JUN 1 8 2003

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FILED
JUN 1 7 2003
MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

PETRA PRESBYTERIAN CHURCH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 03 C 1936
	)	
VILLAGE OF NORTHBROOK	)	Judge Blanche M. Manning
	)	
Defendant.	)	Magistrate Judge Nolan

THE VILLAGE OF NORTHBROOK'S TRIAL BRIEF

Defendant, Village of Northbrook ("Village"), by its attorneys responds to the Trial Brief of Plaintiff, Petra Presbyterian Church ("Petra") and states:

Background Overview

Petra's request for a preliminary injunction should be denied because (i) Petra has no likelihood of success on the merits and Petra has not raised a "fair question" that it is entitled to the relief requested, (ii) preliminary injunctive relief is moot with respect to the Village ordinance prior to April 22, 2003, and (iii) the public interest in land use regulation would be injured if an injunction is entered based upon the following factors:

1. The Village amended its ordinance on April 22, 2004 to also exclude non-religious membership organization from the I-1 Restricted Industrial district and, therefore, now treats religious assembly equally in that district.

2. Petra never established actual use of the property for religious purpose prior to the Village April 22, 2003 amendments to the Village zoning code, and accordingly has no vested rights under Illinois law.

3. Petra's pastor, elder and deacon have testified that the Village has not infringed upon the content of Petra's religious beliefs or practices and thus has not burdened religious exercise.

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4. Petra withdrew its Application for rezoning prior to a final decision by the Village, and therefore never exhausted its administrative remedies in the Village prior to filing the present lawsuit, as required by state and federal law.

Petra is asking the court to bail it out of a series of improvident business decisions. Knowing that its intended use was not allowed, Petra included a zoning contingency in its original purchase contract – and then exercised that zoning contingency to cancel the contract in 2001 after the Plan Commission recommended against approval of Petra's application for rezoning. On May 17, 2001 Petra also withdrew its application for rezoning. (*See* Exhibit A, attached hereto.) In September 2001, Petra, knowing full well that its proposed use was not allowed under the Village's Zoning Code, reinstated the contract without a zoning contingency, and on October 8, 2001, purchased the warehouse/office property for $300,000 less than its originally negotiated price. Thereafter, Petra used the property for office uses, but did not seek any Village approval to hold religious assemblies, and continued to conduct its religious assemblies in Glenview, as it had for the prior three years. Petra may be disappointed in its failure to find appropriate space or obtain a favorable lease for its religious exercise, but that failure is caused by its own decision-making, not the Village's zoning code. Congress did not enact RLUIPA to save churches from their own ill-advised real estate decisions.

I. Petra's Motion For Preliminary Injunctive Relief Is Moot.

Petra admits that on April 22, 2003, the Village amended the Northbrook Zoning Code and the provisions of the I-1 Restricted Industrial district regulating land use for religious assembly. In July, 2001 – just months after the passage of RLUIPA in 2000, and long before Petra filed this suit – the Village began the process of analyzing its zoning code and related legal issues, conducting public hearings, and preparing the amendments. As a result, the Village also excluded non-religious membership organizations from the I-1 Restricted Industrial District. In addition, religious assembly is now a permitted use in the R-1 and R-2 districts, and allowed as special permit use in 15 other residential, office, and commercial districts, as well as the

Institutional Buildings District.[1] Notwithstanding these facts, Petra's lawsuit seeks a preliminary injunction based on defects it perceives in the Village's previous ordinance under RLUIPA. Such an injunction cannot be granted under Seventh Circuit law.

Petra's claim for injunctive relief based on the Village's previous code was mooted by the passage of the amended ordinance, which now treats equally religious and non-religious assembly. *See MacDonald v. City of Chicago*, 243 F.3d 1021, 1025 (7th Cir. 2001); *Penny Saver Publ'ns, Inc. v. Village of Hazel Crest*, 905 F.2d 150, 153 (7th Cir. 1990). As the Seventh Circuit explained in *Penny Saver*, the amendment of an ordinance does not moot an entire action – it moots only that portion of the action seeking injunctive relief based upon the old ordinance. *See Penny Saver*, 905 F.2d at 153. Thus, Petra is procedurally precluded from seeking a preliminary injunction based upon any defects in the previous ordinance, which no longer exists and cannot be enforced by either the Village or this Court.

