Docket No. 08-2281

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Reaching Hearts International, Inc. ..... Appellee,

v.

Prince George's County, County Council of Prince George's County ..... Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

OPENING BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

This appeal is taken from a final judgment of the United States District Court for the District of Maryland. Accordingly, this court has jurisdiction pursuant to 28 U.S.C. § 1291.

Plaintiff/Appellee Reaching Hearts International, Inc. ("RHI") made claims pursuant to the First and Fourteenth Amendments of the United States Constitution and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc to 2000cc-5. The District Court therefore possessed jurisdiction pursuant to 28 U.S.C. § 1331.

STATEMENT OF THE CASE

RHI filed this action on June 21, 2005, challenging two actions by Prince George's County, Maryland and the County Council of Prince George's County (collectively, "the County"): (1) the County's denial of RHI's April 2003 application for an amendment to the County's comprehensive water and sewer service plan, and (2) the County's enactment of an ordinance, CB-83-2003, which restricted lot coverage on land located within 2,500 feet of the Rocky Gorge Reservoir. RHI's complaint alleged that the denial of the application was based on religious and racial animus, in violation of the Constitution, and that the denial and the enactment of CB-83 imposed a substantial burden on RHI's religious exercise,

in violation of RLUIPA. J.A. 25-28.[1] RHI subsequently withdrew its claim of racial discrimination.

After the County's motion to dismiss was denied on December 6, 2005, the parties proceeded to discovery. The district court denied the County's motion for summary judgment on May 1, 2007. J.A. 5.

The case was tried to a jury from April 15, 2008 through April 24, 2008. On April 24, the jury returned a special verdict form finding that the County's "laws, regulations or administrative actions" were motivated by religious discrimination and imposed a substantial burden on RHI's religious exercise. J.A. 1299. The jury further awarded damages of $3,714,822.36. J.A. 1300.

Following the verdict, the district court ordered the parties to submit memoranda concerning (1) any post-trial motions, including motions for judgment as a matter of law or for a new trial; (2) whether the challenged actions of the County were narrowly tailored to serve a compelling governmental interest; and (3) injunctive relief. J.A. 10 (Docket Entry No. 98). Thereafter, the district court entered a memorandum opinion ruling that the County had failed to demonstrate that its challenged actions were narrowly tailored to meet a compelling government interest. *See Reaching Hearts Intl., Inc. v. Prince George's County*, 584 F. Supp. 2d 766 (D. Md. 2008). In addition to the damages awarded by the jury, the district

[1] References to the Joint Appendix will be in the form "J.A. ___."

court ruled CB-83-2003 "unconstitutional and in violation of the Religious Land use and Institutionalized Persons Act as applied to the Plaintiff."[2] J.A. 1301. The court "enjoined [the County] from applying the provisions of CB-83-2003 to the property of the Plaintiff" and directed the County to process any future application by RHI for an amendment of the water and sewer plan "without reference to the provisions of CB-83-2003 and without delay or religious discrimination." J.A. 1302.

The County timely filed its notice of appeal. J.A. 1350-51. Thereafter, the district court granted the County's motion for a stay pending appeal.

[2] As explained *infra*, RHI did not challenge the constitutionality of CB-83. Furthermore, RHI's challenge to the ordinance is facial, not as-applied challenge.

STATEMENT OF ISSUES PRESENTED ON APPEAL

I. RHI'S CLAIMS RELATED TO THE DENIAL OF THE 2003 W&S APPLICATION ARE BARRED.

II. THE DENIAL OF THE 2003 W&S APPLICATION DID NOT VIOLATE RLUIPA.

III. THE DENIAL OF THE 2003 W&S APPLICATION DID NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

IV. RHI'S CHALLENGE TO THE ENACTMENT OF CB-83 IS UNRIPE AND MUST BE DISMISSED.

V. CB-83, ON ITS FACE, DOES NOT IMPOSE A SUBSTANTIAL BURDEN ON RELIGIOUS EXERCISE IN VIOLATION OF RLUIPA.

VI. THE DISTRICT COURT ERRED IN DENYING THE COUNTY'S MOTION *IN LIMINE*.

VII. THE JURY CHARGE FAILED TO INFORM THE JURY OF THE ACTIONS OF THE COUNTY WHICH WERE ALLEGED TO VIOLATE THE CONSTITUTION AND RLUIPA, AND THEREFORE FAILED TO ADEQUATELY INFORM THE JURY OF ITS DUTY.

VIII. THE JURY'S AWARD OF DAMAGES IS NOT SUPPORTED BY THE EVIDENCE.

IX. THE INJUNCTIVE RELIEF ORDERED BY THE DISTRICT COURT WAS IMPROPER.

STATEMENT OF FACTS

I. THE REGULATORY SCHEME

A. The 2001 Water and Sewer Plan

Maryland law requires each county to adopt a water and sewer plan, *see* Md. Code Ann., Environment § 9-503, the purpose of which is "to develop the water supply and sewerage systems in a way consistent with county comprehensive planning," Md. Code Regs. [hereinafter "COMAR"] § 23.03.01.02(A). Pursuant to this statutory mandate, on November 19, 2001, Prince George's County adopted the 2001 Water and Sewer Plan ("the Plan"). J.A. 2833-3073.

The plan sets forth a number of "Goals and Objectives," among which are the following:

- Provide for orderly expansion of community water supply and sewer systems;
- Enhance the quality of life and the economic well-being of the County and its residents by supporting land use policies and orderly development;
- Identify all physical, geographic, and population factors that provide a framework to support water and sewer planning;
- Enhance environmental quality by ensuring proper utilization of natural resources;

J.A. 2841-42.

Maryland statutory law and accompanying regulations require a county, as part of its plan, to categorize every piece property within the sewer envelope (*i.e.*, the area in which the county provides or eventually plans to provide water and

sewer service) in accordance with the level of water and sewer service available. *See* Md. Code Ann., Environment § 9-505(a)(13); COMAR § 26.03.01.04(G). The 2001 Plan adopted by Prince George's County designates each piece of property within the sewer envelope as Water and Sewer Category ("W&S Category") 3, 4, 5, or 6 "[t]o facilitate the orderly extension of community water and sewer service."[3] J.A. 2852. The categories are described as follows:

> Category 3: "Community System … compris[ing] all developed land on public water and sewer, and undeveloped land with a valid preliminary plan approved for public water and sewer."
>
> Category 4: "Community System Adequate for Development Planning … includ[ing] all properties inside the Sewer Envelope for which the subdivision process is required."
>
> Category 5: "Future Community Service … consisting of land inside the Sewer Envelope that should not be developed until adequate public facilities are available to serve the proposed development."
>
> Category 6: "Individual Systems," which employ well and septic systems or "shared facilities approved by the County."

J.A. 2853-54. State law requires that the plan be revised periodically. J.A. 624-26. Between such revisions, a property owner may seek an amendment to the Plan for the purpose of changing the water and sewer category of a piece of land. J.A. 626.

As indicated by the above definitions, construction of a building is permissible only if a property is in Category 3 (*i.e.*, public water and sewer is

[3] Categories 1-6 are defined by state regulation. *See* COMAR 26.03.01.04(G)(2)(b)-(g). The Plan employs only categories 3 through 6, including all Category 1 and 2 land in Category 3. J.A. 2852.

presently available) or Category 6 (*i.e.*, public facilities will not be used at all). Therefore, the owner of a piece of property in Category 5 (the relevant category for purposes of this litigation) must have the property redesignated to Category 3 before beginning construction.[4] J.A. 627.

