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

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

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND PERMANENT INJUNCTION AS A MATTER OF LAW

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INTRODUCTION

This action is a challenge to the Franklin Park Zoning Code, which prohibits places of worship from its commercial districts but permits many other nonreligious assembly land uses in those same districts, and to Franklin Park officials' enforcement of that Code. This Motion respectfully requests partial summary judgment only on the facial invalidity of portions of that Code. A host of nonreligious assembly uses—such as a meeting halls, public baths, clubs, lodges, or theaters—is permitted by right in these districts. Franklin Park Zoning Code, §§ 9-5B-2, 9-5C-2. Amusement centers, dance halls, recreation buildings and auditoriums, among many other uses, are permitted as conditional uses in this district. Franklin Park Zoning Code, §§ 9-5B-3, 9-5C-3. However, places of worship are not permitted at all, even as a conditional use.

This facial discrimination against religious assemblies is unconstitutional under the Free Exercise and Free Speech Clauses and freedom of association protections of the First Amendment. The Code also violates Plaintiffs' rights under the "Equal Terms" provision of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C.A. §§ 2000cc to –5 (West Supp. 2001) [hereinafter "RLUIPA"], which prohibits land use regulation "that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution," *id.* § 2000cc(b)(1), or that "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." *Id.* § 2000cc(b)(3)(B).

The facts relevant to these particular issues are not in dispute, the applicable constitutional law is well established, and the statutory text is clear: the Zoning Code that excludes Calvary Chapel O'Hare—but not meeting halls, public baths, clubs, lodges, or theaters—from locating in Franklin Park's C-3 District is unlawful on its face. For these

reasons, this Court should find, as a matter of law, that Franklin Park's Zoning Code illegally deprives Plaintiffs of their civil rights. In addition, granting summary judgment on these grounds would avoid unnecessary discovery and trial on Plaintiffs' several other claims, such as the *substantial burden* Defendant imposed on Plaintiffs' religious exercise, expression and association without compelling interest, and Defendants' discriminatory *application* of their Code against Plaintiffs.

STATEMENT OF UNDISPUTED FACTS

Between October 2001 and the present, Plaintiffs sought to purchase real property at 10040 Grand Avenue, Franklin Park, Illinois (the "Grand Bowl Property") as a place of worship. The Grand Bowl is currently operating a bowling alley on that property. The property is located in Franklin Park's C-3 zoning district.

Places of worship not are permitted in the C-3 District. The following is a non-exhaustive list of assembly uses which are permitted as of right in that District:

Daycare centers	Governmental buildings	Restaurants
Art shops	Galleries	Banquet halls
Art studios	Clubs and lodges	Schools: music, dance
Libraries	Museums	Art galleries
Meeting halls	Gymnasiums	Theater, indoor
Ticket agencies, amusement	Drive-in establishments	Hotels and motels
Massage salons	Public baths	Schools, vocational or trade

Franklin Park Zoning Code §§ 9-5A-2, 9-5B-2, 9-5C-2; *see also id.* § 9-5C-2 ("Any use permitted in the C-2 Districts shall be permitted in the C-3 District, ..."); *id.* § 9-5B-2 ("Any use permitted in the C-1 District shall be permitted in the C-2 Districts; . . . ."). These uses are

both for-profit and non-profit uses. *See id.* § 9-5B-2 ("Clubs and lodges, nonprofit and fraternal").