Petra strongly relies on a Tenth Circuit case, *Carter v. City of Salina*, 773 F.2d 251 (10th Cir. 1985), to support its bid for injunctive relief (Petra Br. 5). However, *Carter* is inapposite. In *Carter*, the plaintiffs sought injunctive relief against the enforcement of a local zoning code on the ground that the ordinance's enactment did not comply with Utah state law. The Tenth Circuit held that "[o]rdinances which fail to comply with the state enabling statutes *requiring notice and hearing are void.*" (emphasis added). *Carter*, 773 F.2d at 254. Thus, the court held that the zoning code should be treated as if it never existed, because it was improperly enacted, and that the municipality had no effective zoning code whatsoever at the time the plaintiff began its use. *See Carter*, 773 F.2d at 255. In contrast, Petra does not argue that either the Northbrook Zoning Code or its recent amendments have been improperly enacted under state law. Petra is without basis to claim that Northbrook's Zoning Code was void *ab initio* like the ordinance in *Carter.*[2]

[1] The Village has a long history of hospitality to churches and other houses of worship in its Residential Districts and Institutional Building Districts. (*See* Exhibit B, attached hereto.)

[2] Additionally, in *Carter*, the municipality did not make any attempt to rely upon its later-enacted ordinance, unlike the Village here.

Because the court at this time is addressing only Petra's request for injunctive relief, this brief will address Petra's request for relief with respect to the Village's *current* zoning code. That ordinance is in complete compliance with RLUIPA, because it treats religious uses equally to other similarly situated uses,[3] it does not exclude religious uses, and it does not substantially burden religious exercise.

II. The Village's Amended Zoning Code Does Not Improperly Exclude Religious Uses.

Petra's main argument is that the prior Village zoning code improperly excluded churches. (Petra Br. 6-7) However, under the current amendments, churches are now allowed as of right in two residential districts (R-1 and R-2), and as a special permit use in 16 other residential, commercial, office, and institutional buildings districts. (*See* Exhibit C, attached hereto.)[4] This is far from a "total exclusion," particularly because – as Petra acknowledges (Petra Br. 6) – the Village has little discretion to turn down a special permit use application. Under Illinois law, a specially permitted use is *presumed* to be compatible with the designated zoning. *See City of Chicago Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc.*, 749 N.E.2d 916, 929-31 (Ill. 2001). The evidence will show that the Village reviews and processes church applications for zoning changes under its code with that presumption in mind. The Village's Zoning Code provides that the Village can deny a special permit use only if it fails to meet the standards in Section 11-602 E of the Zoning Code, which is consistent with Illinois

[3] Petra argues that the amended zoning code still does not treat religious organizations equally to non-religious assemblies, specifically "Membership Sports and Recreation Clubs" or "Physical Fitness Facilities." However, on June 16, 2003, the Village corrected a scrivener's error in Ordinance No. 03-26 and validated the corrected ordinance so that neither of these uses is permitted in the I-1 Restricted Industrial District or I-2 Light Industrial District, consistent with the Village's prior intent. Moreover, Petra's religious assembly use is not similar to sports or fitness clubs, and it is certainly dissimilar to any uses currently permitted in the I-1 Restricted Industrial District. (*See* Exhibit D, attached hereto.)

[4] Petra also argues that the Village's comprehensive plan does not adequately address religious uses (p. 2), but that is irrelevant. Under Illinois law, "the zoning ordinance is law; the comprehensive plan is not." *Living Word*, 749 N.E.2d at 930; *see also People v. City of Batavia*, 414 N.E.2d 916, 919 (Ill. App. Ct. 1980) (acknowledging that municipalities may adopt comprehensive plans that are "advisory in nature"). If the zoning code conflicts with the comprehensive plan, the zoning code controls. As the evidence will show, the Northbrook zoning code adequately provides for religious uses throughout the Village.

law. *See id.* While religious uses are allowed as of right in two districts, the burden is on the Village to provide a specific justification for not allowing a particular religious use in 16 other districts. The facts will further show that the Village has never discriminated against religious organizations, as evidenced by the fact that there are many religious groups presently located within the Village. (*See* Exhibit B.)