Development of a property in Category 5 is a multi-step process. Conceptually, there are two focal points for the property development process: Provision of water and sewer, which involves the progressive advancement of a property from W&S Category 5, to W&S Category 4, and ultimately to W&S Category 3; and what may loosely be termed the permitting process, which involves the approval of a subdivision plat, a site plan, and, ultimately, a building permit. *See generally* J.A. 2857-58. These aspects of the development process are handled by different governmental bodies: the County Council is responsible for amendments to the Plan, while the Maryland-National Capital Park and Planning Commission (M-NCPPC or "Planning Board") is tasked with considering subdivision applications, site plans, and requests for building permits.

As the first step in the process, the developer of a piece of Category 5 land must seek a legislative amendment of the Plan to redesignate the land from Category 5 to Category 4. J.A. 2853, 2952; *see also* J.A. 627, 629. To seek a legislative amendment from the County Council, the property owner must submit

[4] Theoretically, an owner/developer could also seek to have the property

an application to the Department of Environmental Resources (DER) for one of three amendment cycles occurring each year (beginning April 1, August 1, or December 1). J.A. 632, 2952. DER collects all applications for the amendment cycle and forwards them to the Washington Suburban Sanitary Commission (WSSC), to M-NCPPC, and to any other appropriate agencies. J.A. 632. Ultimately, DER consults with the County Executive and drafts a resolution containing recommendations on each application. J.A. 636. A public hearing is then conducted, at which members of the public and interested parties may speak for or against the application. J.A. 637-38. The draft resolution is then referred to a committee of the County Council, which makes a recommendation on each application and generates a second draft of the resolution. J.A. 639-42. The resolution is then voted on at a public session of the County Council. J.A. 644. The County Council has discretion to approve or deny an application for amendment of the Plan, irrespective of the recommendation of the County Executive and the comments of the reviewing agencies. *See Prince George's County v. Carusillo*, 447 A.2d 90, 94 (Md. Ct. Spec. App. 1982).

If the Plan is amended to place the property in W&S Category 4, the next step is for the developer to submit a preliminary subdivision plat to M-NCPPC for approval. J.A. 648-49. The Subdivision Review Committee will review the

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redesignated as Category 6, but RHI has never sought such a re-designation.

proposed subdivision for compliance with zoning and subdivision requirement under county law (including, as is relevant to this litigation, lot coverage limits), compliance with the Master Plan, and adequacy of public services. J.A. 648-49; Maryland-Nat'l Capital Park and Planning Comm'n, Subdivision Applications, *Subdivision Process Flowchart*, http://www.pgplanning.org/Resources/ Development_Review_Form.htm (scroll down to "Process Flow Chart" section);[5] *see also* J.A. 2857 ("Development plans based on public water and sewer service must be designated in water and sewer service Category 4 or 3, and must display a conceptual alignment ….").

If the preliminary subdivision application is approved by the M-NCPPC, the developer then returns to DER to seek an administrative amendment of the Plan to place the property in W&S Category 3. J.A. 650-51. DER reviews the application, creates a report, and forwards both to the County Executive and the County Council for comment. J.A. 2955. If there are no comments during the ensuing 30 days, the DER has authority to approve the application. *Id.* Upon the property being placed in W&S Category 3, the developer may proceed to the filing of a final subdivision plat and the seeking of building permits.

[5] A space has been inserted between "Resources/" and "Development" for purposes of text flow. This space should be removed when typing the address into a web browser.

B. Lot Coverage Restrictions

Prince George's County zoning regulations limit the percentage of a single lot that may be developed, *i.e.*, covered with impermeable surfaces such as buildings and parking lots. *See* P.G. County Code § 27-442(c). When the events related to this litigation began in 2001, § 27-442(c) allowed an "other permitted use" within a zone to cover up to 60 percent of its lot. In the R-A zone where the Property was located, the lot coverage limitation was 50 percent. In September 2003, the County Council adopted CB-83-2003 ("CB-83"), which amended § 27-442(c) to limit lot coverage for an "other permitted use" to ten percent in zones R-O-S, O-S, R-A, and R-E, and to 20 percent in all other zones. J.A. 2177.

The enactment of CB-83 was preceded by the enactment of a related ordinance, CB-20-2003 ("CB-20"). CB-20

> limits the construction of buildings, other than one- and two-family dwellings in a buffer area near drinking water reservoirs, unless the structures will be served by public water and sewer systems. If enacted, the legislation will help protect water quality from large septic systems and surface water runoff from park areas associated with more intense uses.

J.A. 1592. As was appropriate for a zoning ordinance aimed at protecting the Rocky Gorge Reservoir from septic system runoff, the drafter of the bill, legislative officer Ralph Grutzmacher, looked to Maryland regulations pertaining to on-site sewage disposal. *See* COMAR § 26.04.02.04(K). The regulation in question governs lot size and septic system location for lots "located within 2500

feet of the normal water level of existing or proposed water supply reservoirs." *Id.* Grutzmacher used this 2,500 measurement when drafting the prohibition on non-residential septic systems in CB-20. J.A. 958. Grutzmacher was aware of the 1,320-foot buffer recommended in the environmental guidelines for adjacent Montgomery County for the protection of streams and tributaries of the Patuxent River Watershed, J.A. 930, but elected not to use the smaller buffer zone because it was inadequate for protection of a reservoir:

> Streams and tributaries have different characteristics than reservoirs. Reservoirs act as a trapping area, and it's still water versus running water. Streams and tributaries also have different volumes of water at different times of year, whereas reservoirs have fairly constant quality of water in them ....
>
> There's a different set of laws that apply to streams and tributaries in … state law as well as in COMAR that applies to these particular kinds of bodies of water.

J.A. 933-34. CB-20 was presented to the County Council for a first reading on April 1, 2003. J.A. 956. The bill was enacted on June 10, 2003. J.A. 1595.

Grutzmacher subsequently drafted CB-83, which governs lot coverage near the Rocky Gorge Reservoir. In drafting CB-83, Grutzmacher first looked to the Fairland Master Plan, which applies to a portion of Montgomery County that is adjacent to Prince George's County and which includes a portion of the Rocky Gorge Reservoir. One object of the plan is to "discourage uses that result in more than 10 percent imperviousness." J.A. 961. Because Montgomery and Prince

George's counties work together for the protection of the Patuxent River watershed, Grutzmacher adopted the ten percent maximum lot coverage from the Fairland Master Plan (which was created after Prince George's County adopted its master plan, with a 50 percent lot-coverage limit, for that area), thus "catching up" Prince George's County to Montgomery County. J.A. 962.

Grutzmacher then looked back to the COMAR to define the sensitive area in which the lot-coverage restriction would apply. J.A. 962. For the sake of consistency and clarity in the law, Grutzmacher replicated the 2500-foot buffer zone he had used in CB-20. J.A. 979 (Grutzmacher, stating that he relied on COMAR § 26.04.02.04 in drafting CB-83 "Only to the extent that it replicates the 2500 feet from CB-20 .... One of the things we try to do is not to have inconsistent language in the code so that an applicant can tell what's required and what's provided for him.")

