

**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

**PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT**

**TO THE HONORABLE UNITED STATES DISTRICT JUDGE:**

Plaintiff, Castle Hills First Baptist Church (the “Church”), files this Motion for Summary Judgment pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure and, in support hereof, respectfully shows the following:

**STATEMENT OF THE CASE**

This Motion accompanies Plaintiff’s Response to Defendant’s Motion for Summary Judgment (“the Response”), incorporates the arguments made therein in support of this Motion in order to avoid unnecessary repetition or duplication, and is further supported by the Appendix, including Statement of Facts, affidavits, deposition excerpts, and other documents attached thereto, filed herewith pursuant to Local Rule CV-7(b) and incorporated herein for all purposes.

As discussed at length in the Response and Appendix, Defendant, City of Castle Hills (the “City”), has abused its power to regulate land use in order to wage an ongoing war against Castle Hills First Baptist Church.<sup>1</sup> The City has repeatedly denied the Church’s applications for use of its

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<sup>1</sup> Typical of the City’s view of the Church is its description of it as a “cancer.” Defendants’ Motion for Partial Summary Judgment [“Def. Motion.”] at 7-8.

property as a necessary parking lot facility for its members, refused to even accept applications for the Church's use of its own structure for religious activities, passed laws targeting the Church's growth and use of its property for church purposes, harassed Church members, and otherwise used every means in its power to prevent the Church from fully exercising its fundamental First Amendment rights.

This case is about a Church's basic rights to survive, use its property for religious purposes and grow in the City of Castle Hills. Local governments may not burden a church's religious exercise by using seemingly innocent denials of land use permits. Nor may they discriminate against religious uses of land. Nor may they act arbitrarily without any reasonable justification. *See* Response §§ A-B.

The City's official anti-Church policy is repugnant to the Constitutions of Texas and the United States and violates the federal 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"). While Defendant may attempt to dispute facts pled in Plaintiff's Complaint, this Motion, the Response and the supporting summary judgment and documentary proof set forth and attached to the Appendix establish certain issues for which there exist no disputed material facts and, thus, for which adjudication is appropriate. Plaintiff moves this Court to grant the Church summary judgment on these issues.

#### **SUMMARY OF THE GROUNDS FOR SUMMARY JUDGMENT**

The Church seeks summary judgment in its favor on the following grounds and issues:

1. The Appropriate Standard of Review for Free Exercise Claims Is Strict Scrutiny.

The determination of the proper level of scrutiny under these constitutional and statutory provisions is a purely legal one. For any of seven independent and sufficient reasons, described

*infra*, the appropriate level of judicial review for discretionary land use regulation that substantially burdens religious exercise is strict scrutiny.

2. Defendant’s Denial of an Adequate Parking Facility Constitutes a Substantial Burden on the Church’s Religious Exercise. As discussed below, while Defendant may attempt to gainsay the Church’s own beliefs about its current and future religious mission, the courts are unanimous in holding that lack of adequate parking adversely affects worship and other religious activity, and may constitute a substantial burden on the Church’s religious exercise. This Court should rule that, based on the summary judgment evidence herein, Defendant’s denial of adequate parking facilities substantially interferes with religious worship by preventing current and future church growth and, therefore, substantially burdens religious exercise. Plaintiff has established herein that its religious exercise is, in fact, substantially burdened, and that Defendant has no justification for imposing such a burden. Accordingly, summary judgment is proper even at this stage of the proceedings.

3. Plaintiff Is Entitled to Summary Judgment on Its Claim That the City’s Refusal to Permit the Church to Use Its Fourth Floor Constitutes a Substantial Burden on the Church’s Religious Exercise. Defendant has not meaningfully disputed the Church’s need to use the Fourth Floor of its Victory Building for purposes of its religious Student Ministry. It is also undisputed that the City has repeatedly forbidden that use. As there is no genuine issue of material fact, summary judgment is appropriate at this stage as to whether the City’s denial of that use substantially burdens religious exercise.

4. Defendant’s Asserted Interests Fail to Reach the Level of a “Compelling Governmental Interest.” Defendant’s only allegedly compelling interest<sup>2</sup>—maintaining the

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<sup>2</sup> The Church also claims that this and other asserted “governmental interests” are, as a matter of fact, pretextual, but does not seek summary determination of these claims at this time.

alleged “rural” character of the alleged neighborhood—fails as a matter of law. Such aesthetic interests have been held by the Supreme Court, and every lower court that has examined this issue, *not* to reach the level of a “compelling governmental interest.”

5. If the City Can Address Any of Its Asserted Concerns Through the Special Use Permit Process, Denial of a Permit Is Not the Means “Least Restrictive” on Religious Exercise. Defendant’s ordinances clearly provide for a permitting system which allows the City Council to attach conditions to Special Use Permits in order to alleviate any potential impacts of a project. By refusing to do so, *even if the City had a compelling interest*, it has violated the Church’s constitutional rights by not using a means that is least restrictive of religious exercise.