Petra is correct that under the First Amendment, a municipality must provide "sufficient justification for the exclusion of a broad category of protected expression." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 67-68 (1981). However, the current Village Zoning Code, which allows religious uses and religious expression as of right or by special permit in numerous Village zoning districts, does not "broadly exclude" religious uses. Rather, these uses are allowed in 18 of 24 zoning districts.

Petra erroneously argues that the current Code excludes religious uses by locating them in "areas that are already built up and not suitable for large groups." (Petra Br. 7 n. 2.) The fact of an area being "built up" is hardly an impediment to a church locating there; indeed, the building Petra acquired is in an area that is already built up. In fact, the evidence will show that the vast majority of Northbrook is already built up. Moreover, the evidence will show that there are numerous locations that would be appropriate for development or redevelopment by religious uses in the areas where religious uses are allowed under the current Zoning Code.

As for residential areas being unsuitable for large groups, the Village has concluded that residential areas are, in fact, suitable for religious uses, which reflects the current trend in municipal land use. *See* Jonathan D. Weiss & Randy Lowell, *Supersizing Religion: Megachurches, Sprawl, & Smart Growth*, 21 St. Louis U. Pub. L. Rev. 313, 320 (2002) ("The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) affirmed the general trend allowing church development in residentially-zoned areas."). Municipal authorities are allowed to determine what uses are appropriate for different areas of the municipality, *see Village of Euclid v. Ambler Realty*, 272 U.S. 365, 389-90 (1926), and the Village has decided that churches are appropriate uses in residential areas.

III. The Village's Zoning Code Does Not Substantially Burden Religious Exercise.

Under RLUIPA, the Village may not impose a "substantial burden" on Petra through any land-use regulation. *See* 42 U.S.C. 2000cc(a). The term "substantial burden" is derived from free exercise clause jurisprudence, and has been defined by cases analyzing the free exercise clause. The enactment of RLUIPA has not altered the definition of "substantial burden" found in those cases. *See Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp.2d 961, 991 (N.D. Ill. 2003); *Grace United Methodist Church v. City of Cheyenne*, 235 F. Supp.2d 1186, 1194 (D. Wyo. 2002). Indeed, the requirements for a plaintiff to demonstrate a "substantial burden" on its religious exercise are the same under the free exercise clause and RLUIPA. *See Vineyard*, 250 F. Supp.2d at 991.

Petra argues that the Village's Zoning Code "substantially burdens" the free exercise of its religion. (Petra Br. 8-10). In so arguing, Petra entirely misconstrues the nature of the type of conduct that creates a "substantial burden" on the free exercise of religion. Both the facts and law demonstrate that the Village's zoning code does not impose any type of "substantial burden" on the free exercise of religion.

A. The Zoning Code is a "Neutral" Law.

The Northbrook Zoning Code applies to all Village landowners and occupants and was not enacted for the purpose of burdening religion; accordingly, it is a neutral law of general applicability. *See United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 629 (7th Cir. 2000). As such, it may be found to place an "undue burden" on the free exercise of religion *only* when it interferes with important religious tenets, or affirmatively compels individuals "to 'perform acts undeniably at odds with fundamental tenets of their religious beliefs.'" *Griffin High Sch. v. Illinois High Sch. Ass'n*, 822 F.2d 671, 674 (7th Cir. 1987) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972)). As the Supreme Court has explained:

> It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected

> have been burdened any more than other citizens, let alone burdened *because of their religious beliefs.*

City of Boerne v. Flores, 521 U.S. 507, 535 (1997) (emphasis added). Thus, to show a substantial burden, Petra must demonstrate that the Village has passed an ordinance that prevents Petra's members from adhering to its sincerely-held religious beliefs, or that compels Petra's members to act in ways that conflict with those beliefs. The evidence shows the opposite. Petra's Pastor, Elder, and Deacon have admitted that the Village has not interfered with Petra's religious beliefs or practices in any fashion. "Regulation of the location of church construction is not an impediment to religious observance in the sense of a prohibition." *Messiah Baptist Church v. County of Jefferson, State of Colo.*, 859 F.2d 820, 825 (10th Cir. 1988).

