UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 09-2388

NORTHRIDGE CHURCH, fka Temple Baptist Church, a Michigan ecclesiastical corporation,

Plaintiff/Appellant,

vs.

CHARTER TOWNSHIP OF PLYMOUTH; PLYMOUTH TOWNSHIP PLANNING COMMISSION,

Defendants/Appellees.

On appeal from the United States District Court for the Eastern District of Michigan, Southern Division, District Court No. 94-74045, Honorable Denise Page Hood.

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BRIEF ON APPEAL OF DEFENDANTS/APPELLEES CHARTER TOWNSHIP OF PLYMOUTH AND PLYMOUTH TOWNSHIP PLANNING COMMISSION

*** ORAL ARGUMENT REQUESTED ***

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to 6th Cir. R. 26.1(a), Defendants/Appellees, a municipal corporation and commission, are exempt from the requirement of filing a corporate affiliate/financial interest disclosure statement.

MARCELYN A. STEPANSKI (P43302)

Dated: June 30, 2010

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STATEMENT REGARDING ORAL ARGUMENT

Though Defendants/Appellees submit that the facts and legal arguments are fully presented in the briefs and warrant that the lower court be affirmed, oral argument will allow the parties an opportunity to highlight important matters for the Court and explore any issues the Judges on the panel would like to discuss. Oral argument also will provide the parties a forum to address any questions the Court may have before rendering a decision. As such, Defendants/Appellees respectfully request that they be granted oral argument.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

I. ***Subject Matter Jurisdiction***: On October 6, 1994, Plaintiff, formerly Temple Baptist Church, now known as Northridge Church, filed a Complaint in the United States District Court for the Eastern District of Michigan against Plymouth Township and its Planning Commission. Count I claimed that the Planning Commission's denial of Plaintiff's special land use application placed "a substantial burden" on the church members' exercise of religion in violation of the 1st Amendment to the United States Constitution, Art. 1, §4 of the Michigan Constitution, and the Religious Freedom Restoration Act of 1993 (RFRA), USC §2000bb, et. seq. (R.1, Complaint.) Count II purported a violation of free speech and assembly, and Count III asserted a violation of procedural due process, both under no particularly identified law or statute. Count IV averred that the Township's Zoning Ordinance was unconstitutional, and Count V sought a Writ of Superintending Control compelling approval of its special land use application. (Id.) Over a year later, after Defendants filed dispositive motions but before Plaintiff responded, the parties negotiated a Consent Judgment which was entered by the district court on October 27, 1995. (R.18, 24, dispositive motions; R.39, R.43, Exhibit 1, Consent Judgment.) Construction on the site then took place in phases.

On August 17, 2007, Plaintiff filed a Motion to Re-Open the Case and Set

Aside the Consent Judgment, relying on Fed. R. Civ. P. 60(b)(4) and (5) and the passage of the Religious Land Use and Institutionalized Persons Act (RLUIPA). (R.43, Motion to Re-Open.) Despite that arduous negotiations had taken place over several months to arrive at the Consent Judgment, that Plaintiff had been represented by skilled counsel, and that Plaintiff had received the benefit of its agreement, Plaintiff sought to have the Consent Judgment declared void. (Id.) Essentially, where Plaintiff had already developed the property, it sought to retain the benefit of the Township's sacrifices but absolve itself of any corresponding obligations. Defendants responded to the motion, and Plaintiff replied. (R.50-52, 55, Response, exhibits, Anulewicz Affidavit; R.53, 54, Reply and exhibits.) Subject matter jurisdiction in the district court was purportedly premised upon 28 USC §1331, governing federal questions. However, where RLUIPA - by its express terms - does not apply to this matter, Plaintiff failed to properly invoke jurisdiction under it.

II. ***Appellate Jurisdiction***: On October 10, 2007, a hearing on the motion was held before the Hon. Denise Page Hood. (R.59, hearing transcript.) Thereafter, Plaintiff filed a Supplemental Brief, to which Defendants objected. (R.57, Supplemental Brief; R.58, Objection to Supplemental Brief.) Defendants submitted supplemental authority upon issuance of a new decision, and Plaintiff filed a "Sur-Reply" Brief as well as a Supplemental Brief. (R.60, Supplemental

Authority; R.61, Sur-Reply Brief; R.62, Supplemental Brief.)

On September 30, 2008, the district court issued its Order Denying Plaintiff's Motion to Re-Open the Case and Set Aside the Consent Judgment. (R.63, Order.) Plaintiff moved for reconsideration, Defendant sought permission to respond, and Plaintiff objected. (R.65, 68-69, and 70, respectively.) On September 30, 2009, the district court denied the Plaintiff's Motion for Reconsideration as well as the Defendants' request for leave to file a response to the motion. (R.71, Order Denying Reconsideration.)

Plaintiff filed a Notice of Appeal on October 27, 2009. (R.72, Notice of Appeal.) Appellate jurisdiction is vested in this Honorable Court pursuant to 28 USC §§1291 and 1294.

COUNTER-STATEMENT OF ISSUES FOR REVIEW

I. DID THE DISTRICT COURT PROPERLY DENY PLAINTIFF'S MOTION TO REOPEN THE CASE WHERE RLUIPA WAS INAPPLICABLE TO PLAINTIFF'S CLAIM THAT THE VOLUNTARILY AGREED-UPON CONSENT JUDGMENT, NOT THE TOWNSHIP'S IMPOSITION OF A LAND USE REGULATION, SUBSTANTIALLY BURDENED ITS RELIGIOUS EXERCISE?

Plaintiff/Appellant answers: no
Defendants/Appellees answer: yes
The District Court answered: yes

II. DID THE DISTRICT COURT PROPERLY DENY PLAINTIFF'S MOTION UNDER RULE 60(b)(4) WHERE PLAINTIFF COULD NOT SHOW THAT THE CONSENT JUDGMENT "SUBSTANTIALLY" BURDENED PLAINTIFF'S RELIGIOUS EXERCISE AND, IN ANY EVENT, THE TOWNSHIP DEMONSTRATED COMPELLING GOVERN-MENTAL INTERESTS PROMOTED BY THE CONSENT JUDGMENT AND THAT AGREEING TO SUCH RESTRICTIONS IN THE CONSENT JUDGMENT WAS THE LEAST RESTRICTIVE MEANS OF ALLOWING PLAINTIFF'S MASSIVE DEVELOPMENT WHILE FURTHERING THOSE COMPELLING INTERESTS?

Plaintiff/Appellant answers: no
Defendants/Appellees answer: yes
The District Court answered: yes

III. DID THE DISTRICT COURT PROPERLY DENY PLAINTIFF'S REQUEST UNDER RULE 60(b)(5) TO FORECLOSE PROSPECTIVE APPLICATION OF THE CONSENT JUDGMENT WHERE THE "CHANGED CIRCUMSTANCES" PLAINTIFF CITED EITHER WERE NOT SUPPORTED BY THE EVIDENCE OR WERE NOT "SIGNIFICANT" SO AS TO JUSTIFY THE RELIEF REQUESTED?

Plaintiff/Appellant answers: no

Defendants/Appellees answer: yes
The District Court answered: yes

COUNTER-STATEMENT OF THE CASE

I. *Nature of the Case*

Plaintiff moved in the district court to void a Consent Judgment previously entered in this litigation and consistently honored by the Township. Plaintiff sought on one hand to retain the benefits of the Consent Judgment while on the other hand to eliminate any corresponding obligation to honor its commitments under the agreement. Plaintiff sought to render the Consent Judgment void under Fed. R. Civ. P. 60(b)(4), arguing that *mutually-agreed upon compromises in the Consent Judgment* violated the subsequently passed Religious Land Use and Institutionalized Persons Act (RLUIPA), and under Fed. R. Civ. P. 60(b)(5), asserting that it was no longer equitable to apply the Consent Judgment prospectively because of changed circumstances, such as the passage of RLUIPA and growth of the church.