The following is a non-exhaustive list of assembly uses which are permitted as a conditional use in the C-3 District:

Parks	Libraries	Other public uses
Taverns	Cocktail lounges	Amusement center
Amusement establishments	Bowling alleys	Pool halls
Dance halls	Skating rinks	Recreation buildings
Community centers	Tanning salons	Shooting galleries
Amusement parks	Permanent carnivals	Kiddie parks
Outdoor amusement facilities	Stadiums	Auditoriums
Arenas		

Franklin Park Zoning Code §§ 9-5A-3, 9-5B-3, 9-5C-3; *see also id.* § 9-5C-3 ("Any use allowed as a conditional use in the C-2 Districts shall be allowed in the C-3 District . . . ."); *id.* § 9-5B-2 ("Any use allowed as a conditional use in the C-1 District shall be allowed in the C-2 Districts . . . ."). These uses are both for-profit and non-profit uses. *See id.* § 9-5B-3 ("Recreation buildings and community centers, noncommercial").

Despite numerous attempts by the Plaintiffs to negotiate with Franklin Park for the use of the Grand Bowl property, the Defendant refused to permit Calvary Chapel's use of that facility as a church based on these Zoning Code provisions.[1]

[1]In addition to the discrimination between religious and nonreligious uses of property in Franklin Park's commercial districts, the denial of Plaintiffs' use of the Grand Bowl property also constitutes a *substantial burden* on its religious exercise, expression, and association, *discriminatory enforcement* of Defendant's Zoning Code, and a violation of Calvary Chapel's due process rights. *See* Complaint, Counts II, IV, V, VI, VII, VIII, IX, X, XI, XII. Its current facilities are wholly inadequate for its religious mission. *Id.* ¶ 30. The Church does not have room for its youth ministries or Sunday school. *Id.* ¶ 16. It has no room for growth at its present

LEGAL STANDARD ON SUMMARY JUDGMENT

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In determining whether a genuine issue of material fact exists, courts must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party. *See Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996). However, the "party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). "A genuine issue for trial exists only when a reasonable jury could find for the party opposing the motion based on the record as a whole." *Roger v. Yellow Freight Sys., Inc.*, 21 F.3d 146, 149 (7th Cir. 1994). A party may move for summary judgment "at any time after the expiration of 20 days from the commencement of the action." FED. R. CIV. P. 56(a).

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location. ¶¶ 8-13. Since Plaintiffs assume that Defendant will dispute certain facts necessary for such claims, Plaintiffs do not seek adjudication of those claims at this time.

ARGUMENT

I. PLAINTIFFS MOVE FOR PARTIAL SUMMARY JUDGMENT ON VERY LIMITED GROUNDS THAT DO *NOT* INCLUDE CLAIMS THAT MAY INVOLVE DISPUTED FACTS.

Plaintiffs only seek summary judgment on their claims that Franklin Park's Zoning Code violates RLUIPA's Equal Terms provision, 42 U.S.C. § 2000cc(b)(1), RLUIPA's Exclusion and Limits provision, *id.* § 2000cc(b)(3), and the corresponding federal constitutional doctrines of the First and Fourteenth Amendments—the Free Exercise, Free Speech, Equal Protection, and Due Process Clauses—that prohibit discriminatory treatment between equivalent religious and nonreligious activity. There are very few facts material to the resolution of these claims, and none of them are in dispute.

Plaintiffs do *not*, however, at this time move for summary judgment on their claims that Defendant has *substantially burdened* their religious exercise, expression, and assembly under RLUIPA, 42 U.S.C. § 2000cc(a), the Illinois RFRA, and corresponding constitutional protections of free exercise, speech, and association;[2] enforced its Code in a manner that *discriminates* against Plaintiffs based on animus against religion generally or in particular under RLUIPA, *id.* § 2000cc(b)(2)[3] and the constitutional protections it embodies; and violated Plaintiffs' Due Process rights.

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[2] *See, e.g., Al-Salam Mosque Fdn. v. City of Palos Heights*, No. 00-4596, 2001 WL 204772 at *2 (N.D. Ill. 2001) ("I find that preventing a group from purchasing land to be used as a mosque is a burden on the exercise of religion.").

[3] *See, e.g., Islamic Center of Mississippi, Inc. v. City of Starkville, Mississippi*, 840 F.2d 293 (5th Cir. 1988).