CB-83 was introduced by Councilman Dernoga and two other members of the County Council. J.A. 2173. The proposed ordinance was circulated to various county agencies for their review, including the WSSC and the M-NCPPC. All of the reviewing agencies approved the proposed ordinance. The Planning Board suggested a clarification of the language that would render the ordinance even more inclusive. J.A. 2188-89.

II. The Dispute between the County and RHI.

A. RHI's congregation

RHI is a Seventh Day Adventist congregation formed in 2000. J.A. 230. Michael Oxentenko is the senior pastor. J.A. 231. On an average Saturday (the Adventist day of worship), between 200 and 400 people attend services at RHI. J.A. 243.

Since its formation, RHI has worshipped in rented space at the Cedar Ridge Conference Center in Spencerville, Maryland. Because the Cedar Ridge congregation worships on Sundays, RHI is able to use the facility on Saturday for its services. However, RHI's lease at Cedar Ridge limits RHI's worship practices in certain ways. For example, RHI must set up the facility for worship services on Saturday morning, contrary to the Adventist proscription of working on the Sabbath. J.A. 240-41. RHI is unable to conduct weddings, baptisms, and funerals at the Cedar Ridge location. J.A. 239, 240. And, Oxentenko is unable to maintain an office where parishioners can meet with him. J.A. 238.

B. RHI's purchase of the Property.

In 2002, RHI purchased two adjacent parcels of land (collectively, "the Property") located at 6100 Brooklyn Bridge Road in West Laurel, Maryland, within Prince Georges County. One parcel ("the frontage parcel") consists of 7.04 acres with frontage on Brooklyn Bridge Road. The second parcel ("the rear

parcel") consists of 10.04 acres located directly behind the frontage parcel.[6] J.A. 1395. The frontage parcel is a "split-zoned" property; the "front" 3.4 acres are in W&S Category 3, while the "back" 3.6 acres, on which a house was located at the time of purchase,[7] are in W&S Category 5. The entirety of the rear parcel is in W&S Category 5. Thus, when RHI purchased the Property, it could build on only the "front" portion of the frontage parcel, and then only on 50 percent of it (1.7 acres) unless it obtained legislative and administrative amendments to the Plan, placing all of the Property in W&S Category 3. Behind the rear parcel is the Rocky Gorge Reservoir. Brooklyn Bridge Road, marks, roughly, the ridge of the watershed that drains to the Rocky Gorge Reservoir. J.A. 981.

RHI entered a contract to purchase the Property on September 5, 2001. J.A. 1396. The sales contract was conditioned, in part, on the results of a feasibility study, the purpose of which was to determine whether the property was suitable for a church. The contract was also conditioned on the availability of "ample water and septic for a congregation of 600 people." J.A. 1404.

RHI engaged JFW, Incorporated to conduct the feasibility study. JFW concluded that placement of a church on the Property was feasible and provided a sample sketch of a church that would seat 700 people, J.A. 505, 1366, covering 23

[6] County maps designate the frontage parcel as Parcel 28 and the rear parcel as Parcel 11.

[7] The house burned down some time after RHI purchased the property. J.A. 283.

percent of the Property. The proposed construction was located on the frontage parcel. JFW cautioned, "Please be advised that although 50% coverage is allowed, it remains that M-NCP&PC has final jurisdiction on what would be allowed on this site with regard to steep slopes, stream valley buffers and forest conservation issues." J.A. 1365. RHI closed on the purchase of the Property in February 2002.

After closing on the Property, RHI engaged Cathedral Design and Construction ("Cathedral Construction") to design a church and supervise its construction. J.A. 450-52. Upon viewing the property, Cathedral Construction persuaded RHI to build a far larger complex of buildings than RHI had originally planned. J.A. 527-28. In contrast to JFW's suggestion of building a sanctuary on the frontage parcel that would seat 700, Cathedral Construction, in conjunction with consulting engineer Landmark Engineering, proposed the construction of a 95,000 square foot facility, plus 522 parking places. J.A. 820, 1358. The facility was to include a rotunda and sanctuary with seating for up to 2,250 people, administrative and Sunday school space, and an elementary school. RHI was advised that construction of the proposed facility would require it to obtain recategorization of the Property to W&S Category 3.

Shortly after purchasing the property, representatives of RHI met with the West Laurel Civic Association (WLCA), a community organization. J.A. 256. Prince George's County Council member Thomas Dernoga, who represents the

area, was also present. J.A. 257. During the "cordial" meeting, J.A. 550, the WCLA expressed concern about the church based on its negative experience with Bethany Community Church, a large church located up the road from RHI's property, in Montgomery County.

C. The 2003 W&S Application and ensuing state court litigation.

On March 27, 2003, RHI applied for a legislative amendment of the 2001 Plan that would change the entire rear parcel of the Property, and the "back" portion of the frontage parcel, from W&S Category 5 to W&S Category 4 ("the 2003 W&S Application"). J.A. 1596-1612. The Application noted that Phase I of the proposed construction would result in 750 sanctuary seats, 150 more seats than the 600 seats on which RHI conditioned its purchase of the Property. J.A. 1599. Phase II called for the construction of an additional 1,500 seats, for a total available capacity of 2,250, more than ***five and a half times*** the maximum number of worshippers who had ever attended a service at RHI. J.A. 243 (Oxentenko, stating that typical attendance at RHI is 200-400 people). Regarding the traffic impact of its proposed development, RHI assured the County that its heaviest use of the Property would be on Saturday. RHI did not discuss its plans to operate an elementary school or its frequent weekday use of the Property. J.A. 236-40 (testimony by Oxentenkko that Adventist congregations, including RHI, offer "public meetings," "health training," and smoking cessation programs—usually on

Tuesdays, Wednesdays, and Thursdays—as well as a vespers service on Friday evening and a scouting-type program for youth).

The 2003 W&S Application was forwarded to the M-NCPPC and the WSSC for review and comment. While both organizations provided comments, neither opposed the application. DER staff then prepared a report recommending approval of the application, although the report noted that the 1990 Master Plan for the subregion in which the Property was located "recommends estate residential development at 0.5-1.5 dwelling units per acre for this property." J.A. 1613. The application was forwarded to the County Executive, who also recommended approval.

RHI's application, along with 27 others, was presented to the Prince George's County Council for Action on July 23, 2003. When the proposal was presented to the Council, Oxentenko and attorney Russell Shipley testified in favor of it. There were no unfavorable comments or questions. On July 29, the Council met to discuss and vote on the applications. Witnesses for RHI testified that the Council initially voted to approve the application, but then Councilman Dernoga spoke to the other members of the Council, after which another vote, denying the application, was taken. J.A. 457. In CR-34-2003, the Council provided three reasons for the denial of the 2003 Application:

1. The proposed development was adjacent to a WSSC reservoir;

2. The proposed project was out of character with the surrounding large lot (residential) development; and

3. Impervious surfaces on that site could have a negative impact on the water quality of the adjacent reservoir.

J.A. 1796.

RHI filed a petition for a writ of mandamus in the state circuit court, arguing that it was entitled to advancement to W&S Category 4 because "RHI's application met all the requirements outlined in the ten-year water and sewer plan for granting of the requested category change." J.A. 2122. RHI further asserted that the denial of the 2003 W&S Application was not for the reasons stated by the County, but rather was "based on a proliferation of churches in the area" and concerns about traffic. *Id.* This theme was repeated in RHI's closing argument. *See* J.A. 2037 ("We don't want another church in this area …, and they started advancing theories as to why they should turn it down.").