B. <u>A Substantial Burden Is Not Created By Merely Limiting The Location Of A Church Within A Village.</u>

Since the enactment of RLUIPA, district courts have found that the kinds of "burdens" described by Petra simply are not "substantial burdens" under the Free Exercise Clause or RLUIPA.

For example, in *Vineyard*, the district court agreed with the City of Evanston that an ordinance that "restricts nothing more than the *location* of religious practice . . . does not substantially burden [plaintiff's] free *exercise* of religion." 250 F. Supp.2d at 986. The court found that federal Courts of Appeals have not ruled that land use restrictions, such as the one at issue here, impose a "substantial burden" on religious exercise, because they do not involve "restrictions on the actual content of religious practices." *Id.* at 987. Thus, even though the court acknowledged that as a practical matter its ruling might prevent the plaintiff from locating where it wanted to, it found that "monetary and logistical burdens do not rise to the level of a substantial burden on [plaintiff's] constitutional free exercise rights." *Id.* The court then found that the plaintiff's RLUIPA claim failed for the same reasons its First Amendment free exercise claim failed. *See id.* at 991.

Similarly, in *C.L.U.B. v. City of Chicago*, 157 F. Supp.2d 903 (N.D. Ill. 2001), the district court found that a substantial burden only exists "when the government pressures a plaintiff to

modify her behavior and violate her beliefs." 157 F. Supp.2d at 914. Although the court acknowledged that the municipality's zoning restrictions would cause "hardship and inconvenience" to the plaintiffs, it did not find those matters to constitute a substantial burden. *See id.* at 915. As the court noted, "[t]he harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them." *Id.* (quoting *Love Church v. City of Evanston*, 896 F.2d 1082, 1086 (7th Cir. 1990)). *See also Christian Gospel Church, Inc. v. City & County of San Francisco*, 896 F.2d 1221, 1224 (9th Cir. 1990) ("[T]he Church has made no showing of why it is important for the Church to worship in this particular [building]. . . . The burdens imposed by this action are therefore of convenience and expense, requiring appellant to find another home or another forum for worship. We find that the burden on religious practice in this zoning scheme is minimal.").

C. **The "Compelling Interest" Test Does Not Apply To The Present Facts.**

Petra argues that for a municipality to pass a law that substantially burdens the free exercise of religion, it must have a "compelling interest" for doing so. (Petra Br. 9-10). (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1973)). Petra also argues that the Village's burden to show a "compelling interest" is quite high. (Petra Br. 10, citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993), and *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990).) However, "compelling interest" analysis does not apply here, because Petra can provide no evidence that the Village has "substantially burdened" Petra's free exercise of religion. As the court explained in *Vineyard,* the burden imposed by a zoning code merely regulating location "does not rise to the same level as the burdens found by the Supreme Court in *Smith* and *Lukumi.* Both of those cases involved restrictions on the actual *content* of religious practice." *Vineyard,* 250 F. Supp.2d at 987 (emphasis added). The Village therefore is not required to show any "compelling interest" to justify its neutral zoning code, which does not substantially burden Petra's exercise of its religious beliefs.

Finally, Petra claims that it will show that being unable to use the warehouse/office building it purchased in the Northbrook Industrial District has caused it operational and practical

difficulties. (Petra Br. 8). But the type of difficulties Petra is experiencing simply cannot rise to the level of a "substantial burden" under the free exercise clause or RLUIPA as demonstrated above. As another judge of this court has explained, monetary and logistical burdens do not rise to the level of a substantial burden on Petra's constitutional free exercise rights. *See Vineyard*, 250 F. Supp.2d at 987. Petra is not entitled to an injunction in this case, because its right to exercise its legitimate religious beliefs has *not* been substantially burdened.