Finally, because the issue of damages may create genuine issues of material fact, Plaintiffs move for summary judgment solely on the issue of liability and seek injunctive relief based on that judgment. See FED. R. CIV. P. 56(c) ("A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.").

II. DEFENDANTS VIOLATED PLAINTIFFS' RIGHTS TO EQUAL AND REASONABLE TREATMENT AS A MATTER OF LAW

A. Defendant's Zoning Code Discriminates Against Religious Assemblies, Violating Plaintiffs' Rights Under RLUIPA's "Equal Terms" Provision and Corresponding Constitutional Protections.

1. RLUIPA.

The plain text of RLUIPA's "Equal Terms" section, 42 U.S.C. § 2000cc(b)(1), sets forth a clear standard:

> (1) EQUAL TERMS- No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

The Act's legislative history sheds additional light on this already-clear language. Examples of nonreligious assemblies that the legislative history identifies as comparable to religious assemblies include "banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, places of amusement, recreation centers, lodges, libraries, museums, municipal buildings, meeting halls, and theaters," H. Rep. 106-219 at 19 (July 1, 1999), and "recreation centers, health clubs, backyard barbeques and banquet halls." 146 Cong. Rec. S7774-01, *S7776. Other federal courts have also provided examples of nonreligious assembly uses. The Supreme Court has listed as examples of "any place of assembly": a

"theater, town hall, opera house, as well as a public market place." *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). *See also Love Church v. City of Evanston*, 671 F. Supp. 515, 517-19 (N.D. Ill. 1987) (identifying community centers, schools, meeting halls, and theatres).

Thus, RLUIPA's Equal Terms provision prohibits a municipality from imposing requirements on a religious assembly that are not imposed on otherwise similar, non-religious assemblies. Franklin Park's Zoning Code,[4] violates this provision by prohibiting places of worship outright from Franklin Park's commercial districts, while allowing nearly every other nonreligious assemblies such as meeting halls, public baths, clubs, lodges, or theaters. These myriad uses are "nonreligious assemblies and institutions" within the meaning of the Act, as its legislative history makes clear. Places of worship are undoubtedly "religious assemblies and institutions" within the meaning of the Act. Because Calvary Chapel O'Hare is prohibited from operating a place of worship in a C-3 or any commercial district, but these other nonreligious assembly uses are not so burdened, Franklin Park's Zoning Code treats a religious assembly use on "less than equal terms" with a host of nonreligious assembly uses.

Also informative, although not necessary for adjudication of this Motion, is the fact that the Grand Bowl property is currently being used as a place of assembly, namely as a bowling alley and banquet hall, where weddings and parties have been held for years. *See* H. Rep. 106-

[4] Chapter 5 ("Commercial Districts") of Franklin Park's Zoning Code is a "land use regulation." RLUIPA § 2000cc-5(5) ("The term 'land use regulation' means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest."). Defendants are "government" actors subject to RLUIPA's provisions. *Id.* § 2000cc-5(4) ("The term 'government'-- (A) means-- (i) a State, county, municipality, or other governmental entity created under the authority of a State; (ii) any branch,

219 at 21 ("One witness described twenty-one cases where cities refused to permit churches to use existing buildings that nonreligious assemblies had previously used. In three of the most egregious cases, churches applied for permits to use a flower shop, a bank, and a theater.").

As described more fully below, RLUIPA's "Equal Terms" provision merely restates long-accepted principles of Free Exercise, Free Speech, and Equal Protection under the First and Fourteenth Amendments.[5] The result is the same. Under all these protections, government may not disfavor religious assemblies, in relation to *otherwise similar* non-religious assemblies. This fundamental constitutional principle has been applied consistently by federal courts in the church-zoning context.