II. *Course of Proceedings*

On August 17, 2007, Plaintiff filed a Motion to Re-Open the Case and Set Aside the Consent Judgment, relying on Fed. R. Civ. P. 60(b)(4) and (5) and the passage of the Religious Land Use and Institutionalized Persons Act (RLUIPA). (R.43, Motion to Re-Open.) Despite that arduous negotiations had taken place over several months to arrive at the Consent Judgment, that Plaintiff had been represented by skilled counsel who specializes in land use and development, that

Plaintiff indisputably entered into the Consent Judgment knowingly and voluntarily, and that Plaintiff had received the benefits of its agreement, Plaintiff sought to have the Consent Judgment declared void. (Id.) Essentially, where Plaintiff had already developed the property, it sought to retain the benefit of the Township's sacrifices, but absolve itself of any corresponding obligations. Defendants responded to the motion, and Plaintiff replied. (R.50-52, 55, Response, exhibits, Anulewicz Affidavit; R.53, 54, Reply and exhibits.)

On October 10, 2007, a hearing on the motion was held before the Hon. Denise Page Hood. (R.59, hearing transcript.) Thereafter, Plaintiff filed a Supplemental Brief, to which Defendants objected. (R.57, Supplemental Brief; R.58, Objection to Supplemental Brief.) Defendants submitted supplemental authority upon issuance of a new decision, and Plaintiff filed a "Sur-Reply" Brief as well as a Supplemental Brief. (R.60, Supplemental Authority; R.61, Sur-Reply Brief; R.62, Supplemental Brief.)

III. ***Disposition in the Court Below***

On September 30, 2008, the district court issued its Order Denying Plaintiff's Motion to Re-Open the Case and Set Aside the Consent Judgment. (R.63, Order.) As for Plaintiff's request under Rule 60(b)(4), the court held that the Consent Judgment was not void where Plaintiff's complaints regarding the Consent Judgment did not rise to the level of "substantial" burdens on Plaintiff's

exercise of religious beliefs and were more properly characterized as inconveniences given that the Consent Judgment allows for full operation of the 3,500 person auditorium, and Plaintiff failed to demonstrate why that number of seats is insufficient to meet the Church's counseling or prayer needs. (Id., p. 6.) Further, while the Consent Judgment limits the number of special event services, Plaintiff failed to show that the number of events is insufficient to meet the needs of members or others seeking to worship. (Id.) For example, the court noted that 28,000 people could attend the Christmas shows. Accepting Plaintiff's claim that it has 14,000 members, each member could attend the shows twice. (Id., pp. 8-9.) Finally, the court opined that the inconvenience of busing members in for service did not substantially burden Plaintiff's religious exercise. (Id., p. 6.) The district court further held that the Township cited compelling governmental interests in minimizing the negative impacts of the Church on the low-density residential area and the detrimental effect of traffic, congestion, and safety on the two-lane roads that surround the residential area. (Id., p. 8.) The court opined that the Consent Judgment was the least restrictive means of furthering those compelling interests. (Id.)

With respect to Plaintiff's argument under Rule 60(b)(5), that it was no longer equitable that the Consent Judgment have prospective application, the court held that "the Consent Judgment fixed the obligations of the parties at the time of

its entry, and although it continues to govern the conduct of the parties, it is not executory nor does it involve the ongoing supervision of changing conduct or conditions. The parties agreed to abide by certain standards of conduct, and have done so for approximately 12 years." (Id., p. 9.) The court considered the four factors asserted by Plaintiff to constitute the required significant changed circumstance: (1) the Township's substantial growth, (2) the nature of the area where the church is located, (3) the Church's substantial growth, and (4) the passing of RLUIPA. (Id., p. 10.)

First, the court observed that the Township's population actually grew less than what was anticipated and projected. It also noted that Plaintiff's claim that the area was no longer designated for agricultural use and experienced urbanization and development failed to advance Plaintiff's position that the Township's concern about excessive traffic was no longer valid where such development would lead to more traffic and use of the roads. Plaintiff failed to show that the alleged "new character" of the area is a significant change worthy of upsetting the Consent Judgment. (Id., pp. 10-11.) (This would seem particularly so where Plaintiff seeks to add *more* parking, exponentially increasing traffic flow and exacerbating a congestion problem.) Third, the court noted that given Plaintiff's claimed increase in membership from 1,200 at the time of the agreement to 14,000 today, the Consent Judgment has been flexible enough to allow for over a 1000% increase in

membership, to a level of half of the Township's total residents. The court concluded that growth in membership was anticipated and that such growth did not constitute a significant change to impose revision of the Consent Judgment. (Id., p. 11.) Finally, as for the passage of RLUIPA, the court noted the parallels between the RFRA and RLUIPA and held:

> At the time the Consent Judgment was entered, however, the Religious Freedom Restoration Act ("RFRA") was in effect. RFRA placed restrictions on municipalities and their dealings with religious organizations that are similar to the RLUIPA provision in question. [FN1] As the law in place at the time of the Consent Judgment was essentially the same as, or arguably more restrictive than, RLUIPA, its passage does not qualify as a change in circumstance sufficient to set aside the Consent Judgment.
>
> > FN1 RFRA provided that laws are unconstitutional if "religious exercise is substantially burdened" by them, unless the law is the "least restrictive means" of furthering a compelling state interest. 42 USC §2000bb.
> >
> > RLUIPA provides that "No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government can demonstrate that imposition of the burden on that person, assembly or institution
> >
> > I. is in furtherance of a compelling governmental interest; and
> >
> > II. is the least restrictive means of

> furthering that compelling governmental interest." (Id., p. 12.)

Plaintiff moved for reconsideration, Defendant sought permission to respond, and Plaintiff objected. (R.65, 68-69, and 70, respectively.) On September 30, 2009, the district court denied the Plaintiff's Motion for Reconsideration as well as the Defendants' request for leave to file a response to the motion. (R.71, Order Denying Reconsideration.)

COUNTER-STATEMENT OF FACTS

INTRODUCTION

Plaintiff filed a motion seeking to set aside a Consent Judgment that has been honored by the Township. Pursuant to that Consent Judgment, Plaintiff was permitted to construct a "mega church" on the property. A mega church is defined as having 2,000 or more attendants for a typical weekly service. Plaintiff claims to have over 14,000 in weekly attendance. In fact, in 2008, Plaintiff was ranked as the 15th largest church in the United States.[1] Though the Consent Judgment accommodates Plaintiff's massive scale, it wants more. It seeks to retain all of the benefits it received under the Consent Judgment, but wants to now void it and disregard its obligations and commitments under the agreement. (R.43, Plaintiff's motion, Exhibit 1, Consent Judgment.)

The initial lawsuit filed by the Church challenged the Township's denial of a special use permit to construct a "mega church" with related facilities on its campus under the Religious Freedom Restoration Act of 1993, 42 USC 2000bb, et seq, (RFRA) and the First Amendment to the United States Constitution.[2] The

[1]Plaintiff is registered as a "mega church," see, http://www.usachurches .org/church/northridge-church.htm, and in 2008 claimed 14,762 in weekly attendance, the 15th largest in the country. See, www.sermoncentral.com/ article.asp?article=Top-100-largest-churches.

[2]RFRA was in effect during the lawsuit and provided more stringent requirements on governmental action than RLUIPA. Plaintiff claimed then (as it

special land use application had been denied by the Township based on legitimate and substantial governmental concerns, including the impact of the "mega church" on the low-density residential area, the concern for traffic on the two-lane roads in this residential area, and the inconsistency of the church's proposed use with the planned development of the area. Recognizing the conflict between the church's interests and the interests of the residents of the Township, and trying to reach a compromise which would address both side's goals and concerns, the parties spent some five months negotiating the terms of the Consent Judgment which was entered by the Court.[3] Since that time, both sides have operated under the Consent Judgment.

However, prior to the filing of its motion, Plaintiff sent a letter to the Township demanding the right to build additional parking facilities, otherwise threatening litigation.[4] The Township Board reviewed the letter, and in a public

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does now) that the Township was substantially burdening the church's exercise of religion. (R.1, Complaint.) Although RFRA was declared unconstitutional as applied to states and local governments, it remains in force as applied to the federal government. **Cutter v Wilkinson**, 423 F3d 579, 582 (6th Cir. 2005); **City of Boerne v Flores**, 521 US 507, 532-536 (1997).

[3]Contrary to a statement made by Plaintiff below that the Consent Judgment "was individually negotiated for NorthRidge Church for and by the Defendants," it was the Church's attorney who drafted the Consent Judgment in the first instance. Changes to that draft were made through the negotiation process.