D. <u>The Village's Amendments Eliminate Any Substantial Burden Argument.</u>

RLUIPA is specifically designed to encourage zoning authorities to correct burdens on religious exercise, whether those burdens are actual or perceived. The Village disputes the existence of a substantial burden on Petra's religious exercise here. But even if a substantial burden on religious exercise were found, the policy of RLUIPA is to encourage and promote remedies such as changing a zoning policy or practice that may be claimed to create such a burden. RLUIPA states that a government "may avoid the preemptive force of [RLUIPA] by changing the policy or practice that results in a substantial burden on religious exercise[.]" 42 U.S.C. § 2000cc-3(e). In this case, the Village has amended its Zoning Code, thereby changing its local policy to allow religious organizations in more zoning districts. Even if the Village's pre-April 22, 2003 Zoning Code arguably caused a substantial burden to Petra's religious exercise (based upon religious assembly use, which never occurred), the current Zoning Code does not. Because the Village has amended its Zoning Code, the intent of Section 3(e) should take effect to prevent Petra from obtaining relief allowing it to operate in the Industrial District. Any other result will discourage other municipalities from amending their policies and codes in the future.

IV. <u>Petra Has Not Established a Legal Nonconforming Use.</u>

Petra argues that it is entitled to injunctive relief under the amended ordinance because it is grandfathered as a legal non-conforming use. (Petra Br. 11). However, to establish a legal nonconforming use, the owner of property must establish that it was, at the relevant time, using the property in a way that was legal. Petra argues that the court should find that it established a

legal nonconforming religious assembly use – even though it did not establish such a use on the property. Because Petra never actually used the property for religious assembly purposes from October 8, 2001 -- the date of purchase – to April 22, 2003 – the date of the amendments to the Village Zoning Code -- it cannot now become a legal nonconforming use.

A. **Illinois Law Controls Whether or Not the Plaintiffs Have Established a Legal Non-Conforming Use.**

Property rights are generally determined by state law. *See Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445, 459 (7th Cir. 2002). Thus, federal courts look to state law to determine whether or not a legal non-conforming use has been established. *See, e.g., Scope Pictures of Missouri, Inc.*, 140 F.3d 1201, 1206 (8th Cir. 1998); *South Lyme Property Owners Ass'n, Inc. v. Town of Old Lyme*, 121 F. Supp.2d 195, 205 (D. Conn. 2000). In this case, the court should look to Illinois law to determine whether or not Petra has established a legal nonconforming use.

B. **Illinois Law Requires Actual Use.**

Under Illinois law, "[a]s a general rule it is necessary, to entitle an owner to the protection of a lawful nonconforming use, that the property be in *actual use*, as distinguished from a merely contemplated use, when the zoning restriction becomes effective." *Du Page County v. Elmhurst-Chicago Stone Co.*, 165 N.E.2d 310, 313 (Ill. 1960) (emphasis added); *see also Ford City Bank & Trust Co. v. Kane County*, 449 N.E.2d 577, 587 (Ill. App. Ct. 1983). Here, Petra acknowledges that it only had an "intent to use" the property for religious assembly when the Village amended its Zoning Code. (Petra Br. 11). Without actual use, however, no legal nonconforming use can be established.

This actual use requirement is consistent with the intent of RLUIPA. According to RLUIPA, "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. § 2000cc-5(7)(B). Petra does not, and cannot, argue that it

has engaged in use, building, or conversion of the property for religious assembly.[5] The legislative history clearly notes that such "use, building, or conversion" is required to establish the presence of "religious exercise." 146 Cong. Rec. S7776 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy). "Intent" to use the property without any use, building, or conversion of the property is, quite simply, not enough as a matter of law to establish "religious exercise" – let alone "actual use," which is not the same thing as "religious exercise."

The Village notes that Petra has established certain lawful *office* uses of the property. The Village has never objected to those uses, which may remain. When a person has established a legal nonconforming use, that use may remain even if an additional use is (or would be) unlawful. *See City of Marengo v. Pollack*, 782 N.E.2d 913, 918-19 (Ill. App. Ct. 2002). Thus, although Petra may not use its facility for religious assembly, Petra may continue using its facility to the extent of its actual legal use prior to April 22, 2003.