2. The Free Exercise Clause.

RLUIPA's "Equal Terms" rule, which prohibits disfavored treatment of religious assemblies, reflects the Supreme Court's Free Exercise requirement of "neutrality" with respect to religion. *Employment Div. v. Smith*, 494 U.S. at 877-80 (describing bans on "assembling with

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department, agency, instrumentality, or official of an entity listed in clause (i); and (iii) any other person acting under color of State law; . . . .").

[5]In the first (and thus far, only) decision reaching the issue of the constitutionality of RLUIPA's land use provisions, a federal district court upheld the Equal Terms provision as merely restating existing First and Fourteenth Amendment doctrine:

> Thus, §§ 2(b)(1) and (2) of the RLUIPA are constitutional because they codify existing Free Exercise, Establishment Clause and Equal Protection rights against states and municipalities that treat religious assemblies or institutions "on less than equal terms" than secular institutions or which "discriminate[]" against them based on their religious affiliation.

Freedom Baptist Church v. Township of Middletown, No. 01-5345, 2002 WL 927804 at *10 (E.D. Pa. May 8, 2002).

others . . . only when they are engaged in for religious reasons" as unconstitutional). *See also McDaniel v. Paty*, 435 U.S. 618, 627-29 (1978) (striking down law prohibiting ministers or priests of any denomination, but not members of any secular profession, from serving in the Tennessee legislature). In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Court held that a law "lacks facial neutrality if it refers to a religious practice *without a secular meaning discernable from the language or context.*" *Id.* at 533. The Supreme Court has stressed that, "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates *or prohibits conduct because it is undertaken for religious reasons*." *City of Hialeah*, 508 U.S. at 532 (emphasis added). The Court has also noted that:

> the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: *assembling with others for a worship service*, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. *It would be true ... that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.* It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes" . . . .

Smith, 494 U.S. at 877-78 (emphasis added). These decisions clearly preclude the Code's treating land uses involving assembly for religious purposes differently than land uses involving assembly for nonreligious purposes.

In holding that the denial of a special use permit to a religious organization in a business district was arbitrary and capricious, the Illinois Supreme Court reasoned:

> [B]usiness continuity would likewise be interrupted by a *dance hall*, crematory, mausoleum or *trade school*, all uses permitted in this B4 district. We are unable to see how the use as a church is more harmful to adjacent stores than the aforementioned permitted uses.

> The arguments advanced by defendants, if followed, would be sufficient to bar all religious worship from the commercial areas of Chicago. Such arbitrary prohibition is not consonant with the constitutional guarantees of freedom of religion, nor do we believe it is consistent with the intent of the ordinance.

Columbus Park Congregation of Jehovah's Witness, Inc. v. Board of Appeals of the City of Chicago, 25 Ill. 2d 65, 73, 182 N.E.2d 722, 726 (1962) (emphasis added). *See also Grosz v. City of Miami Beach*, 721 F.2d 729, 740 (11th Cir. 1983) (holding, in the context of a Free Exercise challenge to a zoning ordinance, that "[g]overnment may regulate place and manner of religious expression *as long as there is no content classification* . . . ." (emphasis added))*; Fraternal Order of Newark Police Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir.), *cert. denied*, 528 U.S. 817 (1999) (holding that that a Newark police department policy that prohibited officers from wearing beards, but allowed an exception for health reasons, violated the Free Exercise Clause by not allowing a similar exemption for Sunni Muslim officers who wore beards for religious reasons).

In a closely analogous church-zoning case, a federal court similarly questioned the prohibition on a church's homeless feeding program when restaurants are permitted in the same district. *W. Presbyterian Church v. Bd. of Zoning Adjustment*, 862 F. Supp. 538, 546 (D.D.C. 1994) ("It seems rather incongruous that no objection could be raised if a needy person can buy his or her food, but it becomes inappropriate if that needy individual can obtain food at no cost from a benevolent source. The Court wonders what position authorities would take if instead of providing the meal on its premises, the Church provided the needy with funds and sent them to the nearby restaurant to be fed."). Similarly, it is equally incongruous that people can meet in

Franklin Park's C-3 District for a variety of commercial or noncommercial purposes, but not for religious reasons.