[4]Plaintiff's claim below on page 11 of its motion, that it sought a variance prior to filing its motion, is absolutely false.

meeting, requested that the Church formally present a plan to the Township Board at a public meeting so that it could consider any proposal and receive input from members of the public who would be affected. (R.50, Exhibit 1, 7/17/07 Township Board Meeting Minutes; 7/18/07 correspondence from Township Attorney to Church's attorney.) Rather than go through the usual process, the church filed its motion, again instituting litigation. The district court denied Plaintiff's motion to reopen the case and set aside the Consent Judgment, and its decision should be affirmed.

FACTUAL BACKGROUND

In 1994, Plaintiff, formerly known as Temple Baptist Church, approached the Township about building a "mega church" on 55.8 acres that it purchased in the southwest corner of North Territorial Road and Ridge Road in Plymouth Township. (R.50, Defendants' Response, Exhibit 5, maps, pp. 1-2.) The property was vacant at the time it was purchased by Plaintiff, and it was zoned AG, Agricultural District, which was the lowest density residential zoning classification in the Township. Churches were permitted under that zoning classification, but only after special land use approval under the Zoning Ordinance. Plaintiff's property was master planned by the Township at the time for the lowest-density residential, that being .8 to 1 unit per acre. (Id, Exhibit 2, McKenna Associates Report.)

At the time the lawsuit was initiated, Plaintiff's property was surrounded by low-density residential development. Located to the west of Plaintiff's property was land zoned R-1, with the Andover Lake Subdivision containing 138 homes under construction. North of the property was land zoned R-2-A, Multiple Family Residential, and that parcel contained Plymouth Point Condominiums with 125 units. West of the condominiums was land planned for development of Beacon Hill Apartments with 400 units. North of Plymouth Point Condominiums were 120 acres with an existing mobile home park. To the east of Plaintiff's property were homes built on acreage lots. (R.50, Exhibit 2, McKenna Associates Report; Exhibit 3, Complaint, ¶¶12-14.)

Plaintiff's property is bounded on the west by M-14, but there is no access to that freeway directly serving the Plaintiff's property.[5] To the north of the property is North Territorial Road (a paved two-lane road) and to the east is Ridge Road (then a gravel two-lane road). (R.50, Exhibit 2, McKenna Associates report; Exhibit 5, maps, pp. 1-2.)

When Plaintiff approached the Township regarding the construction of a "mega church," it initially represented to the Township that its congregation

[5]M-14 serves as a commuter connector to and from the Ann Arbor area, to and from I-94 and travelers heading west and back, and those heading to and from the University of Michigan, all of which were existing prior to Plaintiff's request and all of which already bogged down traffic on M-14.

consisted of approximately 4,000 members. That also is reflected in Paragraph 73(b) of Plaintiff's Complaint, which states that the membership of the congregation was then in excess of 3,900 at the time the lawsuit was filed in September 1994. (R.50, Exhibit 3, Complaint.) This was in direct contradiction to the Plaintiff's representations to the court below that the congregation was a mere 1,000 persons at the time Temple Baptist first approached the Township for permission to build the church.

The Township had a study done on the impact of the proposed "mega church" on the rural, residential area. (R.50, Exhibit 2, McKenna Associates Report.) The report identified a number of concerns with the scope of the development, such as vehicular circulation (with even Plaintiff's traffic study anticipating long delays for residents during peak Church traffic time), potential reuses of such a large facility should the use be abandoned, negative impacts on adjacent neighborhoods through noise, lights, and auto exhaust, incompatibility with the surrounding residential uses given the scale of the development and volume of activities, the potential for overloading off-street parking facilities and spilling over into residential areas, traffic congestion, and emergency vehicle access during peak hours and congestion from the facility. (R.50, Exhibit 2, pp. 3-8.) The negative impact on the quality of life for the residents in that area, and the potential traffic hazards, are obvious to anyone but the most partisan observer. The

proposed use as a "mega church" was totally inconsistent with the intent of the zoning district, the surrounding land uses, and the planned development of the area.

On August 17, 1994, the Township Planning Commission voted to deny Plaintiff's application for a special use permit. (R.50, Exhibit 3, Complaint, Exhibit J to Complaint, pp. 15-18.) The Commission explained the reasons for the denial but invited Plaintiff to return with modifications to its plan addressing the concerns raised. (Id.) Instead, Plaintiff sued.

As a result of the concerns expressed over the project, Plymouth Township vigorously contested the litigation. Protracted negotiations between the parties over a period of five months ultimately culminated in a Consent Judgment which was approved and entered by the district court. (R.43, Exhibit 1, Consent Judgment.) There is no question that all the parties agreed to this resolution of the case, which gave no party everything that it wanted. There also is no suggestion that the Court lacked jurisdiction to enter the Consent Judgment or that there was a violation of Plaintiff's due process rights in its entry.

Aside from the massive presence of the Church, little else has changed since entry of the Consent Judgment in the area of Plymouth Township where the Church is located. In 1996, the Plaintiff's property was rezoned to R-1-E, which requires a minimum lot size of 43,560 square feet (about one acre), the lowest-

density residential designation. (R.50, Exhibit 4, Current Zoning Map; Exhibit 5, Aerial View of Area.) Properties located to the south and east of the Plaintiff's property are likewise zoned R-1-E, and the property north across North Territorial is zoned R-2-A, as it was at the time of the Consent Judgment. (Id.) With the Township's current Master Plan and zoning regulations, Plaintiff's church remains an anomaly, and at least a special land use which impacts and burdens the surrounding low-density properties in the same way that it did at the time of the Consent Judgment. In short, the area around Plaintiff's church remains essentially the same, that being an area of low-density, residential development. The conditions in the area have not changed. (Id.)

Although the population of the Township has increased over the years since the Consent Judgment was entered, it has not resulted in a "significant" change in the area where the Plaintiff's church is located. In fact, it is interesting to note that the population increase in the Township is less than that projected by SEMCOG in the early 1990s. SEMCOG projected that Plymouth Township would have a population of 28,872 by 1995, and 32,913 by 2005. The actual population of the Township at the time of the motion was 27,798, which is less than what was projected at the time the Consent Judgment was entered. (R.50, Exhibit 6, Excerpt from Plymouth Township Master Plan; R.55, Anulewicz Affidavit, ¶13.)[6] It

[6]In 2009, the population was only 28,800. See, http://money.cnn.com/

should be noted that the Township's total population has only increased by 5,000 persons over the years. This stands in stark contrast to the Plaintiff's assertion that it now has a congregation of 14,000 persons which are brought into this rural area where the church is located every week.[7]

Since the time the Consent Judgment was entered, Plaintiff has constructed and operated its "mega church" at the location. Plaintiff Northridge's Plymouth campus is depicted and detailed at http://www.northridgechurch.com/discover_us /general_information/plymouth_campus/campus_map_of_plymouth.aspx and elsewhere throughout the site. As shown on the Church's website, it consists of an underground level and two additional floors. It has a large auditorium and numerous classrooms, offices, and other facilities. It has outdoor recreational areas, a bookstore, a café, a kitchen, a grill, childcare, and nurseries. It offers services on Saturdays at 5:15 p.m. and 7:30 p.m. and on Sundays at 9:15 a.m. and 11:30 a.m.[8]

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magazines/moneymag/bplive/2009/snapshots/PL2665085.html.

[7]On the face of the numbers, it is clear that the alleged additional 10,000 members of the church are not commuting locally from Plymouth Township.

[8]Notably, comparing what Plaintiff sought in its application with what it obtained by the Consent Judgment reinforces that Plaintiff should not be heard to complain. (R.1, Complaint, Exhibit C; R.50, Exhibit 2, McKenna Associates Report; R.43, Exhibit 1, Consent Judgment.) It applied for approval of various buildings which together would have had a total square foot footprint of 244,300. The Consent Judgment allows for buildings totaling 235,000 square feet. It sought

Clearly, Plaintiff can engage in religious exercise and beyond. Notwithstanding, Plaintiff moved to void the Consent Judgment, asserting that its ability to exercise its religion is "substantially impaired" by it. Plaintiff sought to have the Consent Judgment and the parties' agreement entirely set aside, and offered no specific proposals for amendment to the Consent Judgment which would accomplish Plaintiff's objectives in the least damaging way to the parties' agreement, hoping that the Court would give it *carte blanche* to do whatever it wants on the property. In spite of the Township's invitation to submit a formal proposal, Plaintiff opted for litigation. (R.50, Exhibit 1, 7/17/07 Township Board Meeting Minutes; 7/18/07 correspondence from Township Attorney to Church's attorney.) The district court properly denied Plaintiff's request to reopen the case and set aside the Consent Judgment. For the reasons delineated by the court and briefed herein, the district court's decision should be affirmed.