C. <u>Petra Is Not Entitled to An Exception to the Rule of Actual Use</u>.

Petra asks for this court to craft an exception to well-established Illinois law requiring actual use, based on one of two reasons: (1) that the Village's pre April 22, 2003 I-1 Restricted Industrial District zoning code was void, and (2) that Petra did everything it could to establish its religious assembly use prior to that date. Petra's argument ignores the intent and purpose of RLUIPA and long-settled Illinois law governing the establishment of legal nonconforming uses, and is based on a misstatement of the facts and controlling law.

1. <u>The Village Ordinance Was Not Improperly Enacted</u>.

Petra wrongly asserts that the regulations of the pre-April 22, 2003 Restricted Industrial District is void. Under Illinois law, if an existing ordinance conflicts with a later-adopted statute, the ordinance "is *not* null and void." *Lily Lake Road Defenders v. County of McHenry*, 619 N.E.2d 137, 143 (Ill. 1993) (emphasis added). Thus, the *Carter* case cited by Petra (Petra Br. 10) is inapposite. In *Carter*, the court held that the zoning ordinance should be treated as if it

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[5] In fact, Petra's only use for religious assembly purposes has been held unlawful and restrained by a state court. (*See* note 7, *infra*.)

never existed, because it was improperly enacted in the first place. *See Carter*, 773 F.2d at 255. In contrast, there is no argument that the Northbrook Zoning Code in existence at the time Petra purchased its property was improperly adopted when it was comprehensively amended in 1988. Thus, even if the Northbrook Zoning Code conflicted with RLUIPA during the period between the passage of RLUIPA and April 22, 2003, the Northbrook Zoning Code was not "void" or "void *ab initio*." Even if Petra is correct that the Zoning Code conflicted with RLUIPA, Petra cites no case, from Illinois or any other jurisdiction, holding that a legal nonconforming use may be established without actual use merely because an earlier version of a zoning code conflicted with a statute. Petra's argument that it had a legal right to assemble for worship services "from the moment it took title" (Petra Br. 7) is therefore incorrect.

2. Petra Did Not Do All it Could to Establish Its Use.

Petra cannot argue that it did everything it could to establish its use. By Petra's own admission, it withdrew its Application for zoning relief on May 17, 2001 before allowing the Village Board of Trustees to vote on it. The legislative history of RLUIPA expressly states that RLUIPA "does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay." 146 Cong. Rec. S7776 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy). *See also id.* at S7777 (statement of the Coalition for the Free Exercise of Religion) ("It is important to note that RLUIPA does not provide a religious assembly with immunity from zoning regulation."). RLUIPA does not entitle Petra to bypass the Village's land use approval processes.

Moreover, under Illinois law, the municipality itself must have the first opportunity to make a final determination whether the requested use is appropriate. *See Bright v. City of Evanston*, 139 N.E.2d 270 (1956); *see also Pecora v. County of Cook*, 752 N.E.2d 532, 538 (Ill. App. Ct. 2001) (citing *Bright*). As the Illinois Supreme Court explained in *Bright*, when an attack is made on the zoning of a particular property, "judicial relief is appropriate only after

available administrative remedies have been exhausted." 139 N.E.2d at 274. Had Petra been denied permission by the Village Board of Trustees, the final word, it could have then attempted to establish its use by challenging the Village's I-1 Restricted Industrial zoning in court, but it never did so. When Petra says it has taken "every step possible to establish its legal right to meet," it is simply incorrect, under RLUIPA and Illinois law.

Petra argues that it is "silly" that it be required to give the Village Board of Trustees an opportunity to make a final decision on Petra's application. (Petra Br. 12 n.4). Petra may find it silly, but the Northbrook Zoning Code requires it, and state and federal courts have universally required it. Not only has Illinois adhered to the *Bright* doctrine, but federal courts have, in numerous land-use contexts, required applicants for land use relief to obtain a final decision from a municipality before invoking the jurisdiction of courts. *See, e.g., MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348-53 (1986) (landowner must obtain final decision of local authorities before filing a lawsuit for improper condemnation of property); *United States v. Village of Palatine, Ill.*, 37 F.3d 1230, 1233 (7th Cir. 1994) (Village did not violate Fair Housing Act by excluding group home when group home had not yet applied for zoning relief). According to Petra's logic, these and all similar cases (and their many progeny) were wrongly decided, because a landowner should be allowed to sue a municipality for land use relief without first allowing the municipality to pass final judgment on its proposed use. Petra may be free to describe the long-standing requirement of exhaustion as "silly," but this Court should not ignore this well-established legal doctrine and Congressional mandate.