The circuit court denied RHI's mandamus petition. J.A. 1794-1800. The court proceeded from the premise that the County possessed discretion to deny the 2003 W&S Application even if RHI satisfied all criteria for an amendment to the Plan. J.A. 1799. The court noted, however, that it would find an abuse of this discretion if the denial of the Application was "arbitrary, illegal, capricious, or unreasonable." J.A. 1797. The circuit court concluded that the denial was none of these things: "The Court concludes that based on the testimony of witnesses and

the evidence provided, [the County's] rationale for denial was neither arbitrary nor capricious, but instead was based upon legitimate reasons supported by the record." J.A. 1798 (parenthetical language omitted). The circuit court distinguished RHI's petition from the mandamus petition at issue in *Prince George's County v. Carusillo*, 447 A.2d 90 (Md. Ct. Spec. App. 1982), in which the petitioner presented evidence that its category change application was denied, while the application of a similarly situated landowner was granted. *See id.*, 447 A.2d at 92-93. In addressing RHI's mandamus petition, the circuit court distinguished *Carusillo* on the basis that RHI had presented no evidence of a similarly situated applicant whose category change application was granted when RHI's was denied. RHI appealed to the Court of Special Appeals, which affirmed. J.A. 2132-41. The Court of Appeals denied certiorari. J.A. 2171.

D. 2004 Subdivision Application

As noted previously, a property owner must submit a subdivision application to the M-NCPPC as a necessary step in the development process. On November 4, 2004, RHI submitted a subdivision application despite the fact that the Category 5 portions of the Property had not been redesignated to Category 4 ("the 2004 Subdivision Application"). J.A. 2199. The application proposed combining the two parcels into one ("proposed parcel A") and building a church on 1.7 acres, or ten percent, of the combined property. J.A. 2247, 2268. The construction was

located entirely on the Category 3 portion of the frontage parcel. The Planning Commission denied the application on April 28, 2005, reasoning that in calculating the size of a "lot" for purposes of the ten percent coverage restriction, only Category 3 land could be considered. J.A. 2203-05. Because RHI's proposed construction was premised on a lot size that included undevelopable land, it was improper. J.A. 2005.

RHI petitioned for review, arguing that the lot coverage limitation could be based on the entire property, so long as development was restricted to Category 3 land. J.A. 2247-48. The circuit court denied the petition for review, J.A. 2267-74, and the Court of Special Appeals affirmed, J.A. 2275-97. The appeals court concluded that acceptance of RHI's argument would defeat the purpose of the lot coverage limitation. J.A. 2290-91. The Maryland Court of Appeals denied certiorari. J.A. 2298.

E. 2005 W&S Application

On July 9, 2005, RHI submitted a second category change application to the DER, again seeking to have the W&S Category 5 portion of the Property redesignated to Category 4 ("the 2005 W&S Application"). DER staff reviewed and commented on the application, recommending approval. During the County Council meeting at which the application was discussed, Councilman Dernoga informed the Council that WSSC was concerned about the application. The

Council voted to deny the application.

III. PROCEDURAL HISTORY OF THIS LITIGATION

RHI filed its complaint on June 22, 2005, alleging (1) that the County's denial of the 2003 W&S Application was motivated by religious (Count I) and racial (Count II) discrimination, in violation of the Equal Protection Clause of the Fourteenth Amendment;[8] and (2) that the denial of the 2003 W&S Application and the enactment of CB-83 constituted a substantial burden on RHI's religious exercise in violation of RLUIPA (Count III). J.A. 25-27. RHI sought damages in the amount of $3 million, a declaration that CB-83 was "null and void," and a permanent injunction against enforcement of CB-83. J.A. 28, 33. RHI did not seek an order directing the County to grant the 2003 W&S Application. J.A. 336.

The case ultimately proceeded to a jury trial. Although the only claims in RHI's complaint concerned the denial of the 2003 W&S Application and the enactment of CB-83, the district court admitted, over the County's objection, evidence regarding the M-NCPPC's denial of the 2004 Subdivision Application and the County's denial of the 2005 W&S Application. At the conclusion of the seven-day trial, the district court submitted two questions to the jury: whether the County's "laws, regulations or administrative actions were motivated, at least in part, on the basis of religious discrimination"; and whether the County's "laws,

[8] RHI abandoned the racial discrimination claim at trial. *See Reaching Hearts Intl.*,

regulations or administrative actions imposed a substantial burden on the exercise of RHI's religion." J.A. 1299.

The jury returned a verdict in favor of RHI and awarded compensatory damages of $3,714,822.36. After receiving post-judgment briefing from the parties, the district court issued a memorandum opinion ruling that the County's actions were not narrowly tailored to meet a compelling governmental interest. *See Reaching Hearts Int'l*, 584 F. Supp. 2d at 787-90. The court therefore imposed damages in the amount found by the jury, and awarded injunctive relief in the form of an injunction against application of CB-83 to RHI (this injunction is presumably against non-party M-NCPPC, the entity with responsibility for applying the ordinance) and an order directing the County not to discriminate against RHI in the future.

Thereafter, the County timely filed its appeal. Judgment has been stayed by the district court pending the outcome of these proceedings.

SUMMARY OF THE ARGUMENT

With due respect to the district court, it simply misunderstood the nature of the claims pressed by RHI, with disastrous consequences for the legal rights of the County. At summary judgment, the district court agreed with the County that RHI's claims regarding the denial of the 2003 W&S Application were barred by

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584 F. Supp. 2d at 780 n.8.

res judicata and collateral estoppel, and that RHI would be limited at trial to its claim that the *enactment* (not the *application*) of CB-83 imposed a substantial burden under RLUIPA. Despite this ruling, the court allowed RHI to present extensive evidence regarding the denial of the 2003 W&S Application, and other alleged discriminatory acts of the County, none of which had any bearing on the *facial* validity, under RLUIPA, of CB-83. The district court then gave a jury instruction that failed to provide the jury proper guidance as to its task, resulting in an award of over $3 million dollars. Finally, the district court awarded injunctive relief against M-NCPPC, a non-party to the litigation, and effectively ordered the County to grant RHI's next application for a water and sewer category change.

When the issues are properly analyzed, it is plain that RHI's claims related to the denial of the 2003 W&S Application are barred by res judicata. Even if these claims are not barred, the County is entitled to judgment as a matter of law. Further, RHI's challenge to CB-83 is unripe because RHI never sought a variance from the lot-coverage limit. Also, the challenge to CB-83 is not cognizable under RLUIPA; even if cognizable, it is without merit. Therefore, the County is entitled to judgment as a matter of law as to CB-83. Alternatively, in light of the deeply flawed trial, this case should be remanded for a new trial.

ARGUMENT

I. RHI'S CLAIMS RELATED TO THE DENIAL OF THE 2003 W&S APPLICATION ARE BARRED.

As noted in the Statement of Facts, RHI filed a petition for mandamus in the Maryland courts. Although RHI asserted in the state court action that the denial of the 2003 Application was because of religious discrimination, it did not include its free exercise or RLUIPA claims in the state court action. Having elected not to do so, RHI is now barred from raising these claims in federal court.