## ARGUMENT

### I. THE APPROPRIATE STANDARD OF REVIEW FOR THE CHURCH’S FREE EXERCISE CLAIMS IS STRICT SCRUTINY.

Defendant’s actions in prohibiting the Church’s use of its vacant South Winston properties and its Fourth Floor are subject to strict scrutiny review for several reasons: (1) Defendant’s actions took place within a system of “individualized assessments”; (2) Defendant’s actions were not “neutral” toward religion in general and this Church in particular; (3) this case involves a situation of “hybrid rights”, namely: free exercise rights coupled with free speech, freedom of association, and property rights; (4) the Fifth Circuit and the Texas Supreme Court have both required the application of the strict scrutiny standard in Free Exercise challenges to land use laws; (5) the Texas Constitution mandates strict scrutiny review; (6) RLUIPA’s text requires it; and (7) the Texas RFRA requires it.<sup>3</sup>

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<sup>3</sup> Furthermore, in any case involving Free Speech interests—even if free exercise of religion implications were not at issue—when “a community’s zoning plan infringes upon First Amendment rights, its validity becomes subject to greater concern. Zoning laws which implicate First Amendment considerations must be narrowly drawn in furtherance of a substantial governmental interest. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68, 101 S. Ct. 2176, 2182, 68 L.Ed.2d 671 (1981).” *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074, 1079 (5<sup>th</sup> Cir. 1986).

A. *Because the City has Burdened the Church’s Religious Exercise Pursuant to a System of “Individualized Assessments,” Its Regulation Is Not “Generally Applicable” Under Employment Division v. Smith.*

Defendant appears to acknowledge that the strict scrutiny test is applicable to governmental action that burdens religious exercise. *See* Def. Motion at 27 (acknowledging that substantial burdens on religious exercise must “satisfy the compelling interest/least restrictive means test”); *id.* 32-35 (“This Court should hold that neighborhood preservation is a compelling governmental interest, . . .”). However, elsewhere in its brief, Defendant appears to suggest that such a deprivation of First Amendment rights might only be subject to rational basis review. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that a law that was either not “neutral” or not “generally applicable” remained subject to strict scrutiny under the Free Exercise Clause, upholding previous Supreme Court cases in which strict scrutiny was applied to a law that entailed individualized assessments.<sup>4</sup> *Id.* at 885; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (“A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.”) (internal citations omitted).

The Fifth Circuit has recognized this limitation. *Flores v. City of Boerne*, 73 F.3d 1352, 1355 (5<sup>th</sup> Cir. 1996) (“[*Smith*] held that the First Amendment’s Free Exercise Clause does not bar application of a facially neutral, generally applicable law to religiously motivated conduct.”), *rev’d on other grounds*, 521 U.S. 507 (1997). The Northern District of Texas has eloquently described the continued vitality of the strict scrutiny standard under the Free Exercise Clause:

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Thus, even absent the Free Exercise Clauses of the federal and state constitutions, RLUIPA and the Texas RFRA, heightened scrutiny would still be required.

<sup>4</sup> *Smith*, of course, also held that a law that is neutral and of general applicability—such as the general criminal drug prohibition at issue in *Smith*—need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.

A finding that *Smith* is generally applicable to every free exercise challenge, whether in the civil or criminal context, would be a gross aberration from decades of established Supreme Court precedent in the First Amendment arena. See *Bowen v. Roy*, 476 U.S. 693, 728, 106 S. Ct. 2147, 2167, 90 L. Ed. 2d 735 (1986) (O'Connor, J., concurring in part and dissenting in part); *United States v. Lee*, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982); *Thomas v. Review Board*, 450 U.S. 707, 719, 101 S. Ct. 1425, 1432, 67 L. Ed. 2d 624 (1981); *Yoder*, 406 U.S. at 221, 92 S. Ct. at 1536; *Gillette v. United States*, 401 U.S. 437, 91 S. Ct. 828, 28 L. Ed. 2d 168 (1971); *Sherbert v. Verner*, 374 U.S. 398, 402-02, 83 S. Ct. 1790, 1792-93, 10 L. Ed. 2d 965 (1963). Moreover, it would represent the erosion, if not the absolute obliteration, of one of the most basic principles our Founders, recently freed from the oppression of European government, sought to establish through the Bill of Rights—the free exercise of religion as a fundamental right of the new American democracy.

*Alabama and Coushatta Tribes of Texas v. Trustees of Big Sandy Independent School Dist.*, 817 F. Supp. 1319, 1331-32 (E.D. Tex. 1993) (footnotes omitted).

This District itself has applied this principle in the context of a school testing policy. In *Hubbard By and Through Hubbard v. Buffalo Indep. Sch. Dist.*, 20 F. Supp. 2d 1012, 1015 (W.D. Tex. 1998), the Court rejected a free exercise challenge to the policy because it was “not disputed that BISD’s policy applies ‘across the board.’ That is, the policy applies to all students without regard to the nature of their prior education.” Impliedly, if the policy made certain exemptions for various reasons, such a policy would not be “generally applicable.”

It is patently obvious that land use decisions, such as denial of a permit, nearly always involve individualized, subjective judgments by local government officials. This process is extremely discretionary and fact-specific:

No one contests that zoning ordinances must by their nature impose individual assessment regimes. That is to say, land use regulations through zoning codes necessarily involve case-by-case evaluations of the propriety of proposed activity against extant land use regulations. They are, therefore, of necessity different from laws of general applicability which do not admit to exceptions on Free Exercise grounds.

*Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857, 868 (E.D. Pa., 2002).