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over 1,350 parking spaces and agreed to 1,167. It wanted 4,000 seats in the auditorium and agreed to 3,500. It requested 25-30 special events per year. During Christmas and Easter it agreed to 21. It desired outdoor space and no limit on services - all of which it got in the Consent Judgment.

SUMMARY OF ARGUMENT

Plaintiff attempts to justify setting aside the Consent Judgment or foregoing prospective application of it by arguing that it substantially burdens its religious exercise and, therefore, violates RLUIPA. However, in order to invoke jurisdiction under RLUIPA on that ground, Plaintiff must show that the alleged burden is caused by the Township implementing land use regulations. This Plaintiff cannot do. The Township has not assessed a proposal submitted by Plaintiff and denied it based upon the implementation of its land use regulations, zoning, or landmarking laws. The Township is merely relying upon the Consent Judgment that Plaintiff voluntarily entered into and the mutual promises and concessions made by the parties in that agreement. RLUIPA is inapplicable under these circumstances, and the district court properly denied Plaintiff's attempt to void the Consent Judgment on that ground.

The district court also properly analyzed the arguments and evidence submitted below in conjunction with Plaintiff's Rule 60(b)(4) request to void the Consent Judgment and denied that request where Plaintiff could not show that the Consent Judgment "substantially" burdened Plaintiff's religious exercise. Given the scope and intensity of Plaintiff's operations permitted under the Consent Judgment - and the fact that it could add more services to accommodate its members if it chose to - Plaintiff could not demonstrate a substantial burden. Nor

could Plaintiff show that the Township lacked compelling governmental interests (for example, in maintaining compatible zoning districts and property uses, minimizing traffic concerns which raise safety issues and adversely impact the surrounding residential uses, and preserving quality of life for those impacted by the intensity of the Church's operations) or that the Consent Judgment was not the least restrictive means of allowing Plaintiff's development but furthering those compelling interests.

Finally, the district court properly denied Plaintiff's request under Rule 60(b)(5) where it is not inequitable for the Consent Judgment to have prospective application. The "changed circumstances" that Plaintiff advanced in an attempt to set aside the Consent Judgment either were not supported by the evidence or were not "significant" so as to justify the relief requested.

Plaintiff operates the 15th largest church in the United States. It can hardly legitimately contend that its religious exercise is substantially burdened by the Consent Judgment or that it is inequitable to require Plaintiff to honor its agreement, given the scope and intensity of the activities permitted under the Consent Judgment. The district court's decision should be affirmed.

STANDARD OF REVIEW

Fed. R. Civ. P. 60(b) provides in pertinent part:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> …
>
> **(4)** the judgment is void;
>
> **(5)** the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; …

Motions brought under Fed. R. Civ. P. 60(b)(4) involving questions of law are subject to de novo review. See e.g., **General Star Nat. Ins. Co. v Administratia Asigurarilor de Stat**, 289 F3d 434, 437 (6th Cir. 2002) (analyzing whether subject matter jurisdiction existed); **Jalapeno Property Management, LLC v Dukas**, 265 F3d 506, 515 (6th Cir. 2002), concurring opinion, (considering whether the statue of limitations was properly calculated). Such review is appropriate because "[i]f the underlying judgment is void, it is a *per se* abuse of discretion for a district court to deny a movant's motion to vacate the judgment under Rule 60(b)(4)." Id. However, where a party voluntarily disposes of a claim and then seeks to set aside that underlying judgment on the ground that it was void, like the Plaintiff here, this Court has reviewed such motions for an abuse of discretion. **Warfield v AlliedSignal TBS Holdings, Inc.**, 267 F3d 538, 542 (6th

Cir. 2001) (reviewing voluntary dismissal of claim against employer for abuse of discretion). This Court will find an abuse of discretion only upon a "definite and firm conviction that the trial court committed a clear error of judgment." Id. Regardless of which standard is employed here, the district court properly denied Plaintiff's request to void the Consent Judgment under Rule 60(b)(4).

When a judgment is challenged under Fed. R. Civ. P. 60(b)(5) on grounds that it is no longer equitable to give the judgment prospective application, the fact-intensive question is one of discretion for the court and is reviewed for an abuse of that discretion, based upon the standard cited above. **Brown v Tennessee Dept. of Finance and Admin.**, 561 F3d 542, 545 (6th Cir. 2009).

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED PLAINTIFF'S MOTION TO REOPEN THE CASE WHERE RLUIPA WAS INAPPLICABLE TO PLAINTIFF'S CLAIM THAT THE VOLUNTARILY AGREED-UPON CONSENT JUDGMENT, NOT THE TOWNSHIP'S IMPOSITION OF A LAND USE REGULATION, SUBSTANTIALLY BURDENED ITS RELIGIOUS EXERCISE.

This Court may affirm a district court for any reason supported by the record, even if different from the ground articulated by the district court. **City Management Corp. v US Chem. Co., Inc.**, 43 F3d 244, 251 (6th Cir. 1994); **Andrews v Ohio**, 104 F3d 803, 808 (6th Cir. 1997); **Holloway v Brush**, 220 F3d 767, 772 (6th Cir. 2000). Lack of subject matter jurisdiction is not a waivable defect and may be raised at any time. **Hopson v DaimlerChrysler Corp.**, 157 Fed

Appx 813, 817 (6th Cir. 2005), citing **Ambrose v Welch**, 729 F2d 1084, 1085 (6th Cir. 1984); **One Beacon Ins. Co. v Chiusolo**, 295 Fed Appx 771, 774 (6th Cir. 2008), citing **Kontrick v Ryan**, 540 US 443, 455 (2004). The Township argued to the district court that RLUIPA was not applicable where upholding the mutually-agreed upon Consent Judgment did not equate with the implementation of a land use regulation by the Township within the meaning of RLUIPA. (R.59, hearing transcript, pp. 22-23; R.58, Defendants' Objections to Supplemental Brief, p. 2.)

Plaintiff argued below that the Consent Judgment is void because it substantially burdens Plaintiff's religious exercise and, therefore, violates the subsequently-passed RLUIPA. However, Plaintiff "may not rely upon RLUIPA unless it first demonstrates that the facts of the present case trigger one of the bases for jurisdiction provided in that statute." **Prater v City of Burnside**, 289 F3d 417, 433 (6th Cir. 2002), cert denied 537 US 1018 (2002).

Pursuant to 42 USC 2000cc(a)(2), RLUIPA expressly applies only in a case where:

> (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
>
> (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

> (C) the substantial burden *is imposed in the implementation of a land use regulation or system of land use regulations*, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved. (Emphasis added.)

Plaintiff proceeded under subsection (C), which requires a plaintiff to show that the alleged substantial burden "is imposed in the implementation of a land use regulation or system of land use regulations." Id. RLUIPA defines a "land use regulation" as:

> [A] zoning or landmarking 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. 42 USC 2000cc-5(5).

"Under this definition, a government agency implements a 'land use regulation' only when it acts pursuant to a 'zoning or landmarking law' that limits the manner in which a claimant may develop or use property in which the claimant has an interest." **Prater**, supra at 434; **Vision Church v Village of Long Grove**, 468 F3d 975, 998 (7th Cir. 2006), cert denied 552 US 940 (2007). Given this prerequisite, RLUIPA has been deemed inapplicable in a number of scenarios.

In **Prater**, supra, this Court held that the city there did not act pursuant to a zoning or landmarking law when it chose to develop, rather than close, a dedicated roadway located between two lots owned by a church. There was no jurisdictional

basis for the plaintiff's RLUIPA claim where the city obtained its original interest in the roadway long before the church acquired adjacent property, the city later acquired interest in the realigned roadway upon rededication by the church, and the city's property interest gave it the right to choose whether to develop the roadway. Id., at 434. See accord, **St. John's United Church of Christ v City of Chicago**, 502 F3d 616, 640-642 (7th Cir. 2007), cert denied 553 US 1032 (2008) (city's plan to condemn religious cemetery in connection with airport expansion project was not "land use regulation" within meaning of RLUIPA).