A. Standard of Review

The district court denied the County's requests for dismissal or judgment as a matter of law on the basis of res judicata and collateral estoppel. These rulings are reviewed de novo. *See Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 209 (4th Cir. 2009). In determining whether RHI's claims are barred by the prior state court action, this court must apply principles of Maryland law. *See Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 162 (4th Cir. 2008) ("Generally, the preclusive effect of a judgment rendered in state court is determined by the law of the state in which the judgment was rendered.").

B. RHI's claims are barred by its failure to raise them in state court.

The Maryland courts have recognized that the purpose of the twin doctrines of res judicata and collateral estoppel is "to avoid the expense and vexation of multiple lawsuits, conserve judicial resources, and foster reliance on judicial action

by minimizing the possibilities of inconsistent decisions." *Janes v. State*, 711 A.2d 1319, 1324 (Md. 1998). "The two doctrines are based on the judicial policy that the losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on issues raised, or that should have been raised." *Colandrea v. Wilde Lake Cmty. Assoc.*, 761 A.2d 899, 909 (Md. 2000).

Maryland law distinguishes between res judicata and collateral estoppel as follows:

> If the second suit is between the same parties and is upon the same cause of action, a judgment in the earlier case on the merits is an absolute bar, not only as to all matters which were litigated in the earlier case, but as to all matters which could have been litigated (res judicata). If, in a second suit between the same parties, even though the cause of action is different, any determination of fact, which was actually litigated in the first case, is conclusive in the second case (collateral estoppel).

MPC, Inc. v. Kenny, 367 A.2d 486, 489 (Md. 1977) (internal quotation marks omitted); *see Colandrea*, 761 A.2d at 907-08.

1. RHI's Equal Protection and RLUIPA Claims Are Barred under Principles of Res Judicata.

Maryland courts will apply res judicata to bar all claims that were, *or could have been*, raised in a prior action when: (1) the parties in the present suit are the same as the parties in the prior suit; (2) the cause of action in the present suit is the same as the cause of action in the prior suit; and (3) there was a final judgment on the merits in the prior suit. *Colandrea*, 761 A.2d at 910. When these factors are

met, the prior judgment "is a final bar to any other suit upon the same cause of action and is conclusive, not only as to all matters decided in the original suit, *but also as to all matters that could have been litigated in the original suit.*" *Id.* Employing this test, it is clear that RHI's free exercise and RLUIPA claims could have been raised in the prior state court action, and thus now are barred.

There is no dispute that the parties in this suit are the same as the parties in the state court action filed by RHI following the denial of the 2003 W&S Application and that the Maryland courts rendered a final judgment on the merits in that suit. The only question, then, is whether the state suit involved the same "cause of action" as the federal litigation. In determining what is the "cause of action" for purposes of applying preclusion doctrines, Maryland has adopted the "transactional test" of the RESTATEMENT (SECOND) OF JUDGMENTS § 24: A matter sought to be raised in a second action is "fairly included within" the first action, and is therefore barred, if as a practical matter, "the facts are related in time, space, origin or motivation, … they form a convenient trial unit, and … their treatment as a unit conforms to the parties' expectations or to business understanding or usage." *Anne Arundel Co. Bd. of Educ. v. Norville*, 887 A.2d 1029, 1038 (Md. 2005) (internal quotation marks omitted); *see Pittston Co. v. United States*, 199 F.3d 694, 704 (4th Cir. 1999) ("The expression 'transaction' in the claim preclusion context 'connotes a natural grouping or common nucleus of operative facts.'" (quoting

RESTATEMENT (SECOND) OF JUDGMENTS § 24, cmt. b)).

Applying the transactional test, there can be no question that RHI's federal claims regarding the denial of the 2003 W&S Application are part of the same cause of action as the state suit. Certainly the facts were identical, as is demonstrated by a comparison of the allegations in the mandamus petition and the allegations in the federal complaint. *Compare* J.A. 2122 (mandamus petition ¶ 4, alleging that RHI purchased the Property for the construction of a church and school) *with* J.A. 19 (complaint ¶ 16, alleging the same); *compare* J.A. 2122 (mandamus petition ¶ 10, alleging "[t]hat Plaintiff RHI's application met all of the requirements outline in the ten-year water and sewer plan for the granting of the requested category change") *with* J.A. 21 (complaint ¶ 31, alleging that "Reaching Hearts' Application met all of the requirements outlined in the Sewer Plan for the requested category change"); *compare* J.A. 2122 (mandamus petition ¶ 11, alleging that the County "denied Plaintiff RHI's requested water and sewer category change based on proliferation of churches in the area") *with* J.A. 25 (complaint Count I, alleging that the County denied the 2003 Application because of bias against RHI's religious mission).

Furthermore, all of the facts relevant to the federal claims were known at the time of the mandamus petition. Two of the key witnesses in the federal trial, Pastor Mike and Karl Kent of Cathedral Construction, testified in support of the

mandamus petition; Shirley Branch and Charles Grimsley also provided testimony at both trials.[9] Russell Shipley, who testified at the federal trial, represented RHI in the state court action.

Finally, RHI's federal claims could have been joined with the mandamus petition. Maryland law clearly permits claims for damages to be joined with a claim for mandamus relief as part of the same action. *See East v. Gilchrist*, 445 A.2d 343, 346 (Md. 1982) (holding action seeking mandamus, declaratory relief, and damages was a single "claim" for purposes of final judgment rule). *Accord, e.g.*, *Plum Creek Dev. Co. v. City of Conway*, 491 S.E.2d 692, 694-95 (S.C. Ct. App. 1998) (holding that prior mandamus action had res judicata effect as to subsequent claims for damages arising from the same subject matter). And, the mandamus remedy for denial of a zoning application allows the Maryland circuit court to consider whether the denial of the application was an abuse of discretion; the court is not limited to the legal question of whether granting the application was a mere ministerial act. Maryland law allows mandamus relief for the purpose of obtaining judicial review of a claim that an administrative body abused its authority to take, or not take, a discretionary act. *See, e.g.*, *Heaps v. Cobb*, 45 A.2d 73, 76 (Md. 1945) ("Courts have the inherent power, through the writ of mandamus, by injunction, or otherwise, to correct abuses of discretion and

[9] Ms. Branch did not testify in person at the federal trial; her deposition testimony

arbitrary, illegal, capricious or unreasonable acts; but in exercising that power care must be taken not to interfere with the legislative prerogative or with the exercise of sound administrative discretion, where discretion is clearly conferred" (citations omitted)); *Reese v. Dept.of Health & Mental Hygiene*, 934 A.2d 1009, 1033 n.21 (Md. Ct. Spec. App. 2007).

RHI had every reason to present its evidence regarding the allegedly discriminatory nature of the denial of the 2003 W&S Application as evidence of the illegality of the denial. *See Takahashi v. Bd. of Educ*, 249 Cal. Rptr. 578, 586 (Cal. Ct. App. 1988) (refusing to excuse litigant's failure to present constitutional and civil rights challenges to her termination during administrative proceedings, as proof of such claims would have rendered her termination illegal and required granting of the administrative relief she sought). The only inference to be drawn from this is that RHI deliberately "held back" its discrimination claims, planning to raise them in federal court if the mandamus strategy failed. In this vein, it is worth noting that RHI waited nearly a year after the denial of the 2003 Application—until shortly after its mandamus petition had been denied—before filing the federal action, rather than simply filing the federal action simultaneously with the mandamus petition, as would have been expected if RHI truly believed that the issues were entirely separate.