There is no better example of this than in the case at bar, where Defendant’s hostility towards

Plaintiff prompted the City to abuse its discretion and stymie the Church's growth at every possible opportunity. Defendant chose to apply a subjective law in a subjective manner, singling out the Church for special disfavor.<sup>5</sup> Plaintiff's Response demonstrates endless examples of arbitrary, irrational, and hostile actions taken by the City against the Church. Such a regulatory scheme is a far cry from the across-the-board drug prohibition at issue in *Smith*.

Courts addressing this question in the land use context agree. In addition to *Freedom Baptist Church, supra*, several other federal district courts have ruled that land use decisions are made pursuant to a system of individualized assessments and, thus, are not "generally applicable." The District of Maryland held that holding that enforcement of a historic preservation ordinance was not neutral and generally applicable:

Clearly, Cumberland's Historic Preservation Ordinance is significantly different from the "across-the-board criminal prohibition on a particular form of conduct" sustained in *Smith II*. Rather, like the unemployment compensation programs at issue in *Sherbert, Thomas* and *Hobbie*, the ordinance "has in place a system of individual exemptions." *Smith II*, . . . . *Smith II* recognized that where the government enacts a system of exemptions, and thereby acknowledges that its interest in enforcement is not paramount, then the government "may not refuse to extend that system [of exemptions] to cases of 'religious hardship' without compelling reason." 494 U.S. at 884, 110 S.Ct. at 1603 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)). Accordingly, the City's zoning regulation is not entitled to enforcement under the principles set forth in *Smith II*. 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." *Church of Lukumi Babalu Aye*, 508 U.S. at 546.

*Keeler v. Mayor & City of Cumberland*, 940 F. Supp. 879, 886 (D. Md. 1996) (emphasis added).

In a lengthy discussion of the interaction between the Free Exercise Clause and land use regulation, the Central District of California very recently reached the same conclusion:

Even in the absence of RLUIPA, a strict scrutiny standard of review is appropriate in this case under the Free Exercise Clause, U.S. Const. amend. I. Although *Smith*

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<sup>5</sup> Although a conclusion that land use regulation involves individualized assessments is inevitable, the burden is on the Defendant to prove otherwise. See *Fifth Ave. Presbyterian Church v. City of New York*, 293 F. 3d 570, 576 (2d Cir. 2002) ("[T]he City has not sufficiently shown the existence of a relevant law or policy that is neutral and of general applicability, . . .").

determined that there was no violation of the Establishment Clause when a government seeks to enforce a law of general applicability, it left undisturbed the application of a strict scrutiny test to situations where there are “individualized governmental assessment[s].” 494 U.S. at 884, 110 S. Ct. at 1603. Cases before and after *Smith* have continued to apply a strict scrutiny test to such individualized assessment questions. *E.g.*, *Christian Gospel Church, Inc. v. City and County of San Francisco*, 896 F.2d 1221, 1224 (9th Cir. 1990) (pre-*Smith* case applying strict scrutiny to land-use decisions); *First Covenant Church of Seattle v. City of Seattle*, 120 Wash.2d 203, 840 P.2d 174, 180 (1992) (post-*Smith* case applying strict scrutiny to historical landmark decision); *Peterson v. Minidoka County School Dist. No. 331*, 118 F.3d 1351 (9th Cir.1997) (post-*Smith* case applying strict scrutiny for individualized assessments in government personnel decisions).

No one contests that zoning ordinances must by their nature impose individual assessment regimes. That is to say, land use regulations through zoning codes necessarily involve case-by-case evaluations of the propriety of proposed activity against extant land use regulations. They are, therefore, of necessity different from laws of general applicability which do not admit to exceptions on Free Exercise grounds. *Freedom Baptist Church*, 204 F.Supp.2d at 868. Defendants' land-use decisions here are not generally applicable laws. Just like the historical landmarking decisions at issue in *First Covenant Church of Seattle*, the City's refusal to grant Cottonwood's application for a CUP “invite [s] individualized assessments of the subject property and the owner's use of such property, and contain mechanisms for individualized exceptions.” 840 P.2d at 181. Even the . . . Defendants' efforts to condemn the land are individualized assessments. By condemning the Cottonwood Property, the Redevelopment Agency had to come to the decision that the Cottonwood Property was blighted, that the Walker/Katella Retail Project was consistent with the Specific Plan and the LART plan, and that condemning the land was the only solution.

*Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1222-23 (C.D. Cal. 2002) (emphasis added). And even more recently, the District of Hawaii agreed:

It is also apparent, then, that (1) Haw. Rev. Stat. § 205-6, which provides for special use permits for “unusual and reasonable” uses, and (2) Haw. Admin. R. § 15-15-95(b), which defines “unusual and reasonable,” allow for exemptions from the permitted uses in Haw. Rev. Stat. § 205-4.5 on an individualized basis. The provisions are a system of “individualized exemptions” to which strict scrutiny applies. *Smith*, 494 U.S. at 884; *Hialeah*, 508 U.S. at 537. Maui County may not deny a special use permit to Plaintiffs to operate a church if doing so imposes a “substantial burden” on Plaintiffs' free exercise of religion, unless the County demonstrates a compelling interest and denying the permit would be the least restrictive means of reaching that goal.

