this Court's disposition of GLS's claim under the Free Speech Clause of the Federal Constitution controls

the Court's disposition of GLS's claim under the Free Speech Clause of the Michigan Constitution. Summary disposition is granted in favor of defendants to count IX of the 03 case and count IX of the 05 case.

Count X of the 03 case alleges violation of the Freedom of Assembly guaranteed by the United States Constitution. The First Amendment of the United States Constitution provides, in pertinent part: "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . . ." This Court holds that the facts in the case at bar do not support the contention that defendants have interfered with the Freedom of Assembly guaranteed by the United States Constitution. Pursuant to MCR 2.116(C)(8) and (C)(10), summary disposition is granted in favor of defendants to count X of the 03 case.

Count XI of the 03 case and count XI of the 05 case allege violation of the Freedom of Assembly guaranteed by the Michigan Constitution. Const 1963, art I, section 3, provides, in pertinent part: "The people have the right peaceably to assemble . . . ." This Court holds that the facts in the case at bar do not support the contention that defendants have interfered with the Freedom of Assembly

guaranteed by the Michigan Constitution. Pursuant to MCR 2.116(C)(8) and (C)(10), summary disposition is granted in favor of defendants to count XI of the 03 case and count XI of the 05 case.

Count X of the 05 case alleges violation of the Freedom of Association guaranteed by the United States Constitution. The First Amendment is the source of the Freedom of Association. *Dallas v Stanglin*, 405 US 19; 109 S Ct 1591; 104 L Ed 2d 18, 25 (1989). Though the text of the First Amendment contains no reference to such a freedom, the Supreme Court has held that, by implication, such a freedom exists under certain circumstances. *Dallas, supra*.

The United States Supreme Court ". . . has recognized a right to associate for the purpose of engaging in . . . the exercise of religion." *Dallas, supra* (quoting from *Roberts v United States Jaycees*, 468 US 609; 104 S Ct 3244; 82 L Ed 2d 462, 471 (1984). "An individual's freedom . . . to worship . . . could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward . . . [that end was] not also guaranteed." *Roberts, supra*, p 474 L Ed 2d.

"Consequently, we have long understood as implicit in the . . . the First Amendment a . . . right to associate with others in pursuit of . . . religious . . . ends." *Roberts, supra.*

The right to associate with others in pursuit of religious ends is not absolute. *Roberts, supra*, p 475 L Ed 2d. Limitations thereon imposed by the State " . . . may be justified by regulations adopted to serve compelling state interests" if those interests " . . . cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts, supra.*

As a result of the ZBA's action, members of GLS are unable to associate with others in pursuit of religious ends. Therefore, this Court holds that the ZBA's action is violative of the Freedom of Association. This Court has already held that the ZBA's action was not taken in furtherance of a compelling governmental interest. Therefore, pursuant to MCR 2.116(C)(10), summary disposition is granted in favor of GLS to count X of the 05 case.

Count XII of the 03 case and count XII of the 05 case

allege violation of the Equal Protection Clause of the United States Constitution. US Const, Am XIV, section 1 provides, in pertinent part: ". . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

"A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Shepherd I, supra*, p 334 (quoting from *Wisconsin v Yoder*, 406 US 205, 220; 92 S Ct 1526; 32 L Ed 2d 15 (1972)). If a zoning ordinance, as applied, encroaches on the free exercise of religion, the governmental body must show that the ordinance was necessary to promote a compelling governmental interest and that the governmental body chose the least restrictive means of achieving this interest. *Shepherd I, supra*, pp 334-335.

This Court has already held that the ZBA's action encroaches on GLS's free exercise of religion. The Court has also held that the ZBA's action was not taken in furtherance of a compelling governmental interest. Therefore, pursuant to MCR 2.116(C)(10), summary

disposition is granted in favor of GLS to count XII of the 03 case and count XII of the 05 case.

Count XIII of the 03 case and count XIII of the 05 case allege violation of the Equal Protection Clause of the Michigan Constitution. Const 1963, Art I, section 2 provides, in pertinent part: "No person shall be denied the equal protection of the laws . . . ." The protections afforded by the Equal Protection Clause of the Michigan Constitution and the Equal Protection Clause of the United States Constitution are "coextensive." *Shepherd I, supra*, p 334. Therefore, this Court's disposition of GLS's claim under the Equal Protection Clause of the Federal Constitution controls the Court's disposition of GLS's claim under the Equal Protection Clause of the Michigan Constitution. Pursuant to MCR 2.116(C)(10), summary disposition is granted in favor of GLS to count XIII of the 03 case and count XIII of the 05 case.

Count XIV of the 03 case and count XIV of the 05 case allege violation of the Due Process Clause of the United States Constitution. US Const, Am 14, section 1 provides that a State shall not " . . . deprive any person of life, liberty, or property, without due process of law." The

United States Supreme Court has held that there are two components to the Due Process Clause: "procedural due process" and "substantive due process." *Town of Castle Rock v Gonzales*, 545 US 748; 125 S Ct 2796; 162 L Ed 2d 658, 668 (2005).

The procedural due process component of the Fourteenth Amendment imposes three requirements on a state: (1) adequate and timely notice; (2) the opportunity to be heard; and (3) a neutral and detached decisionmaker. *Hamdi v Rumsfeld*, 542 US 507; 124 S Ct 2633; 159 L Ed 2d 578, 601-602 (2004). The extensive record in the case at bar amply demonstrates that defendants have satisfied each of the three elements of the procedural due process component of the Fourteenth Amendment.