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was read into the record by RHI in support of its claims.

At the summary judgment stage, the district court *agreed* with the County's position that RHI's claims related to the denial of the 2003 W&S Application were completely barred. *See* Transcript of Hearing (April 30, 2007), at 100 ("[A] claim focused only on the denial of the water and sewer service category change is gone. It's precluded. It's over."). Nevertheless, the court allowed RHI to present extensive testimony regarding the allegedly discriminatory nature of the denial of the 2003 W&S Application. Then, as discussed *infra* Part VII, the district court instructed the jury in a manner that permitted it to find the denial of the 2003 W&S Application a violation of the Equal Protection Clause and RLUIPA.

Perhaps realizing its mistake in allowing evidence of the 2003 denial to go to the jury, the district court again addressed preclusion in its post-verdict opinion. *See Reaching Hearts Intl.*, 584 F. Supp. 2d at 794 ("Finally, neither res judicata nor collateral estoppel applies to bar RHI's claims before this Court." (footnotes omitted)). The district court reasoned that "[t]he development plan that RHI presented at trial … was different than *any* and *every* prior plan that had been submitted as part of an application before the Defendant," with the result that the issues presented at trial were different from those presented in the mandamus petition. *Id.* This holding fails to recognize the simple reality that regardless of what plan RHI might present to the County in the future,[10] what was at stake in the

[10] The district court's order of injunctive relief did not direct the County to

federal action was RHI's ability to recover damages for the County's alleged *past* violation of the Equal Protection Clause and RLUIPA by denying the 2003 W&S Application.

2. At a minimum, RHI should have been barred from relitigating the validity of the County's reasons for denying the 2003 W&S Application.

Even if RHI's claims regarding the denial of the 2003 W&S Application are not barred in their entirety, RHI's assertion that the County's articulated reasons for denying the 2003 Application were invalid and pretextual should have been barred under principles of issue preclusion. This question was "actually litigated and determined by a valid and final judgment" in the state courts of Maryland, *Colandrea*, 761 A.2d at 907 (internal quotation marks omitted), and thus should not have been relitigated in the federal proceeding. Despite this clear bar, the district court allowed RHI to present evidence tending to show that the articulated reasons for the denial of the 2003 W&S Application were invalid. Moreover, the district court failed to instruct the jury that the reasons for the denial had been reviewed by the Maryland courts and found legitimate and supported by the evidence.

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consider the development plan presented by RHI, but rather directed the County to consider "any" development plan RHI might present.

II. THE DENIAL OF THE 2003 APPLICATION DID NOT VIOLATE RLUIPA.

Following the jury's verdict, the district court denied the County's motion for judgment as a matter of law on RHI's claim that the denial of the 2003 W&S Application imposed a substantial burden, in violation of RLUIPA. *See Reaching Hearts Intl.*, 584 F. Supp. 2d at 784-87. The analysis of the district court was factually and legally flawed, however. Reversal is required.

A. Standard of Review

This court reviews the decision of the district court regarding judgment as a matter of law de novo. *See U.S. ex rel. DRC, Inc. v. Custer Battles, LLC*, 562 F.3d 295, 305 (4th Cir. 2009). Judgment as a matter of law is appropriate when, viewing the evidence in the light most favorable to the prevailing party, a reasonable jury could not have reached the result it did. *See Dotson v. Pfizer, Inc.*, 558 F.3d 284, 292 (4th Cir. 2009).

B. The denial of the 2003 W&S Application did not impose a substantial burden on RHI.

RLUIPA prohibits a local government from "impos[ing] or implement[ing] 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." 42 U.S.C. § 2000cc(a)(1).[11] This case presents the first occasion for this court to define the

[11] RLUIPA's "substantial burden" provision applies only if one of three jurisdictional "hooks" is present: the burden is imposed in the context of a

term "substantial burden" in the context of a land use regulation under RLUIPA.

1. Meaning of "substantial burden"

RLUIPA defines "religious exercise" broadly, providing specifically that "[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). RLUIPA does not define the term "substantial burden"; however, legislative history indicates that the term is to be construed as in previously existing First Amendment jurisprudence. *See* Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000 ("Joint Statement"), 146 Cong. Rec. S7774, S7776.

The Fourth Circuit has considered the definition of "substantial burden" in the context of an individual believer's claim under RLUIPA. *See Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006). In *Lovelace*, this court held that a substantial burden exists "when a state or local government, through act or omission, puts substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Id.* (internal quotation marks omitted). However, the court has not yet

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program that receives federal financial assistance; the burden or its removal would affect commerce, or the burden is imposed in the implementation of a land use regulation, or system of land use regulations, that permits "individualized assessments of the proposed uses for the property involved." 42 U.S.C. § 2000cc(a)(2). The parties do not dispute that the jurisdictional element of RLUIPA

had occasion to rule on the meaning of "substantial burden" in the context of a land-use claim under RLUIPA.

Federal appellate courts have noted that the definition of "substantial burden" must, in light of RLUIPA's broad definition of religious exercise, be phrased differently in the case of a land use regulation. *Cf. Westchester Day Sch. v. Village of Mamaroneck*, 504 F.3d 338, 348-49 (2d Cir. 2007) (noting that the *Lovelace* definition of "substantial burden" is difficult to apply in the land-use context). For example, in *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003), the Seventh Circuit noted that its definition of "substantial burden" under the Free Exercise Clause included a burden that "inhibits or constrains conduct or expression." *Id.* at 761. But,

> [a]pplication of the substantial burden provision to a regulation inhibiting or constraining *any* religious exercise, including the use of property for religious purposes, would render meaningless the word "substantial," because the slightest obstacle to religious exercise incidental to the regulation of land use—however minor the burden it were to impose—could then constitute a burden sufficient to trigger RLUIPA's requirement that the regulation advance a compelling governmental interest by the least restrictive means.

Id. Therefore, the Seventh Circuit concluded that a "substantial burden" exists, within the context of a land-use regulation under RLUIPA, when the burden imposed by the regulation "bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose

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is satisfied.

thereof within the regulated jurisdiction—effectively impracticable." *Id.* Similarly, the Ninth Circuit has held that application of a land-use regulation imposes a substantial burden when it "imposes a significantly great restriction or onus on the exercise of religion." *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034-35 (9th Cir. 2004).

In light of the foregoing, the County suggests that that the application of a land-use regulation substantially burdens the religious exercise of a church when it effectively precludes the use of the land for the religious purpose intended for it. This test is consistent with other circuits' decisions holding that a substantial burden exists when the denial of a zoning application leaves a church with no recourse, but not when other avenues are available to the religious institution, even if the solution may not be the institution's first choice. *See, e.g.*, *Westchester Day Sch.*, 504 F.3d at 349 (holding that denial of a zoning application does not create a substantial burden when "there is a reasonable opportunity for the institution to submit a modified application" that remedies the problems with the first); *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, --- F. Supp. 2d ---, 2009 WL 230108 (D. Ariz. Jan. 30, 2009) (holding that the denial of a conditional use permit would constitute a substantial burden when "the breadth or arbitrariness of the City's reasoning indicates that it will likely deny a CUP for almost any location" or there is "a severe shortage of acceptable alternative properties").