Regardless of RLUIPA, then, the substantive test before the Court is strict scrutiny. Has the County's denial of the special use permit “substantially burdened”

Plaintiffs' free exercise of religion? If so, has the County demonstrated a "compelling" interest and that the denial is the "least restrictive means" for meeting that interest?

*Hale O Kaula v. Maui Planning Comm'n*, \_\_\_ F. Supp. 2d \_\_\_, 2002 WL 31455083 at \*12-13 (D. Haw. Oct. 24, 2002) (emphasis added). *See also Cam v. Marion County*, 987 F. Supp. 854, 861-62 (D. Or. 1997) (holding that a zoning scheme was not neutral and generally applicable); *Alpine Christian Fellowship v. County Comm'rs of Pitkin Cy.*, 870 F. Supp. 991 (D. Colo. 1994) ("To justify imposing such a burden on religion, the County must show some 'compelling state interest.' Because this is an individualized question, the state interests which justify zoning codes in general are not applicable. The more narrow focus here is whether the reasons given for denial of this special permit application can be characterized as compelling governmental interests."). Several state courts have also agreed. *See First Covenant Church v. Seattle*, 840 P.2d 174, 218 (Wash. 1992) ("City's preservation ordinances . . . are 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.").

The law at issue here is no different. Defendant admits, as it must, that the actions it took occurred in a system of individualized assessments. *See, e.g.*, Def. Motion at 2 ("This application was denied on July 13, 1999 after several hearings." (emphasis added)). Councilmember Helen Glass stated that she voted to deny the permit based on her assessment that the Church did not "immediately need" the parking lot.<sup>6</sup> Glass Depo. 31:5-9, Ex. 47" to Prince Aff., Ex. "L" to App. ("Q: . . . [D]o you believe that the need for a parking lot is a factor in your decision whether to vote for or against an application for one? A: I think it has a

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<sup>6</sup> This assessment, of course, is not a proper factor to be used in determining whether a special use permit should be granted. *See, e.g.*, Seyfarth Depo. 13:7-18, Ex. "46" to Prince Aff.; Buie Depo. 17:11-18:9, Ex. "49" to Prince Aff. However, the fact that Ms. Glass made it so demonstrates both the hostility to this Church and the fact that such hostility came in the form of an individualized assessment, not a law of general applicability.

great deal.”); Glass Aff. ¶ 6, attached to Def. Motion as Tab “1” (“The Church failed to convince me that they had an immediate need . . .”).

Accordingly, because the Special Use Permit process is extremely discretionary, fact-specific and involves individualized assessments, strict scrutiny is applicable to Defendant’s actions.

B. *Because the City Has Discriminated Against the Church, Its Regulation is Not “Neutral” Under Employment Division v. Smith.*

As described in great detail in Plaintiff’s Response, Defendant’s laws and actions are also not “neutral” within the meaning of *Employment Division v. Smith*, because they have been applied in a discriminatory fashion against the Church. *See* Response, § A.

Even where a law is facially neutral, this Court has recognized *Smith’s* principle of non-neutrality in an as-applied context:

Clearly, as the Tribe argues, even a facially neutral law may not withstand scrutiny if interpreted or applied in a discriminatory manner. But the intrusion caused by application of article 49 equally affects those of other faiths, as well as the recently bereaved who profess no faith at all but would still be deeply disturbed by the autopsy or disinterment of a loved one. The Tribe has presented absolutely no evidence that Chacon’s decision to order an autopsy was motivated by the decedent’s or her family members’ adherence to the Tribe’s particular religious beliefs. Rather, it was based on Chacon’s perception, right or wrong, that there was insufficient evidence upon which she could determine cause of death.

*Kickapoo Traditional Tribe of Texas v. Chacon*, 46 F. Supp. 2d 644, 653-54 (W.D. Tex. 1999) (citations omitted). Unlike *Kickapoo Traditional Tribe*, however, Defendant’s actions here were specifically targeted toward this Church, rather than being “neutral laws of general applicability” that may be subject only to rational basis review under *Smith*. In fact, not only were permits denied for less-than-compelling (or even less-than-rational) reasons, but the Defendant passed an Ordinance and a Resolution specifically targeting Castle Hills First Baptist Church:

Q: Why was [Resolution 0007-01] passed?

A: Well, it was The Church who said they needed more parking spaces.  
 . . . .  
 A: Well, it's—it's when The Church came and bought the homes, which I did not know about until after it was done.  
 . . . .  
 Q: Do you remember why [Ordinance No. 884] was passed?  
 A: Well, I think that—just The Church had, you know, come back to the City to ask for the variance.  
 Q: Okay. So it was generally passed because of the situation involving the Church?  
 A: Uh-huh.

Glass Depo. 11:3-15:15. See City of Castle Hills Ordinance No. 884 (attached to Defendant's Motion as Tab "18"); City of Castle Hills Resolution No. 0007-01 (attached to Defendant's Motion as Tab "21"). These laws and actions can hardly be described as neutral, across-the-board prohibitions made without reference to religion. Strict scrutiny thus applies because the City's actions lack neutrality.

C. *Because the City's Regulation Implicates What the Supreme Court Has Termed "Hybrid Rights," It Is Subject to Strict Scrutiny.*

Strict scrutiny is also appropriate because this case involves a situation of "hybrid rights": Plaintiff has asserted a Free Exercise claim in conjunction with other constitutional claims. In *Smith, supra*, the Supreme Court held:

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 constitutional protections, such as *freedom of speech* and of the press. . . . And it is easy to envision a case in which a challenge on *freedom of association* grounds would likewise be reinforced by Free Exercise Clause concerns.