D. <u>Petra Fails to Meet Its Burden To Establish A Legal Nonconforming Use For Religious Assembly</u>.

The cases cited by Petra do not support its argument that it is entitled to a legal non-conforming use. In *Village of Burr Ridge v. Elia*, 382 N.E.2d 876 (Ill. App. Ct. 1978) and *Village of Lake Bluff v. Horne*, 164 N.E.2d 217 (Ill. App. Ct. 1960), the courts rejected the landowners' contentions that their property had become a legal nonconforming use. (Petra Br. 11). In *Hazel Wilson Hotel Corp. v. City of Chicago*, 308 N.E.2d 372 (Ill. App. Ct. 1974), the

court allowed the landowner to continue a prior use that had gone on for nearly three years, giving the court a record upon which to determine that the use was compatible with the neighborhood. No case cited by Petra involves a court forcing a municipality to accept a new and disparate land use in a zoning district such as the present case, under the guise of becoming a "legal nonconforming use."

Indeed, Petra's logic would make it fruitless for municipalities to amend their zoning code. Under Petra's view, if a municipality amended its zoning code to a property owner's disliking, the property owner could simply opt to operate instead under the previous zoning code standards, claiming that it had planned or "intended" to do so before the change in zoning codes. Petra's argument that a decision in favor of the Village will set a precedent for municipalities to sandbag landowners, and then change their ordinances when sued (Petra Br. 12), ignores the availability of damages relief for the enforcement of superseded but improper zoning codes, which prevents chicanery of the type Petra envisions.

The burden is on a landowner to establish a legal nonconforming use. *See County of Lake v. Zenko*, 528 N.E.2d 414, 421 (Ill. App. Ct. 1988). Here, Petra did not establish any religious assembly use, and did not even exhaust its remedies in an attempt to establish that use. Because Petra did not establish any religious assembly use under the Village Zoning Code prior to April 22, 2003, and its recently attempted post-April 22, 2003 religious assembly use is not allowed under the Village's current zoning code,[6] its request for injunctive relief should be denied.

V. RLUIPA is Unconstitutional.

In the case of *C.L.U.B. v. City of Chicago*, the City of Chicago and *amici* have argued to the Seventh Circuit that RLUIPA is unconstitutional. The Seventh Circuit took the case, No. 01-4030, under advisement on January 17, 2003. For the reasons stated in the briefs of the City of

[6] On May 28, 2003, the Circuit Court of Cook County entered a Temporary Restraining Order preventing Petra from holding assembly meetings in the unsafe 3005 MacArthur property, because of the numerous building code violations such assemblies would cause.

Chicago and its *amici*, which is incorporated herein by reference, the Village contends that RLUIPA is unconstitutional.

VI. Conclusion.

The Village's current zoning code does not violate any of Petra's constitutional or statutory rights, indeed, Petra barely argues that it does. This court cannot grant injunctive relief against the enforcement of the current Village zoning code, which is entirely constitutional because it treats religious and non-religious assembly equally. Moreover, Petra has not established that its property has acquired a legal nonconforming use status. Finally, the Village zoning code does not violate RLUIPA, and Petra has made no argument that the Village's present zoning code violates either the constitution or RLUIPA. Petra's request for preliminary injunctive relief should therefore be denied.

VILLAGE OF NORTHBROOK,
Defendant

By:
One of Its Attorneys

Steven M. Elrod
Donald G. Mulack
James R. Carr
HOLLAND & KNIGHT LLC
131 South Dearborn Street
30th Floor
Chicago, Illinois 60603
(312) 715-5789

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See Case File for Exhibits