In **Multi Denominational Ministry of Cannabis and Rastafari, Inc. v Gonzales**, 474 F Supp 2d 1133, 1143 (ND Cal, 2007), RLUIPA was held not to apply to the government's enforcement of its Controlled Substance Act by confiscating marijuana plants from property used by a religious organization and its members.

In **Second Baptist Church of Leechburg v Gilpin Township**, 118 Fed Appx 615, 617 (3rd Cir. 2004), the Third Circuit held that the Township's mandatory "tap-in ordinance" did not fall within RLUIPA's definition of a "land use regulation" where the ordinance was not enacted pursuant to a zoning or landmarking law.

Notably, in **Vision Church**, supra, the Seventh Circuit held that the defendant village's annexation of land owned by a religious organization did not

fall within the ambit of RLUIPA:

> The process of annexation, whether voluntary under 65 ILCS 5/7-1-8 or involuntary under 65 ILCS 5/7-1-13, may indeed make possible the subsequent zoning or marking of the land; however, an annexation statute is not itself a "zoning" or "landmarking" regulation and its application therefore does not constitute government action covered by RLUIPA. Id., at 998.

Defendants/Appellees have not been able to unearth a single case where a religious organization entered into a consent judgment and was permitted to void it under RLUIPA, much less a case where the consent judgment was deemed a zoning or landmarking law.

By parity of reasoning, in order to seek relief under RLUIPA, Plaintiff was required to allege and show that the Township was acting pursuant to a "zoning or landmarking law" that limited the manner in which Plaintiff could develop or use property in which it has an interest when it purportedly substantially burdened Plaintiff's religious exercise. This Plaintiff could not do. At best, Plaintiff could show only that it was objecting to the application of a Consent Judgment that it voluntarily entered into. The parties *mutually agreed* to compromises on both sides which allowed construction of the mega church, but placed certain limitations on it to minimize its impact on the surrounding residential uses. Those mutually-agreed upon compromises culminated in the Consent Judgment between the parties. (R.43, Motion to Reopen, Exhibit 1, Consent Judgment.) There is no

dispute that the parties were represented by zealous and competent counsel when negotiating the Consent Judgment and that the parties entered into the Consent Judgment knowingly and voluntarily. The Consent Judgment sets forth and governs the scale of the project and the corresponding restrictions *as agreed to* by the parties. (Id.) It also provides that in the event of a conflict between the terms of the Consent Judgment and terms contained in the Township's Ordinances, the Consent Judgment controls. (Id., Exhibit 1, §1.5(f).)

The Township is not applying a land use regulation to the property. It is simply honoring its commitments and complying with the mutually-agreed upon Consent Judgment, under which Plaintiff took the benefits of its bargain and constructed the massive complex. The fact that this case emanates from application of the Consent Judgment, rather than the Township's implementation of land use regulations, is exemplified by Plaintiff's Appeal Brief where it repeatedly contends: the "Consent Judgment" places time and place restrictions on Northridge, the "Consent Judgment" limits Northridge's charitable work, the "Consent Judgment" burdens Northridge with financial strain, and the "Consent Judgment" restricts Northridge's ability to meet the current needs of its congregants. (Appeal Brief, p. iii.)

The district court properly declined to void the Consent Judgment that was entered into after five months of protracted negotiations between the parties and

give and take on both sides. Plaintiff had the option to litigate its claims before - the identical claims raised in the motion to reopen the case - and chose to settle by entering into the Consent Judgment. The Township has stood by its agreement and accepted the burdens imposed by Plaintiff's development and use of the property, and it is inequitable for Plaintiff to accept and retain the benefits of the Consent Judgment, while at the same time seeking to void it.

If Plaintiff's position is adopted, a plaintiff could enter into a consent judgment, ponder whether it could have obtained a better deal, and almost immediately move to have the consent judgment declared "void" as in violation of RLUIPA, even though at the time of the agreement, the plaintiff entered into the consent judgment knowingly and voluntarily. No consent judgment could be sacrosanct or reliable.

RLUIPA is inapplicable to the present matter. The district court properly denied Plaintiff's request to reopen the case to void the Consent Judgment, and its decision should be affirmed.

II. THE DISTRICT COURT PROPERLY DENIED PLAINTIFF'S MOTION UNDER RULE 60(b)(4) WHERE PLAINTIFF COULD NOT SHOW THAT THE CONSENT JUDGMENT "SUBSTANTIALLY" BURDENED PLAINTIFF'S RELIGIOUS EXERCISE AND, IN ANY EVENT, THE TOWNSHIP DEMONSTRATED COMPELLING GOVERNMENTAL INTERESTS PROMOTED BY THE CONSENT JUDGMENT AND THAT AGREEING TO SUCH RESTRICTIONS IN THE CONSENT JUDGMENT WAS THE LEAST RESTRICTIVE MEANS OF ALLOWING PLAINTIFF'S MASSIVE DEVELOPMENT WHILE FURTHERING THOSE COMPELLING INTERESTS.

"A void judgment is one which, from its inception, was a complete nullity and without legal effect." **Jalapeno Property Management**, supra at 515. Clearly, the Consent Judgment was not void from its inception and Plaintiff cannot avail itself of relief under this rule. Plaintiff cannot legitimately argue that the Consent Judgment is void under RLUIPA where the same agreement could be entered into today in any community across the country and, given the scope of what it allows, it is unfathomable that it could be declared void in violation of RLUIPA.

A. No Substantial Burden imposed by the Consent Judgment

As demonstrated by its legislative history, RLUIPA was not intended to immunize religious organizations from all land use limitations. *See* 146 Cong. Rec. S7774-01, S7776 (daily ed. July 27, 2000) (Joint Statement of Sen. Orrin Hatch and Sen. Edward Kennedy) (stating that RLUIPA was not intended to "relieve religious institutions from applying for variances, special permits or exceptions, where available without discrimination or unfair delay"). **Murphy v**

New Milford Zoning Com'n 402 F3d 342, 350 (2nd Cir. 2005). Rather, RLUIPA provides in relevant part that:

> No government shall impose or implement a land use regulation in a manner that imposes a ***substantial*** *burden on the religious exercise* of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution-
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.

42 USC 2000cc(a)(1), emphasis added.

As noted by this Court in **Living Water Church of God v Charter Tp. of Meridian**, 258 Fed Appx 729 (6th Cir. 2007), the U.S. Supreme Court has not yet defined "substantial burden" as it applies to RLUIPA. Nor does the statute define the term. However, the statute's legislative history indicates that the "term 'substantial burden' as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise." Id., at 733-734, quoting 146 CONG. REC. S7774-01, 7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy).

As such, this Court reviewed the Supreme Court's definition in the Free Exercise context and observed that "the 'substantial burden' hurdle is high and that determining its existence is fact intensive." Id., at 734. The Court summarized:

> In short, while the Supreme Court generally has found that a government's action constituted a substantial burden on an individual's free exercise of religion when that action forced an individual to choose between "following the precepts of her religion and forfeiting benefits" or when the action in question placed "substantial pressure on an adherent to modify his behavior and to violate his beliefs," *Sherbert*, 374 U.S. at 404, 83 S.Ct. 1790; *Thomas*, 450 U.S. at 717-18, 101 S.Ct. 1425, it has found no substantial burden when, although the action encumbered the practice of religion, it did not pressure the individual to violate his or her religious beliefs. *See Lyng*, 485 U.S. at 449, 108 S.Ct. 1319; *Braunfeld*, 366 U.S. at 605-06, 81 S.Ct. 1144; *see also* *735 *Episcopal Student Found. v. City of Ann Arbor*, 341 F.Supp.2d 691, 702 (E.D.Mich.2004) ("[C]ourts have been far more reluctant to find a violation where compliance with the challenged regulation makes the practice of one's religion more difficult or expensive, but the regulation is not inherently inconsistent with the litigant's beliefs."). **Living Water Church**, at 734-735.