*Id.* at 881-882 (emphasis added). As in this case, many of the cases cited in *Smith, supra*, involved restrictions on the right to freely express religious convictions. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Follett v. McCormick*, 321 U.S. 573 (1944).

The Fifth Circuit quickly adopted this standard. *See Society of Separationists v. Herman*, 939 F.2d 1207, 1217 (5<sup>th</sup> Cir. 1991) (“Thus, *Smith* specifically excepts religion-plus-speech cases from the sweep of its holding.”). *See also Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 293 n.7 (5<sup>th</sup> Cir. 2001) (“The ‘hybrid-rights’ argument is based on the Supreme Court’s language in *Smith*, which recognized that a heightened standard of review may be required when a Free Exercise Clause claim is combined with another constitutional protection such as free expression or parental rights. *See Smith*, 494 U.S. at 881, 110 S. Ct. 1595”). The Eastern District of Texas held that a school district’s hair length policy violated students’ free exercise rights because it implicated hybrid rights. *Alabama and Coushatta Tribes of Texas v. Trustees of Big Sandy Independent School Dist.*, 817 F. Supp. 1319 (E.D. Tex. 1993) (holding that because plaintiffs alleged violations of their free speech, due process, and equal protection rights as well as their free exercise rights, strict scrutiny was applicable). *See also Hubbard By and Through Hubbard v. Buffalo Indep. Sch. Dist.*, 20 F. Supp. 2d 1012, 1015 (W.D. Tex. 1998) (recognizing hybrid rights analysis).

Other courts have applied this doctrine in the zoning context. *See First United Methodist Church of Seattle v. Hearing Examiner for Seattle Landmarks Pres. Bd.*, 916 P.2d 374 (Wash. 1996) (free exercise and free speech); *First Covenant Church of Seattle*, *supra* (free exercise and free speech); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 473 (8th Cir. 1991) (“Our reversal of the summary judgment orders [on the Church’s free speech, freedom of association, and equal protection claims] breathes life back into the Church’s ‘hybrid rights’ claim; thus, the district court should consider this claim on remand.”). In *First Covenant Church*, *supra*, the Washington Supreme Court determined that a church challenging Seattle’s Landmarks Preservation Ordinance presented such a hybrid situation. There, the church’s claim

was “hybrid” because the church building was used to “express Christian belief and message.” The other constitutional rights violated by Defendant here—property rights and the right to freedom of expression and freedom of association—satisfy this requirement. Being unable to use and operate all of its facilities (e.g., Fourth Floor) and have adequate parking affects a congregation’s ability to worship together and receive spiritual instruction. Plaintiff’s claim thus involves “hybrid rights” triggering strict scrutiny.

D. *The Fifth Circuit, the Texas Supreme Court and Other Courts Have Applied Strict Scrutiny Review to Land Use Regulation That Burdens Religious Exercise.*

In the seminal case of *Islamic Center of Mississippi v. City of Starkville*, the Fifth Circuit held that denial of a religious organization’s application for an “exception” to operate a place of worship was an impermissible burden of exercise of religion. In facts strikingly similar to the case at bar, the Court based its opinion on the fact that the City’s decision would create too much of a transportation burden on the religious group:

Regulatory statutes or ordinances that affect religious activity are constitutional so long as they impose no undue burden on the ability of the church or its members to carry out the observances of their faith. The district court’s opinion and the City’s brief both suggest that application of the zoning ordinance to the Islamic Center 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. The suggestion is reminiscent of Anatole France’s comment on the majestic equality of the law that forbids all men, the rich as well as the poor, to sleep under bridges, to beg in the streets, and to steal bread. 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. 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. By making a mosque relatively inaccessible within the city limits to Muslims who lack automobile transportation, the City burdens their exercise of their religion.

840 F.2d 294, 298-99 (5<sup>th</sup> Cir. 1988) (footnotes omitted). The Court applied the strict scrutiny test to such a burden. *Id.* at 299 (“Once it has been established that an ordinance burdens religious exercise, however, the government must offer evidence of an overriding interest to

justify its application of the ordinance.”) (citing *Yoder, Sherbert*). Given the obvious similarity between *Islamic Center* and the case at bar, it is evident that strict scrutiny is applicable here as well.

The Texas Supreme Court has also refused to permit a city to use its zoning power to exclude church uses:

With this conclusion all the available authorities seem to agree. It must not be overlooked that 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, and to relegate them to business and manufacturing districts could conceivably result in imposing a burden upon the free right to worship and, in some instances, in prohibiting altogether the exercise of that right. An ordinance fraught with that danger will not be enforced.

*City of Sherman v. Sims*, 183 S.W.2d 415, 416-17 (Tex. 1944). This reasoning applies with equal force to the case at bar. Further, in examining whether a requirement that church-run child-care centers could be regulated by the state, the same Court held that the strict scrutiny test was the appropriate standard of review. *State v. Corpus Christi People’s Baptist Church*, 683 S.W.2d 692, 696 (Tex. 1985) (analyzing substantial burden, compelling state purpose, and least restrictive means).