2. RHI did not suffer a substantial burden.

In its order denying the County's motion for judgment as a matter of law, the district court identified several bases for its finding that the denial of the 2003 W&S Application resulted in a substantial burden on RHI's religious exercise. None of the bases identified by the district court is adequate, however.

As a preliminary matter, the County notes that the district court's analysis of the "substantial burden" test is affected by its failure to understand that RLUIPA, like the free exercise jurisprudence on which it is premised, contemplates a legal challenge to a particular act of a local government. Rather than consider whether the denial of the 2003 W&S Application imposed a substantial burden, the district court considered whether *any* act of the County, or all of its alleged actions together, imposed a substantial burden. This simply is not the correct analysis, and on this basis alone reversal is required.

(a) Cedar Ridge Lease

The district court ruled that "the temporary and limited use of the leased Cedar Ridge facilities for RHI's religious exercise placed substantial pressure on RHI to violate or choose between its religious beliefs." *Reaching Hearts Int'l*, 584 F. Supp. 2d at 786. However, RLUIPA requires that a causal nexus exist between the governmental conduct (here, the denial of the 2003 W&S Application) and the modification of behavior and violation of beliefs. *See Westchester Day Sch.*, 504

F.3d at 349 ("There must exist a close nexus between the coerced or impeded conduct and the institution's religious exercise for such conduct to be a substantial burden on that religious exercise.").

There is no such causal nexus between the denial of the 2003 W&S Application and the terms of RHI's lease with Cedar Ridge. RHI entered the lease with Cedar Ridge, and took upon itself the resultant limited availability and functionality of the space, long before it purchased the Property. Moreover, RHI presented no evidence at trial that its only options for worship space were Cedar Ridge or the Property. It is both unfair and illogical to find a violation of RLUIPA in RHI's own choice of premises.

(b) 2003 W&S Application denial; 2005 W&S Application denial.

The district court found the denials of RHI's 2003 and 2005 Applications constituted a substantial burden. *See Reaching Hearts Intl.*, 584 F. Supp. 2d at 785. The mere denial of a zoning application cannot, by itself, constitute a substantial burden in violation of RLUIPA. *See Westchester Day Sch.*, 504 F.3d at 349; *Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 989 (9th Cir. 2006). Otherwise, any church, synagogue, or mosque would be able to run roughshod over a municipality's zoning scheme.

A denial of a zoning or permit application may constitute a substantial burden when it leaves a church with no reasonable alternatives. *See Westchester*

Day Sch., 504 F.3d at 340 (noting that "a conditional denial may represent a substantial burden if the condition itself is a burden on free exercise, the required modifications are economically unfeasible, or where a zoning board's stated willingness to consider a modified plan is disingenuous"). However, the mere fact that a church may not be able to use its land in the particular manner it desires does not prove a lack of alternatives. *See Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 704-05 (E.D. Mich. 2004); s*ee also Midrash Shephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 n.11 (11th Cir. 2004) ("That congregations may be unable to find suitable alternative space does not create a substantial burden within the meaning of RLUIPA.").

(c) Delay and Uncertainty

The district court also held that RHI was substantially burdened by the "delay and uncertainty" caused by "Defendant's actions."[12] The cases cited by the district court do not support its conclusion.

The district court cited *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005), for the proposition that a "substantial burden existed on church whose zoning variance was denied because it

[12] Again, the County notes that the district court erroneously considered all of RHI's allegations against the County as a single claim. That error has particularly egregious effect with respect to the district court's analysis of the delay and expense encountered by RHI, in that the court embraced within its analysis the entire course of proceedings.

'faced the possibility of having to sell its land and finding an alternative piece of land or the possibility of being subjected to unreasonable delay in restarting its application for a variance,' when doing so would have led to 'delay, uncertainty, and expense.'" *Reaching Hearts Intl.*, 584 F. Supp. 2d at 786 (quoting *Sts. Constantine & Helen*, 396 F.3d at 898-900). *Sts. Constantine & Helen*, however, did not involve the mere denial of a zoning variance. There, the church sought a variance to rezone 14 acres of a 40-acre tract it owned so that it could build a church. In response to the city's concern that rezoning might lead to the construction of a non-religious structure if the church failed to raise the funds needed to build a church, the church agreed to accept a restriction (a "planned unit development overlay," or PUD) on use of the property so that it could only be used for a church. *See id.* at 898. The city nevertheless denied the variance on the spurious basis that sale of the property would result in the dissolution of the PUD. *See id.* at 898-99. The city then suggested that the church apply for a conditional use permit (an unworkable suggestion under the circumstances) or re-apply for a variance under a different PUD that would have had exactly the same effect as the one the church had already agreed to. *See id.* at 899. In light of this record establishing that the city's reasons for denying the variance were disingenuous, the court found a substantial burden. *See id.* at 900 (finding that a substantial burden inhered in "having to restart the permit process to satisfy the Planning Commission

about a contingency for which the Church has already provided complete satisfaction); *id.* at 901 (holding that it was burdensome to require church to begin searching for new property when "the Church is perfectly willing to bind itself by whatever means are necessary not to sell the land for a nonreligious institutional use, and the City has expressed no other concern about the use of the land"). Thus, the Seventh Circuit did not find a substantial burden simply because of the delay and expense occasioned by the denial of a zoning variance, but rather because the delay and expense was caused by a spurious denial.

RHI is simply not in the same position as was the church in *Sts.Constantine & Helen*. The Maryland state courts have found that the County's reasons for denying the 2003 W&S Application were valid and supported by the evidence. Furthermore, RHI has not attempted to meet these concerns, for example by submitting a category change application limited to the rear portion of the frontage parcel (which would provide a ten-acre buffer between RHI's construction and the Reservoir).

The district court also cited *Grace Church of North County v. City of San Diego*, 555 F. Supp. 2d 1126 (S.D. Cal. 2008). *Grace Church* involved the denial of a ten-year conditional use permit (CUP) for a space leased in an industrial park. The church sought a ten-year CUP so that it could grow its congregation and then seek a permanent location. Instead, the city granted a five-year CUP, and members

of the planning commission made clear that they would be hostile to any application for an extension. The court found this ruling to constitute a substantial burden because it imposed a substantial financial burden on the church that a five-year CUP would not have, *see id.* at 1138-39, and because CUPs had been granted for other non-industrial uses, including a church, in the industrial park, *see id.* at 1137-38. *Grace Church* is distinguishable because the denial of RHI's 2003 Application does not have the kind of direct financial impact on RHI that the reduced CUP did on Grace Church, and because RHI has not established that the County granted a W&S Category Change Application under the same circumstances in which it denied RHI's 2003 Application.

(d) Existence of Alternatives

Although the circuit courts are consistent in holding that the denial of a zoning application does not result in a substantial burden when there is a viable alternative, the district court did not consider this factor. As discussed *infra* Part V(C)(2), RHI has several options available to it that would address the problems of its prior application. The existence of such alternatives establishes that the denial of the 2003 Application did not create a substantial burden.

C. Even if the denial of the 2003 W&S Application imposed a substantial burden, the County's action was narrowly tailored to a compelling government interest.

RLUIPA provides that the implementation of a land-use regulation that

causes a substantial burden is justified if the imposition of the burden is the least restrictive means of furthering a compelling governmental interest. *See* 42 U.S.C. § 2000cc(a)(1)(A), (B). The district court erred in denying the County's motion for judgment as a matter of law on the basis of this defense. The County has a compelling interest in the protection of the Rocky Gorge Reservoir, and the denial of the 2003 Application was narrowly tailored to meet that interest.