Finally, whatever justification the Defendants may offer for excluding places of worship in Franklin Park's commercial districts would apply with equal force to the nonreligious assembly uses Defendants permitted as of right, such as a meeting hall, public bath, club, lodge, or theater.

3. The Free Speech Clause.

Defendants' discriminatory Code also violates the Free Speech Clause. The Supreme Court has repeatedly held that land use regulation that restricts expressive activity implicates the Free Speech Clause, and also that the government may not favor nonreligious speech over equivalent religious speech. Applying the Free Speech Clause to the zoning context, the Supreme Court has held that an ordinance prohibiting nudity on drive-in movie screens as a traffic regulation was unconstitutionally overbroad:

> Nothing in the record or in the text of the ordinance suggests that it is aimed at traffic regulation. Indeed, the ordinance applies to movie screens visible from public places as well as public streets, thus indicating that it is not a traffic regulation. But even if this were the purpose of the ordinance, it nonetheless would be invalid. By singling out movies containing even the most fleeting and innocent glimpses of nudity the legislative classification is strikingly underinclusive. There is no reason to think that a wide variety of other scenes in the customary screen diet, ranging from soap opera to violence, would be any less distracting to the passing motorist.

Erznoznik v. City of Jacksonville, 422 U.S. 205, 214-15 (1975). The Supreme Court has also held that zoning restrictions that restrict constitutionally protected speech are subject to heightened scrutiny under the First Amendment. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981).

Outside of the zoning context, the Supreme Court has repeatedly held that discrimination against religious speech—especially distinctions between equivalent religious and nonreligious speech—constitutes viewpoint discrimination in violation of the Free Speech Clause. *See Good News Club v. Milford Cent. Sch.*, 121 S. Ct. 2093 (2001); *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). A place of worship and a religious assembly such as Calvary Chapel O'Hare engages in expressive activity. *See Good News Club v. Milford Central School*, 121 S. Ct. 2093 (June 11, 2001) ("We disagree that something that is quintessentially religious or decidedly religious in nature cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint.").

A review of the permitted uses demonstrates the patent irrationality of this content-based restriction on speech. For example, a theatrical production depicting a wedding ceremony would be permissible in the C-3 District, *see* Zoning Code § 9-5B-2 ("the following uses shall be permitted: . . . Theater, indoor . . . ."), while a comparable assembly for a real religious wedding service would be prohibited. Similarly, while Calvary Chapel cannot use the Grand Bowl property for a religious funeral service, such activity is expressly permitted in a funeral parlor. *Id.* § 9-5C-2. In both examples, the number of people involved, their outward conduct, and their potential impact on surrounding properties are substantially identical. The prohibitions of the Code thus turn entirely on the religious content of the expression and the religious motivation of the participants. Since (1) zoning laws which regulate expressive activity implicate the Free

Speech Clause,[6] and (2) that favoring nonreligious speech over religious speech represents impermissible viewpoint discrimination, Defendants' Code violates Plaintiffs' Free Speech rights.

4. Freedom of Association

Freedom of association principles also prohibit Defendant's unequal treatment of religious land uses. The ability of Calvary Chapel and Pastor Deane to worship together as their religious beliefs require falls within the core of this protected activity. The Supreme Court has long recognized that the First Amendment implicitly protects an independent right of freedom of association:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, *religious* or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

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

NAACP v. Alabama, 357 U.S. 449, 460-61 (1958) (striking down statute requiring disclosure of group members' names and addresses) (citations omitted, emphasis added). Being able to worship together in the manner Plaintiffs view as necessary falls squarely within this protection:

> An individual's freedom to speak, *to worship*, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, *religious*, and cultural ends.

Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) (citations omitted; emphases added). By prohibiting outright Plaintiffs' use of the Grand Bowl Property because of its religious character, Defendant's Code has the effect of curtailing the Church members' freedom to associate.

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

> Other assembly uses are not subjected to the same treatment as churches. If meeting halls as well as theatres had to get special use permits, then Evanston could assert that it zoned on the basis of something other than religion.
>
> . . . . Suppose, for example, a group of people wished to assemble on a regular basis in Evanston to discuss and hear lectures on classical literature. This group might also wish to have seminars for young people after school or on weekends to expose them to "great books." These people could rent a building in any business or commercial zone and have their meetings. But if that same group of people wished to assemble for the purpose of religious worship and to hold classes for its young people to educate them about religion, they would have to get special permission from Evanston. The only distinguishable feature of the groups in our hypothetical is the purpose and content of the

assembly. Because Evanston's ordinance distinguishes between religious assembly uses and non-religious assembly uses, it classifies on the basis of religion.

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

671 F. Supp. 515, 518-19 (N.D. Ill. 1987) (footnote omitted), *vacated on other grounds*, 896 F.2d 1082 (7th Cir. 1990). Likewise, Franklin Park's Code would permit *Love Church's* hypothetical "Classical Literature Club" (*see* Zoning Code § 9-5C-2 ("Any use permitted in the C-2 Districts shall be permitted in the C-3 District, ..."); *id.* § 9-5B-2 ("[T]he following uses shall be permitted: . . . clubs . . . .")), but not a house of worship therefore is equally subject to strict scrutiny.

Thus, on its face, the Franklin Park Zoning Code not only constitutes an indisputable violation of RLUIPA's "Equal Terms" provision, but also violates the constitutional provisions discussed above.

B. Defendants' Code Limiting Religious Assemblies Is Patently Unreasonable, Violating Plaintiffs' Rights Under RLUIPA's "Exclusion and Limits" Provision and Corresponding Constitutional Protections.

Section 2(b)(3)(B) of RLUIPA, 42 U.S.C. § 2000cc(b)(3)(B), requires that:

(3) EXCLUSIONS AND LIMITS- No government shall impose or implement a land use regulation that--

* * *

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

This requirement is merely a restatement of the longstanding Due Process and Equal Protection principle that land use laws must be rational. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Supreme Court held that such laws violate the Constitution if they are "clearly arbitrary and *unreasonable*, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395 (emphasis added); *see Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928) ("Legislatures may not, under the guise of the police power impose restrictions that are unnecessary and *unreasonable* upon the use of private property or the pursuit of useful activities." (emphasis added)). This baseline requirement of rationality applies with equal force in the church zoning context. *See Allendale Congr. of Jehovah's Witnesses v. Grossman*, 30 N.J. 273, 152 A.2d 569 (1959) (collecting cases and holding that "property used for church purposes, along with property used for other purposes, may be lawfully subjected to *reasonable* zoning restrictions").

As described above, there can be no rational basis for treating churches worse than equivalent nonreligious assemblies such as meeting halls, public baths, clubs, lodges, or theaters. The only meaningful difference between a place of worship and these permitted assembly uses is the religious content of the speech and motivation of the activity.

Like the Due Process standard of *Village of Euclid*, the relevant Equal Protection Clause standard (as defined by the Supreme Court in *City of Cleburne*) similarly forbids irrational legislative distinctions between land uses:

> The constitutional issue is clearly posed. The city does not require a special use permit in an R-3 zone for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged (other than for the insane or feebleminded or alcoholics or drug addicts), private clubs or fraternal orders, and other specified uses. It does, however, insist on a special permit for the Featherston home, and

> it does so, as the District Court found, because it would be a facility for the mentally retarded. May the city require the permit for this facility when other care and multiple-dwelling facilities are freely permitted?
>
> It is true, as already pointed out, that the mentally retarded as a group are indeed different from others not sharing their misfortune, and in this respect they may be different from those who would occupy other facilities that would be permitted in an R-3 zone without a special permit. But this difference is largely irrelevant unless the Featherston home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not. Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case.