E. *The Texas Constitution Mandates Strict Scrutiny Review of Regulation that Substantially Burdens Religious Exercise.*

“The Texas Constitution grants greater religious freedom than is provided for in the United States Constitution.” *Howell v. State*, 723 S.W.2d 755 (Tex. App.--Texarkana 1986, no writ). In interpreting the Texas Constitution, Texas state courts rely “heavily on the literal text” and its “plain language.” *Republican Party v. Dietz*, 940 S.W.2d 86, 89 (Tex. 1997); *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148 (Tex. 1995); *Davenport v. Garcia*, 834 S.W.2d 4, 19 (Tex. 1992); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989); *Mellon Serv. Co. v.*

*Touche Ross & Co.*, 946 S.W.2d 862, 867 (Tex. App.--Houston [14th Dist.] 1997, no writ). The Court may also consider historical context and original intent, if these can be determined, and the interpretation of analogous provisions by other jurisdictions. *City of Sherman v. Henry*, 928 S.W.2d 464, 472 (Tex. 1996); *Edgewood*, 777 S.W.2d at 394.

The text of the Freedom of Worship Clause is far more detailed and uncompromising than the federal Free Exercise Clause:

*All men have a natural and infeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.*

Tex. Const. art. I, §6 (emphasis added). Defendant desperately argues that the Church's right to worship is indeed "defeasible," through the application of zoning laws, despite the constitutional text. Defendant also claims that human authority may indeed "control and interfere with the rights of conscience in matters of religion" in cases involving religious land use, despite the constitutional ban on interfering "in any case whatever." Defendant's arguments are flawed. The Texas Constitution's textually absolute constitutional right to "worship Almighty God according to the dictates of their own consciences" must remain as nearly absolute as possible, overridden only for truly compelling reasons.

The appropriate standard of review under the Texas Constitution is the compelling interest test.<sup>7</sup> See *Tilton v. Marshall*, 925 S.W.2d 672, 678 (Tex. 1996) ("government must show to the court that granting the [religious] exemption [from burdensome regulation] would significantly hinder a compelling state interest"); *State v. Corpus Christi People's Baptist Church, Inc.*, 683

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<sup>7</sup> Obviously, the Supreme Court's decision in *Employment Division v. Smith*, dealing with interpretation of the **federal** Free Exercise Clause, says absolutely nothing about the **Texas** provision.

S.W.2d 692, 696 (Tex. 1984) (“if the complaining party demonstrates that it is burdened by the regulation, then the State must have a compelling state purpose for the laws”). Each of these decisions interpreted federal law as it then stood; both referred to the Freedom of Worship Clause without indicating that it provided any less protection. To similar effect, but explicitly interpreting the Freedom of Worship Clause, is *Howell v. State*, 723 S.W.2d 755 (Tex. App.--Texarkana 1986, no writ):

If a group of parents showed that the exercise of their religious beliefs was substantially burdened . . . , the State would then be required to show a compelling State interest behind the regulation and the lack of a less restrictive, alternative means of meeting that State interest . . . .

*Id.* at 758. See also *City of New Braunfels v. Waldschmidt*, 207 S.W. 303, 304 (Tex. 1918) (holding that religious liberty may be subjected to regulations “essential” to health and safety).

F. *RLUIPA Mandates Strict Scrutiny Review.*

Under RLUIPA, the prohibition on substantial burdens on religious exercise applies if the burden<sup>8</sup> affects interstate commerce, or is imposed pursuant to a system of procedures permitting the government to make individualized assessments of the property uses. See RLUIPA, 42 U.S.C. § 2000cc(a)(2)(B)-(C).

The individualized assessments portion merely codifies existing Supreme Court law:

What Congress manifestly has done in this subsection is to codify the individualized assessments jurisprudence in Free Exercise cases that originated with the Supreme Court's decision in *Sherbert v. Verner*, 374 U.S. 398 (1963).

*Freedom Baptist Church, supra*, 2002 WL 927804 at \*9. As discussed *supra*, the Church meets this standard.

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<sup>8</sup> The denial of a conditional use permit fits within RLUIPA's definition of a “Land Use Regulation”: “(5) LAND USE REGULATION- The term ‘land use regulation’ means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant’s use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.”). RLUIPA § 8(5).

Defendant argues that RLUIPA is simply not triggered by the land use regulation that affects a church's parking lot. Def. Motion at 20-21 ("The church's alleged parking rights are beyond the scope of . . . RLUIPA. . . . 'Free Exercise' does not encompass the right to establish a belief system in how much parking space is needed."). This is simply not true. RLUIPA is implicated by any land use regulation that either substantially burdens religious exercise, discriminates against religious denomination, treats religious assemblies on unequal terms as nonreligious assemblies, or is simply unreasonable. For example, if the City Council ruled that the Church could not build a parking lot because it was of the Baptist denomination, RLUIPA would most certainly apply. In fact, the City's hostility toward those churches that believe in large congregations—those that the City terms "mega-churches"—is in fact just such a hostility that implicates not only the First and Fourteenth amendments, but RLUIPA's "Nondiscrimination" section as well. *See* Response § A. Likewise, no one could contest that if a city denied a church the ability to build any parking lot at all, RLUIPA's "Substantial Burden" provisions would apply.