This Court also considered definitions of "substantial burden" employed by other circuits. It observed that the Seventh Circuit in **Civil Liberties for Urban Believers v City of Chicago**, 342 F3d 752, 761 (7th Cir. 2003), found that "a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise-including the use of real property for the purpose thereof within the regulated jurisdiction generally-effectively impracticable." **Living Water Church**, at 735, quoting **Civil Liberties**, at 761. This Court noted that several years later, the Seventh Circuit relaxed its definition of substantial burden, finding

that where the city's denial of a rezoning permit would require the church to search for other parcels of land or file more applications with the city, the resulting "delay, uncertainty, and expense" constituted a substantial burden. See **Sts. Constantine & Helen Greek Orthodox Church, Inc. v City of New Berlin**, 396 F3d 895, 901 (7th Cir. 2005) (addressing a challenge to city's denial of permit to rezone existing tract of land so that plaintiff could build a church).

However, this Court went on to observe that the Seventh Circuit thereafter returned to the **Civil Liberties** definition of substantial burden in **Vision Church v Village of Long Grove**, 468 F3d 975, 997-1000 (7th Cir. 2006). There, the church sought a special use permit to construct a church complex. The Court held that where under the village's ordinance, the church would be permitted to build a smaller facility - in fact, only slightly smaller than what the church had earlier proposed - the village's conditions limiting the size of the buildings, the number of services, the use of surrounding outdoor areas, and the number of major activities to be conducted in the course of the week did ***not*** impose a substantial burden on the church's religious exercise.

Continuing on, this Court in **Living Water Church** turned to the Eleventh Circuit which concluded that a substantial burden:

> must place more than an inconvenience on religious exercise; a "substantial burden" is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a

> substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct. Id., at 735, quoting **Midrash Sephardi, Inc. v Town of Surfside**, 366 F3d 1214, 1227 (11th Cir. 2004).

The Ninth Circuit held:

> [F]or a land use regulation to impose a 'substantial burden,' it must be 'oppressive' to a 'significantly great' extent. That is, a 'substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise." **Guru Nanak Sikh Soc. of Yuba City v County of Sutter** 456 F3d 978, 988-989 (9th Cir. 2006), quoting **San Jose Christian College v City of Morgan Hill**, 360 F3d 1024, 1034 (2004).

This Court declined to set a bright line test by which to measure a substantial burden in **Living Water Church**, though it set forth a framework to apply to the facts before it and found the following consideration helpful:

> though the government action may make religious exercise more expensive or difficult, does the government action place substantial pressure on a religious institution to violate its religious beliefs or effectively bar a religious institution from using its property in the exercise of its religion? With that framework in mind, we now turn to the facts before us. Id., at 737.

The Court concluded that the denial of a special use permit to build a structure in excess of 25,000 square feet did not impose a substantial burden on the plaintiff so as to violate RLUIPA where it could build a smaller facility and could conduct services, accept new members, provide religious education, and run religious programs and meetings in the evenings and on weekends. In sum:

> although the government action may make Living Water's religious exercise more expensive or difficult, does that government action place substantial pressure on Living Water to violate its religious beliefs or effectively bar the church from using its property in the exercise of its religion? We conclude that the Township's denial does neither. Ideally, no doubt, Living Water would have an unlimited and ever-expanding place of worship with open doors to all who are interested-the same would surely apply to its school. The Township's action here, and the zoning ordinance in general, burdens this hope and objective. And although the Township's action may make Living Water's religious exercise more expensive or difficult, we cannot say that it places substantial pressure on this religious institution to violate its religious beliefs or that it effectively bars the institution from using its property in the exercise of its religion. Id., at 739.

See accord, **Greater Bible Way Temple of Jackson v City of Jackson**, 478 Mich 373; 733 NW2d 734 (2007) where the Michigan Supreme Court surveyed a panoply of state and federal cases and concluded:

> we believe that it is clear that a "substantial burden" on one's "religious exercise" exists where there is governmental action that coerces one into acting contrary to one's religious beliefs by way of doing something that one's religion prohibits or refraining from doing something that one's religion requires. That is, a "substantial burden" exists when one is forced to choose between violating a law (or forfeiting an important benefit) and violating one's religious tenets. A mere inconvenience or irritation does not constitute a " *substantial* burden." Similarly, something that simply makes it more difficult in some respect to practice one's religion does not constitute a "*substantial* burden." Rather, a "substantial burden" is something that "coerce [s] individuals into acting contrary to their religious beliefs ...." *Lyng, supra* at 450, 108 S.Ct. 1319.[FN23]

> FN23. We recognize that some courts have held that a "substantial burden" exists where there is "delay, uncertainty, and expense." See, for example, *Sts Constantine & Helen Greek Orthodox Church v. City of New Berlin*, 396 F.3d 895, 901 (C.A.7, 2005), and *Living Water Church of God v. Meridian Charter Twp.*, 384 F.Supp.2d 1123, 1134 (W.D.Mich., 2005). However, we reject this definition of "substantial burden" both because it is inconsistent with the United States Supreme Court's definition of the phrase and because it is inconsistent with the common understanding of the phrase "*substantial* burden."

Greater Bible Way, at 400-401.

The within Plaintiff argues that the Consent Judgment imposes a substantial burden on Plaintiff's religious exercise through: (1) time and place restrictions, (2) limitations on the Church's ability to perform charitable work, (3) financial burdens, and (4) restricting Plaintiff's ability to meet the current needs of its congregants. Plaintiff is mistaken.

First, the Consent Judgment places no limitation on the number of services the Church may conduct. To the contrary, §2.5(f) of the Consent Judgment states: "This Section 2.5 shall not be construed to limit the number and/or size of services or activities, other than Musical Service Events, nor would it prohibit concurrent services or activities provided that the total number of attenders at services or activities held concurrently do not exceed 3,500." (R.43, Exhibit 1, Consent

Judgment, §2.5(f).)

Plaintiff relies on **Murphy v Zoning Comm'n**, 148 F Supp 2d 173, 189 (D Conn, 2001), vacated 402 F3d 342 (2nd Cir. 2005), where a municipality's order requiring homeowners to cease and desist from holding prayer meetings of more than 25 people violated RLUIPA. However, that decision was vacated by **Murphy v New Milford Zoning Com'n** 402 F3d 342, 350 (2nd Cir. 2005) on ripeness grounds. Moreover, the 25 there is a far cry from the 3,500 allowed here at any given time in a residential area.

As for musical events, Plaintiff agreed to 14 of them a year (more than one a month). (R.43, Exhibit 1, §2.5(a).) These are *in addition to* the Christmas and Easter special music events, which are permitted by the agreement 12 times and 9 times a year, respectively. (Id., 2.5(g).) With 3,500 people being able to attend each show, 42,000 people may attend the Christmas musical event, while 31,500 may attend the Easter musical event. (Id.)

Plaintiff argues that the Consent Judgment indirectly limits the time and place of exercise by limiting the seating capacity and parking spaces. Plaintiff cites to **DiLaura v Township of Ann Arbor**, 112 Fed Appx 445 (6th Cir. 2004) as support. That reliance is misplaced where there, the bed and breakfast permit imposed a substantial burden on plaintiffs because it "effectively barred the plaintiffs from using the property in the exercise of their religion." Here, Plaintiff

is not barred from using its property for religious exercise. To the contrary, the Consent Judgment allows religious exercise on a grand scale. Plaintiff argues that the Consent Judgment violates RLUIPA because all of its members cannot pray together at once. This assertion begins to strain reason. Plaintiff's congregants can worship, pray, and engage in fellowship with 3,500 other members or attendees at any given time on the property. The fact that they cannot do so with all 14,000 members at once does not impose a substantial burden. Plaintiff's position begs the question: what if Plaintiff had 100,000 members? would it violate RLUIPA if they all were not allowed to worship at the same site at the same time?