Turning to the substantive due process component, the Supreme Court has held that the Due Process Clause ". . . guarantees more than fair process." *County of Sacramento v Lewis*, 523 US 833; 118 S Ct 1708; 140 L Ed 2d 1043, 1053 (1998). The Court has held that the Due Process Clause embodies a ". . . substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them." *County of*

*Sacramento, supra*, quoting from *Daniels v Williams*, 474 US 327, 331; 106 S Ct 662; 88 L Ed 2d 662 (1986).

A claim in substantive due process may be brought to prevent governmental officials " . . . from abusing their power, or employing it as an instrument of oppression." *County of Sacramento, supra*, p 1054 L Ed 2d. An action in substantive due process is directed at an abuse of power that is so "clearly unjustified" by any legitimate government objective "as to be barred by the Fourteenth Amendment." *County of Sacramento, supra*. The test is whether or not the challenged governmental action shocks the conscience of the court "in a constitutional sense." *County of Sacramento, supra*, pp 1057-1058 (quoting from *Collins v Harker Heights*, 503 US 115, 128; 112 S Ct 1061; 117 L Ed 2d 261 (1992)).

However: the Supreme Court has " . . . always been reluctant to expand the concept of substantive due process." *County of Sacramento, supra*, p 1055 L Ed 2d (quoting from *Collins, supra*, p 117 US). "Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more

generalized notion of substantive due process, must be the guide for analyzing these claims." *County of Sacramento*, supra (quoting from *Albright v Oliver*, 510 US 266, 273; 114 S Ct 807; 127 L Ed 2d 114 (1994)).

In the case at bar, the First Amendment- specifically, the Free Exercise Clause- provides an "explicit textual source" of constitutional protection against the ZBA's action. Therefore, pursuant to *County of Sacramento* and *Albright*, the First Amendment, not the more generalized notion of substantive due process, must be the source for analyzing GLS's claims. Pursuant to MCR 2.116(C)(10), summary disposition is granted in favor of defendants to count XIV of the 03 case and count XIV of the 05 case- both as to GLS's procedural due process claims and as to GLS's substantive due process claims.

Count XV of the 03 case and count XV of the 05 case allege violation of the Due Process Clause of the Michigan Constitution. Const 1963, art I, section 17 provides, in pertinent part: "No person . . . shall . . . be deprived of life, liberty, or property, without due process of law."

"Michigan's due process guarantee provides no greater

protection than does the federal due process guarantee." *People v Conat*, 238 Mich App 134, 157; 605 NW2d 49 (1999). Therefore, this Court's disposition of GLS's claim under the Due Process Clause of the Federal Constitution controls the Court's disposition of GLS's claim under the Due Process Clause of the Michigan Constitution. Pursuant to MCR 2.116(C)(10), summary disposition is granted in favor of defendants to count XV of the 03 case and count XV of the 05 case.

Count XVI of the 03 case and count XVI of the 05 case allege a claim in superintending control. The filing of a complaint for superintending control " . . . is an original civil action designed to order a lower court to perform a legal duty." *Shepherd I, supra*, pp 346-347 (emphasis added). "[I]f a plaintiff has a legal remedy by way of an appeal, the court may not exercise superintending control and must dismiss the complaint." *Shepherd I, supra*, p 347.

The ZBA is not a "court." Therefore, GLS has failed to state a claim on which relief can be granted in superintending control. Furthermore, GLS has a legal remedy in the form of an appeal to circuit court. GLS pursued this remedy and the Court has disposed of GLS's

appeal. Pursuant to MCR 2.116(C)(8), summary disposition is granted in favor of defendants to count XVI of the 03 case and count XVI of the 05 case.

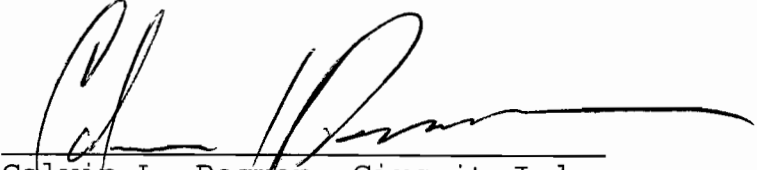
As to the 03 case: summary disposition is granted in favor of GLS to: count IV (RLUIPA- substantial burden); count VI (US Const- Free Exercise); count VII (Const 1963- Free Exercise); count XII (US Const- Equal Protection); and count XIII (Const 1963- Equal Protection). Summary disposition is granted in favor of defendants to: count II (RLUIPA- nondiscrimination); count III (RLUIPA- equal terms); count V (RLUIPA- total exclusion/unreasonable limitation); count VIII (US Const- Free Speech); count IX (Const 1963- Free Speech); count X (US Const- Freedom of Assembly); count XI (Const 1963- Freedom of Assembly); count XIV (US Const- Due Process); count XV (Const 1963- Due Process); and XVI (Superintending Control).

As to the 05 case: summary disposition is granted in favor of GLS to: count IV (RLUIPA- substantial burden); count VI (US Const- Free Exercise); count VII (Const 1963- Free Exercise); count X (US Const- Freedom of Association); count XII (US Const- Equal Protection); and count XIII (Const 1963- Equal Protection). Summary disposition is

granted in favor of defendants to: count II (RLUIIPA-nondiscrimination); count III (RLUIIPA- equal terms); count V (RLUIIPA- total exclusion/unreasonable limitation); count VIII (US Const- Free Speech); count IX (Const 1963- Free Speech); count XI (Const 1963- Freedom of Assembly); count XIV (US Const- Due Process); count XV (Const 1963- Due Process); and count XVI (Superintending Control).

*It is so ordered.*

Dated: July 25, 2007

  
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Calvin L. Bosman, Circuit Judge