G. *Texas RFRA Mandates Strict Scrutiny Review.*

Like RLUIPA, Texas RFRA, by its terms, mandates strict scrutiny review of governmental action that substantially burdens religious exercise. *See* Tex. Civ. Prac. & Rem. Code Ann. §110.003.

**II. THE CITY'S DENIAL OF AN ADEQUATE PARKING FACILITY CONSTITUTES A SUBSTANTIAL BURDEN ON THE CHURCH'S RELIGIOUS EXERCISE.**

The Church moves this Court to determine that, as a matter of law, the City's prohibition on parking for worship not only may substantially burden religious exercise but also, under the overwhelming summary judgment evidence herein, actually has substantially burdened

Plaintiff's religious exercise. Defendant argues that "convenient parking is not a part of free exercise." Def. Motion at 20.<sup>9</sup> In other words, Defendant asks for a per se rule that denial of a permit to operate a parking facility can *never* rise to an unconstitutional burden. Plaintiff respectfully requests that this Court not only reject such a categorical rule, but additionally find that the undisputed facts now on the record establish the existence of a "substantial burden" as a matter of law.

A parking lot, as the Texas Supreme Court has specifically 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 facts here bear that out. The Church has submitted a great deal of evidence demonstrating that churches' congregations generally suffer without adequate parking facilities, and that this Church in particular is suffering from inadequate parking for its current congregation, and is also completely unable to further grow without additional facilities. Statement of Facts ("SOF") ¶¶ 8-11, 43-45, Ex. "A" to Appendix. *See also* Response § B. In addition, City officials themselves acknowledge that adequate physical facilities such as parking lots are a necessary aspect of religious exercise. *See* SOF ¶ 43; Seyfarth Depo. 23, Ex. "46" to Prince Aff., Ex. "L" to App.

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<sup>9</sup> The authorities cited by Defendant for this proposition are inapposite. Def. Motion ¶ 47. The only cases cited in Defendant'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 (6<sup>th</sup> Cir. 1983); *Christian Gospel Church, Inc. v. City and County of San Francisco*, 896 F.2d 1221 (9<sup>th</sup> Cir. 1990); *C.L.U.B. v. City of Chicago*, 157 F. Supp. 2d 903 (N.D. Ill. 2001). 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."); *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."); *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."). The Defendant's actions do not prevent the Church from moving to a new location, they prevent its congregation from being 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.

More importantly, as set forth in detail in the Response, the entire weight of judicial authority runs against Defendant’s contention. 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. In today’s world, a house of worship is practically useless to most faiths 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.”). Defendant’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.--Austin 1987), *rev’d on other grounds*, 768 S.W.2d 718 (Tex. 1988) (emphasis added). The Texas Supreme Court has also 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).<sup>10</sup> “[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 be used for church services and special religious events, and thus is necessary for its religious exercise. *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 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. 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. *Islamic Center, supra*, at 299. The circumstances of that case

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<sup>10</sup> *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”).

involve an application of laws that made it difficult for members of a mosque that did not own automobiles to attend services. *Id.* The application of such 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 (4<sup>th</sup> 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 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 (N.Y. 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 Defendant’s contention.

### **III. THE CITY’S REFUSAL TO PERMIT THE CHURCH TO USE ITS FOURTH FLOOR CONSTITUTES A SUBSTANTIAL BURDEN ON THE CHURCH’S RELIGIOUS EXERCISE.**

Defendant does not attempt to justify its repeatedly refusing an application from the Church to occupy the Fourth Floor of its Victory Building. Instead, the City simply argues that “recognizing and enforcing a condition for prior approval of a Special Use Permit” is valid, Def. Motion at 41-43, and that the Church somehow has “unclean hands,” which prohibit it from bringing this claim. *Id.* at 46-49. The first argument is irrelevant; the second is both irrelevant and false. Although the Church recognized that it would be unable to use the Fourth Floor at the time of construction, it had always understood that it would be able to seek a permit from the City to do so. Furthermore, it is not true that the Church “does not come to the court with clean hands.” In fact, as every city official deposed admits, the Church *never* represented that it would never seek permission to use the Fourth Floor. *See infra*.

At deposition, Council members and the Mayor could not reasonably justify such a denial. *See, e.g.*, 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—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.”).

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.”<sup>11</sup> 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 the Fourth Floor space. Glass Depo. 36:18-20 (“Q: So The Church did not tell you that it never would apply for a variance, did it? A: No”). 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

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<sup>11</sup> 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.

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.” The entire situation is described fully in Mr. Heintz’s Affidavit. See Heintz Aff. ¶¶ 7-10, Ex. “D” to App. This hardly demonstrates “unclean hands,” as the City accuses the Church.

Since it is both undisputed and undisputable that the Church intends to use the Fourth Floor for religious activity, and since Defendant has absolutely no justification to forbid such use, Plaintiff is entitled to summary judgment on this claim.

#### **IV. THE CITY’S ASSERTED INTERESTS FAIL TO REACH THE LEVEL OF A “COMPELLING GOVERNMENTAL INTEREST.”**

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

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.’

*City of Hialeah*, 508 U.S. at 546 (citations omitted). Compelling governmental interests are those that protect public safety and order. *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)).

Defendant’s sole alleged “compelling governmental interest”—preventing the “destruction of the neighborhood,” *see also id.* at 30 (“To confer the right to destroy neighborhoods”), is an example of an irrational motivation that has been rejected by the Fifth Circuit. “[N]egative 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 (9<sup>th</sup> Cir. 1994).