Next, Plaintiff contends that the Consent Judgment impermissibly limits its ability to perform charitable work. However, as demonstrated both by Plaintiff's website and in its Appeal Brief at page 15, it engages in numerous charitable outreach programs and volunteer endeavors. Though Plaintiff is restricted from setting up a homeless shelter or soup kitchen at this primarily residential location, it can do so at another site. Plaintiff has never sought permission to establish such programs at another site. If Plaintiff was so committed to these endeavors, it did not have to commit to the Consent Judgment. Further, simply because Plaintiff cannot establish a homeless shelter or soup kitchen on the property, it is not foreclosed from helping those in such need in myriad other ways, such as by collecting food and clothing, donating funds to existing shelters, or establishing its

own shelter or soup kitchen at another site. Plaintiff's assertion that this one limitation, to which it agreed, constitutes a substantial burden on its religious exercise is fallacious.

The same is true for Plaintiff's claim that the Consent Judgment hinders its ability to provide counseling services. Plaintiff claims that many have been turned away for such counseling. However, Plaintiff is unable to explain why that is so when they could conduct various counseling sessions for up to 3,500 at any given time or why that number is insufficient.

Buried deep into Plaintiff's Appeal Brief is what appears to be the main source of consternation for Plaintiff - parking - where it is the one issue that it brought to the attention of the Director of Public Services before threatening litigation and raising a litany of objections to the Consent Judgment. (R.55, Anulewicz Affidavit, ¶14.) Although Plaintiff has initiated a shuttle service to an off-site lot at Johnson Controls, it contends that the cost of the busing is in the area of $300,000 per year. However, Plaintiff provides no information as to what percent of its gross revenue is allocated to the shuttles. Moreover, there really should be very little need for this if Plaintiff is limiting its attendees to 3,500 per service under the Consent Judgment, particularly where it has almost 1,200 parking spaces on site. While some attendees may come alone, there are certainly others who carpool or drive together as a family. Plaintiff has not shown that this

expenditure constitutes a substantial burden on its religious exercise.

Lastly, Plaintiff contends that the Consent Judgment restricts its ability to meet the current needs of its congregants. Plaintiff claims that its weekly attendance soared from 1,200 to 14,000. At the time the parties agreed to the Consent Judgment, it was understood that Plaintiff intended to increase its membership. (R.55, ¶¶6, 11-12.) Plaintiff has been able to accommodate this number under the Consent Judgment to where it is the 15th largest church in the country. Plaintiff accomplishes this by having two services on Saturday and two services on Sunday, apparently with approximately 3,500 attendees at each. However, there is nothing preventing Plaintiff from incorporating additional services into its program. For example, Plaintiff could have services on Sundays at 8:00 a.m., 10:00 a.m., Noon, and 5:00 p.m. It could even move the times up on Saturdays so it can accommodate weddings, a limitation it claimed below. While Plaintiff may have to enlist the assistance of more volunteers to accomplish this, the Consent Judgment allows room for even more growth.

In sum, the district court properly held that Plaintiff failed to show that the Consent Judgment substantially burdened Plaintiff's religious exercise so as to void the Consent Judgment under Rule 60(b)(4). Its decision should be affirmed.

B. The Township demonstrated compelling governmental interests

As noted above, each case is examined according to its facts. The scope and

intensity of the use here sets it apart from most others. It has long been recognized that "local governments have a compelling interest in protecting the health and safety of their communities through the enforcement of the local zoning regulations." **Greater Bible Way**, supra at 403. "'All property is held subject to the right of the government to regulate its use in the exercise of the police power so that it shall not be injurious to the rights of the community or so that it may promote its health, morals, safety and welfare.'" Id. "The city has a cognizable compelling interest to enforce its zoning laws.... Reserving areas for commercial activity both protects residential areas from commercial intrusion and fosters economic stability and growth." Id. Municipalities have a compelling interest in regulating homeless shelters and food banks. Id., citing **Daytona Rescue Mission, Inc. v City of Daytona Beach**, 885 F Supp 1554, 1560 (MD Fla, 1995).

Here, the Township conducted a study to determine the impact of the proposed "mega church" on the rural, residential area. (R.50, Exhibit 2, McKenna Associates Report.) The report identified a number of concerns with the scope of the development, such as vehicular circulation (with even Plaintiff's traffic study anticipating long delays for residents during peak Church traffic time), potential reuses of such a large facility should the use be abandoned, negative impacts on adjacent neighborhoods through noise, lights, and auto exhaust, incompatibility with the surrounding residential uses given the scale of the development and

volume of activities, the potential for overloading off-street parking facilities and spilling over into residential areas, traffic congestion, and emergency vehicle access during peak hours and congestion from the facility. (R.50, Exhibit 2, pp. 3-8.) As previously noted, the negative impact on the quality of life for the residents in that area, and the potential traffic hazards, are obvious to anyone but the most partisan observer. The proposed use as a "mega church" was totally inconsistent with the intent of the zoning district, the surrounding land uses, and the planned development of the area. The Township Planning Commission voted to deny Plaintiff's application for a special use permit for all of those reasons. (R.50, Exhibit 3, Complaint, Exhibit J to Complaint, pp. 15-18.) It subsequently entered into the Consent Judgment, compromising but also attempting to safeguard against the concerns expressed.

Plaintiff argues that traffic alone does not constitute a compelling interest. However, the Township did not advance a traffic concern in isolation. Notwithstanding, the amount of traffic at a given time (just before and after services) amounts to a crush of cars attempting to leave the area at once. The Church is located in a heavily residential area where residents are attempting to enter and exit their subdivisions and homes and where children are crossing streets and playing. Emergency vehicles need to have access to the site and Plaintiff's own traffic study warned of periods of congestion and long delays. (R.50, Exhibit

2.) As explained by Justice Powell:

> It is undeniable that zoning, when used to preserve the character of specific areas of the City, is perhaps the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. **Young v American Mini-Theaters, Inc.**, 427 US 50, 80 (1976).

Based on the facts of this case, the district court properly concluded that the Township advanced compelling governmental interests sought to be protected by the Consent Judgment. (R.63, Opinion, p. 8.) Its decision, if reached by this Court on this issue, should be affirmed.

C. The Consent Judgment is the least restrictive means of protecting those interests.

Short of an outright denial of Plaintiff's massive development, the Consent Judgment represents the only way to safeguard the compelling governmental interests delineated above. Plaintiff argues that parking could be increased, but that certainly would make congestion into, out of, and around the site even worse.

In **Greater Bible Way**, supra at 407, the Court noted there were two responses the city could have had to the rezoning request - grant it or deny it. Denying it was the least restrictive means to advance the governmental interest in maintaining the single-family residential zoning there. Here, the Township opted for the least restrictive means of allowing the Plaintiff's grand-scale use, but attempted to minimize the negative impacts of it by agreeing to certain limitations.

Plaintiff cannot show that without giving *carte blanche* to Plaintiff to do whatever it wishes on the property, the Consent Judgment was the least restrictive way of protecting the compelling interests advanced.

The district court properly denied Plaintiff's motion on this ground as well and its decision should be affirmed.

III. THE DISTRICT COURT PROPERLY DENIED PLAINTIFF'S REQUEST UNDER RULE 60(b)(5) TO FORECLOSE PROSPECTIVE APPLICATION OF THE CONSENT JUDGMENT WHERE THE "CHANGED CIRCUMSTANCES" PLAINTIFF CITED EITHER WERE NOT SUPPORTED BY THE EVIDENCE OR WERE NOT "SIGNIFICANT" SO AS TO JUSTIFY THE RELIEF REQUESTED.

Plaintiff's motion was properly denied where the Consent Judgment in this case is not one that is subject to revision under this rule. In **Kalamazoo River Study Group v Rockwell International Corporation**, 355 F3d 574 (6th Cir. 2004), this Court addressed whether a judgment imposing percentages of PCB cleanup in the Kalamazoo River was subject to revision under Fed. R. Civ. P. 60(b)(5). In ruling that the judgment in that case was not subject to revision under the court rule, the Court stated:

> The mere possibility that a judgment has some future effect does not mean that it is "prospective" because "virtually every court order causes at least some reverberations into the future, and has . . . some prospective effect. (Citations omitted). The essential inquiry into the prospective nature of a judgment revolves around "whether it is executory" or involves the "supervision of changing conduct or conditions. Id., at 587.

Thus, a judgment which essentially fixes the parties' obligations at the time of its entry is not subject to modification under this section of Fed. R. Civ. P. 60(b)(5).