City of Cleburne, 473 U.S. at 447-48.

In determining whether a particular land use regulation affecting churches is unreasonable, courts have consistently applied the *Cleburne* test of considering whether the non-permitted use under the regulation "'would threaten legitimate interests of the [government] in a way that other permitted uses . . . would not.'" *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 471 (8th Cir. 1991) (quoting *Cleburne*, 473 U.S. at 450) (reversing summary judgment for the city and applying *Cleburne* in considering constitutionality of ordinance allowing certain non-commercial uses, but not churches, in a particular district). *See also Cam v. Marion County*, 987 F. Supp 854, 859 (D. Or. 1997) (no "legitimate or rational . . . state interest" advanced for prohibiting regular use of building on agriculture land for religious worship, but allowing other secular assemblies such as a square dance hall or educational assembly); *Christian Gospel Church v. City and County of San Francisco*, 896 F.2d 1221, 1225-26 (9th Cir. 1990) (holding that no Equal Protection violation was shown in church zoning case, but only because "[t]he Church was treated no differently than a school or community center would have been.").

Also applying *City of Cleburne*, the Eastern District of Pennsylvania recently held that,

> [i]ndeed, there can be no rational reason to allow a train station, bus shelter, municipal administration building, police barrack, library, snack bar, pro shop, club house, country club, or other similar use to request a special exception under the 1996 Ordinance, but not [a place of worship].

Congregation Kol Ami, 161 F. Supp. 2d 432, 437 (E.D. Pa. 2001). The secular assembly uses preferred pursuant to Franklin Park's Zoning Code are even more nearly analogous to places of worship than the uses deemed comparable in *Congregation Kol Ami.* Just like places of worship, these preferred uses involve assemblies of people, parking requirements, periodic usage, and ceremonial activity. Yet places of worship are forbidden from the commercial districts. Thus Defendants violated Plaintiffs' rights under 42 U.S.C. § 2000cc(b)(3)(B).

III. PLAINTIFFS ARE ENTITLED TO A PERMANENT MANDATORY INJUNCTION.

Because the issues raised herein are purely a matter of law, this case can be resolved without an evidentiary hearing. Of equal importance, however, the timing is critical. The parties involved in this real estate transaction have been substantially and negatively affected by the position of the Village. Since the real estate contract was consummated in February of 2002, the owner/seller canceled the summer/fall bowling leagues. Likewise, the Plaintiff was making plans to build-out and move their ministry headquarters. Absent the real estate closing, the seller may be forced into bankruptcy and the Plaintiff church will be without adequate worship facilities.

In order for an injunction to issue, Plaintiff must demonstrate an ascertainable right, no adequate remedy at law, irreparable harm and a likelihood of success on the merits. *Advent*

Electronics, Inc. v. Bowman, 112 F.3d 267 (7th Cir. 1997). As with any equitable relief, there exists a balancing test which considers the harms suffered by the parties to the controversy. *Air Craft Owners and Pilots Association v. Hinson*, 102 F.3d 1421. In the instant case, the law and the equities are clear. The Franklin Park Zoning Code is both antiquated and indefensible. In the event the Village is not enjoined from enforcing its Zoning Code as to religious uses within the C-3 District, the Plaintiffs' interest in the real estate will be lost. As with most real estate issues, time is of the essence. Moreover, there is no harm to the Defendants.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Partial Summary Judgment should be granted.

Respectfully submitted,

By: _____

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Dated: May 29, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of May, 2002, I served on all parties the above and foregoing Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, and the associated Motion for Partial Summary Judgment, Proposed Order, and Statement of Undisputed Material Facts, by depositing same in the United States mail, with proper first-class postage affixed thereto, addressed to counsel of record as follows:

_____

Timothy P. Dwyer, Esq.