As is amply demonstrated by Defendant’s officials themselves, the Defendant’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, any such purported “governmental interest.” *See, e.g.*, Buie Depo. 19:18-25, Ex. “49” to Prince Aff.; Seyfarth Depo. 20:20-21:7, Ex. “46” to Prince Aff.; Wynn Depo. 26:24-27:3, Ex. “48” to Prince Aff.; McLaughlin Depo. 57:12-16, Ex. “44” to Prince Aff. And while Mr. McLaughlin states that the “City is permitted to protect . . . . their communities from the threat of . . . destruction,” McLaughlin Aff. ¶ 15, Tab “29” to Def. Motion, 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, Tab “30” to Def. Motion, 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, Ex. “45” to Prince Aff. (“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,” period.

However, even if Defendant’s stated reasons were seen as rational, they would not be “compelling,” as a matter of law. Charitably viewed, their justifications could be seen as run-of-the-mill aesthetic and traffic concerns. The City may be concerned with the 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.

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.

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 (5<sup>th</sup> Cir. 1999). Defendant’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 (5<sup>th</sup> Cir. 1997); “increasing juvenile safety and decreasing juvenile crime,” *Qutb v. Strauss*, 11 F.3d 488, 493 (5<sup>th</sup> 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 (5<sup>th</sup> 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).

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). *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 (8<sup>th</sup> 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 (11<sup>th</sup> 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 (9<sup>th</sup> 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 (N.Y. 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 identical<sup>12</sup> to those made by the Defendants 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. Civ. App.—Fort Worth 1956, no writ). As in this case, “[t]he zoning ordinance of Haltom City expressly permits the erection, construction,

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<sup>12</sup> 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.

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:

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.* Given the weak interests asserted by the Defendant, the fact that traffic concerns related to the construction project on West Avenue was the only reason asserted for denying the Church's first SUP application and has now been resolved,<sup>13</sup> and the strong weight of authority against such interests, this Court should hold that they cannot justify a substantial burden on religious exercise.

**V. IF THE CITY CAN ADDRESS ANY OF ITS ASSERTED INTERESTS THROUGH THE SPECIAL USE PERMIT PROCESS, DENIAL OF A PERMIT IS NOT THE "LEAST RESTRICTIVE MEANS" TO PROMOTE THE INTEREST.**

Finally, even if the City's interest in aesthetics and traffic were deemed rational and compelling, and they actually existed in this case, the City must still demonstrate that preventing the Church from having adequate facilities for its current congregation and future growth is the "least restrictive means" of achieving the City's objectives. Because the City can attach conditions on the grant of a Special Use Permit in order to alleviate any negative effect of a project,<sup>14</sup> and because it refused to do so in this case, its denial was not the means least restrictive on religious exercise.

This Court has acknowledged the doctrine of "least restrictive means" 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.

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<sup>13</sup> See Anderson (3/2/00) Depo. 25, 26, Ex. "2" to Allison Aff., Ex. "I" to App.; Anderson (11/29/99) Depo. 89, 90, 117, 118, Ex. "4" to Allison Aff.; Wynn Depo 34, Ex. "48" to Prince Aff.

<sup>14</sup> City Code § 31.1301 (1995), Ex. "20" to Prince Aff. (now § 31.1701 (see Tab "16" to Def. Motion)); Anderson (3/2/00) Depo. 26, Ex. "2" to Allison Aff.; Seyfarth Aff. 18, 19, 22, 33-35, Ex. "46" to Prince Aff.; Wynn Depo. 28:13-17, Ex. "48" to Prince Aff.

*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 Defendants 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, very public<sup>15</sup> settlement negotiations to accomplish this goal (which was eventually inexplicably rejected by the City Council). One means of achieving any purported interest of the City would have been to grant

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<sup>15</sup> See SOF ¶¶ 32-33, Ex. “A” to App.

the permit allowing less than 488 spaces, which it was certainly within its rights to do, *see* Seyfarth Aff. 18, 19, 22, 33-35, Ex. “46” to Prince Aff., Ex. “L” to App., and which the Church has offered to do in its settlement proposals. *See* Mediated Settlement Agreement, Ex “8” to Earl Aff., Ex. “H” to App. Furthermore, after rejecting its own traffic expert David Steitle’s report, even 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.<sup>16</sup> *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. Motion as Tab “12”).<sup>17</sup> *See also* Medbury Depo. 75:22-79:18, Ex. “45” to Prince Aff. (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, Ex. “44” to Prince Af. *See also* Wynn Depo. 28:13-17, Ex. “48” to Prince Aff. (“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.”).

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<sup>16</sup> 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).

<sup>17</sup> Defendant 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., Defendant 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.

Plaintiff thus requests that this Court hold that, because of the important First Amendment rights at issue here, the City must first attempt to alleviate any concerns through the imposition of reasonable conditions on a Special Use Permit, instead of repeatedly denying such a permit outright.

**VI. PRAYER.**

For all of the foregoing reasons, Plaintiff, Castle Hills First Baptist Church, respectfully requests that the Court grant Plaintiff's Motion for Summary Judgment in its entirety.

Respectfully submitted,

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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 14<sup>th</sup> day of November, 2002.

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