In this case, the Consent Judgment is like the judgment in the **Kalamazoo River Study Group** case. The obligations of the parties were essentially fixed at the time of its entry, and though the Consent Judgment continues to govern the conduct of the parties, it is not executory nor does it involve the ongoing supervision of changing conduct or conditions. Rather, the parties agreed to a certain course of conduct, and the parties have abided by that Judgment. It is unconscionable that Plaintiff seeks to undo the bargain of the parties, which has worked to Plaintiff's benefit to the point where it has increased its congregation substantially with very little inconvenience. As this Judgment is not the type of judgment which is subject to modification under Fed. R. Civ. P. 60(b)(5), Plaintiff's motion was properly denied.

Even assuming that the Consent Judgment is subject to Rule 60(B)(5), Plaintiff failed to demonstrate to the district court any reason for modification of the Consent Judgment. As the Supreme Court said in **Rufo v Inmates of Suffolk County Jail**, 502 US 367 (1992):

> Rule 60(B)(5) provides that a party may obtain relief from a court order when "it is no longer equitable that the judgment should have prospective application", not when it is no longer convenient to live with the terms of the consent decree. Accordingly, a party seeking modification of a consent decree bears the burden of

> establishing as ***significant*** change in circumstances warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance.
>
> A party seeking modification of a consent decree may meet its initial burden by showing there is either significant change either in factual conditions or in the law. Id., at 383, emphasis added.

In this portion of its Appeal Brief, Plaintiff essentially repackages arguments made earlier and addressed in detail by the Township.

Plaintiff failed to meet its initial burden of showing that the Consent Judgment must be set aside. First, Plaintiff failed to show that there is any significant change in circumstances or law which would make it inequitable to continue with the Consent Judgment. As detailed earlier, there simply was no "significant" change in circumstances so as to warrant upsetting the Consent Judgment. The Church intended to increase its membership. Even though it may have been more successful than it even hoped, the Consent Judgment still allows for it to operate, flourish, and grow even more. Nor did the passage of RLUIPA warrant setting aside the Consent Judgment. This issue has been fully briefed under issues I and II. Plaintiff originally proceeded under the RFRA and the 1st Amendment, among other claims alleged in the Complaint. The RFRA governed the same conduct as that now governed by RLUIPA. However, because the Township is relying on a mutually agreed-upon Consent Judgment, RLUIPA is

inapplicable. Even if it somehow could be construed to apply, Plaintiff's arguments under RLUIPA fail as briefed above. The passage of RLUIPA is not a significant change so as to foreclose prospective application of the Consent Judgment.

The district court properly observed that the Township's population actually grew less than what was anticipated and projected. Although the population of the Township has increased over the years since the Consent Judgment was entered, it has not resulted in a "significant" change in the area where the Plaintiff's church is located. In fact, the population increase in the Township is less than that projected by SEMCOG in the early 1990s. As briefed earlier, SEMCOG projected that Plymouth Township would have a population of 28,872 by 1995, and 32,913 by 2005. The actual population of the Township at the time of the motion was 27,798, which is less than what was projected at the time the Consent Judgment was entered. (R.50, Exhibit 6, Excerpt from Plymouth Township Master Plan; R.55, Anulewicz Affidavit, ¶13.)

The district court also noted that Plaintiff's claim that the area was no longer designated for agricultural use and experienced urbanization and development failed to advance Plaintiff's position that the Township's concern about excessive traffic was no longer valid where such development would lead to more traffic and use of the roads. Plaintiff failed to show that the alleged "new character" of the

area is a significant change worthy of upsetting the Consent Judgment. (R.63, pp. 10-11.) (This would seem particularly so where Plaintiff seeks to add *more* parking, exponentially increasing traffic flow and exacerbating an already existing congestion problem.)

The district court properly denied Plaintiff's request to foreclose prospective application of the Consent Judgment and its decision should be affirmed.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for all of the foregoing reasons, Defendants/Appellees, the Township of Plymouth and the Plymouth Township Planning Commission, respectfully request that this Honorable Court affirm the district court.

Respectfully submitted,

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Dated: June 30, 2010

CERTIFICATE OF CONFORMITY

Pursuant to FRAP 32(a)(7)(C), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation found at FRAP 32(a)(7)(B). It contains 11,645 words and has been prepared in Microsoft Word, using a proportionally spaced face, Times New Roman, and a 14-point font size.

Respectfully submitted,

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Dated: June 30, 2010

CERTIFICATE OF SERVICE

I certify that on July 6, 2010, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Marcelyn A. Stepanski

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 09-2388

NORTHRIDGE CHURCH, fka Temple Baptist Church, a Michigan ecclesiastical corporation,

Plaintiff/Appellant,

vs.

CHARTER TOWNSHIP OF PLYMOUTH; PLYMOUTH TOWNSHIP PLANNING BOARD,

Defendants/Appellees.

ADDENDUM
DEFENDANTS/APPELLEES CHARTER TOWNSHIP OF PLYMOUTH AND PLYMOUTH TOWNSHIP PLANNING BOARD
DESIGNATION OF RECORD ON APPEAL

Pursuant to 6 Cir R 30(b), Defendants/Appellees hereby designate the following filings in the district court's electronic record to be relevant documents for purposes of the record on appeal:

DESCRIPTION OF ENTRY	DATE FILED	RECORD ENTRY NO.
Complaint	10/06/94	1
Motion to Reopen Case and Set	08/17/07	43

Aside Consent Judgment		
Consent Judgment	08/17/07	43, Exhibit 1
Affidavit of James King	08/17/07	43, Exhibit 2
Response to Motion to Reopen Case and Set Aside Consent Judgment	08/31/07	50
July 17, 2007 Board Meeting Minutes	08/31/07	50, Exhibit 1
McKenna Report	08/31/07	50, Exhibit 2
Summons and Complaint	08/31/07	50, Exhibit 3
Zoning Ordinance	08/31/07	50, Exhibit 4
Area Map	08/31/07	50, Exhibit 5
Excerpt from Master Plan	08/31/07	50, Exhibit 6
Corrected Exhibit 3 re: Response to Motion to Reopen Case and Set Aside Consent Judgment	08/31/07	51
Corrected Exhibit 5 re: Response to Motion to Reopen Case and Set Aside Consent Judgment	08/31/07	52
Reply to Response to Motion to Reopen Case and Set Aside Consent Judgment	09/11/07	53
McKenna Affidavit	09/11/07	53, Exhibit 1
Detroit News March 2006	09/11/07	53, Exhibit 2
Corrected Index of Exhibits re: Reply to Response to Motion to Reopen Case and Set Aside Consent Judgment	09/14/07	54

McKenna Affidavit	09/14/07	54, Exhibit 1
Detroit News article March 2006	09/14/07	54, Exhibit 2
Affidavit of James D. Anulewicz re: Response to Motion to Reopen Case and Set Aside Consent Judgment	09/14/07	55
Plaintiff's Supplemental Brief re: Reply to Response to Motion to Reopen Case and Set Aside Consent Judgment	11/10/07	57
Email of James Anulewicz	11/10/07	57, Exhibit 1
Defendant's Objection to Plaintiff's Supplemental Brief	11/15/07	58
Transcript of Hearing of Motion to Reopen Case held on 10/10/07	11/27/07	59
Defendant's Supplemental Brief re: Response to Motion to Reopen Case and Set Aside Consent Judgment	04/24/08	60
Plaintiff's Sur-Reply re: Motion to Reopen Case and Set Aside Consent Judgment	05/08/08	61
King Affidavit	05/08/08	61, Exhibit 1
McKenna Affidavit	05/08/08	61, Exhibit 2
Large Scale Church Zoning Ordinance	05/08/08	61, Exhibit 3
Plaintiff's Supplemental Brief re: Sur-Reply re: Supplemental Authority	06/15/08	62
Order Denying Motion to Reopen Case	09/30/08	63

Motion for Reconsideration re: Order on Motion to Reopen Case	10/10/08	65
Motion for Leave to File Response in Opposition to Plaintiff's Motion for Reconsideration	12/17/08	68
Exhibit 1 which was inadvertently not attached to Motion for Leave to File Response	12/18/08	69
Response to Motion for Leave to File Response in Opposition to Motion for Reconsideration	12/29/08	70
Order Denying Motion for Reconsideration; Denying Motion for Leave to File	09/30/09	71
Notice of Appeal by Plaintiff	10/27/09	72