The County undoubtedly has a compelling interest in protecting the environmental integrity of the Reservoir, which is a key source of drinking water for the Washington metropolitan area. *See, e.g.*, *Crow v. Gullet*, 706 F.2d 856, 858 (8th Cir. 1983) (per curiam) (holding that restriction of access to geological formation for Native American religious ceremonies was justified by the government's compelling interest in "preserving the environment and the resource from further decay and erosion"); *Badoni v. Higginson*, 638 F.2d 172, 177 (10th Cir. 1980) (holding that governmental interest in maintaining the capacity of Lake Powell was "of a magnitude sufficient to justify the alleged infringements" on plaintiffs' religious practices).

The County's expert, Leslie Shoemaker, Ph.D., testified to the fragility of the Reservoir and the importance of protecting it from further damage. Among other things, Dr. Shoemaker noted that one issue with the Reservoir was the need to control phosphorus, which enters the water through soil erosion and surface

runoff. J.A. 790.

III. THE DENIAL OF THE 2003 W&S APPLICATION DID NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

The district court denied the County's motion for judgment as a matter of law on the question of whether the denial of the 2003 Application violated the Equal Protection Clause.

A. Standard of review

A plaintiff may establish a violation of the Equal Protection Clause by demonstrating "that a statute has been administered or enforced discriminatorily," provided the discrimination is intentional. *Sylvia Devel. Corp. v. Calvert Co.*, 48 F.3d 810, 819 (4th Cir. 1995); *see Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *id.* at 266 (holding that a plaintiff makes a sufficient showing by demonstrating that discriminatory purpose was "a motivating factor in the decision").

> Several factors have been recognized as probative of whether a decisionmaking body was motivated by a discriminatory intent, including: (1) evidence of a "consistent pattern" of actions by the decisionmaking body disparately impacting members of a particular class of persons; (2) historical background of the decision, which may take into account any history of discrimination by the decisionmaking body or the jurisdiction it represents; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by decisionmakers on the record or in minutes of their meetings.

Sylvia Devel. Corp., 48 F.3d at 819. Review of these factors establishes that there was insufficient evidence from which a reasonable jury could find discrimination.

As previously noted, review of the denial of a motion for judgment as a matter of law is de novo.

B. Insufficient evidence of discriminatory intent.

Arlington Heights and related cases are clear that an Equal Protection claim of the type raised by RHI must pertain to a particular action taken by a governmental body. RHI recognized as much by specifically pleading in its complaint that the County discriminated against it by denying the 2003 Application. J.A. 25-26. Nevertheless, the district court lumped all the alleged actions of the County together and purported to decide that these actions as a whole were motivated by discriminatory intent, as though RHI had alleged a disparate treatment claim. *See Williams v. Giant Food Stores*, 370 F.3d 423, 429-30 & n.3 (4th Cir. 2004) (explaining that an individual may only use evidence of a pattern or practice of discrimination as evidence of that a discrete act was discriminatory; an individual plaintiff may not make a claim for disparate treatment, "pattern or practice" discrimination). As a consequence, the district court failed to determine whether the various alleged actions of the County tended to prove that the discrete act challenged by RHI—denial of the 2003 W&S Application—was motivated by discriminatory intent.

1. Denial of 2003 W&S Application.

The district court concluded that the County's denial of the 2003 W&S Application "supports an inference of intentional discrimination" because (1) the reviewing agencies and the County Executive all recommended approval and (2) something Councilman Dernoga said caused the council members to reverse their original vote to approve the application. Neither of these factors will bear the weight the district court attached to them.

(a) Denial despite meeting criteria for category change.

First, the mere fact that the County denied RHI's Application, even though the reviewing agencies and the County Executive recommended approval and no one testified against the Application, cannot constitute evidence of discrimination. The district court's reasoning amounts to a conclusion that the County had no discretion to deny the Application. However, this is precisely the argument raised to, and rejected by, the Maryland courts in the mandamus action. J.A. 1799 ("… Defendant was not obligated to accept nor adopt the recommendations of the various reviewing agencies."). If, as the Maryland courts ruled, the County was not obliged to grant the 2003 W&S Application despite it meeting all criteria and having the approval of the reviewing agencies, then the mere fact that it exercised this discretion, without more, cannot be discriminatory. This is especially so when the Maryland courts determined that the County's proffered reasons for denying

the application "[were] neither arbitrary nor capricious, but instead [were] based upon legitimate reasons supported by the record." J.A. 1798.

(b) Reversal of initial vote.

RHI presented testimony that the County Council apparently "reversed" itself, voting first to approve the 2003 Application, then, after Councilman Dernoga said something inaudible to the rest of the council, voting to deny the Application. However, exactly what Councilman Dernoga said is a matter of speculation.

(c) Dugan's Estates.

The district court also found evidence of discrimination in fact that the County granted the category change application of "Dugan's Estates" over the contrary recommendation of the County Executive.[13] The court incorrectly concluded that the Dugan's Estates applicant was similarly situated to RHI.

Dugan's Estates was a proposed development of five homes with a minimum floor area of 3,500 square feet on 14.77 acres of land. As proposed, the homes would have occupied a total of 17,500 square feet, or four-tenths of an acre. Thus, the proposed development—which was subject to a ten percent lot-coverage maximum, *see* P.G. County Code de § 27-442(c)—occupied only 2.7 percent of the parcel of land. In contrast, RHI's proposed buildings alone occupied 95,000

[13] In the record, "Dugan's Estates" is variously referred to as "Dugan's Addition to

square feet, or 2.18 acres, and the 500-plus parking spaces necessary to accommodate RHI's congregation would add at least another 2.5 acres.[14] In short, RHI proposed to cover *at least* 27 percent of its land with impervious surfaces. Additionally, the Dugan's Estates proposal involved adding more large lot, single family residences, exactly the kind of development intended to take place in the R-A zone. Under these circumstances, it was improper for the district court to compare Dugan's Estates to RHI.

2. Enactment of CB-83.

Again demonstrating its misunderstanding of the question before it (whether the denial of the 2003 W&S Application violated the Equal Protection Clause), the district court found that the County's enactment of CB-83 was discriminatory. Such an allegation was never raised by RHI, which claimed only that the enactment of the ordinance imposed a substantial burden in violation of RLUIPA.

This is not a trivial error by the district court. CB-83 is facially neutral. In order to demonstrate that its enactment was discriminatory, RHI would have had to make the difficult showing that CB-83, which amended lot-coverage limitations for property near the Rocky Gorge Reservoir in all zoning categories, was enacted

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Meromy Estates" and "Dugan's Addition to Memory Estates." J.A. 1624-25.

[14] This calculation is based on a standard parking space of 9x18. *See* http://www.parkinglotplanet.com/Help_Stuff/angle%20parking.htm. 522 spaces times 162 square feet per space equals 84,500 square feet, or nearly two acres before back-out space and driving lanes are added. 2.5 acres for parking is an

specifically to discriminate against RHI. *See* C*hurch of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993). RHI explicitly declined to make this claim. J.A. 1103. The district court thus awarded RHI relief on a claim it never made.

3. Contemporaneous statements.

Over the County's objection, RHI introduced statements made in 2005 by some members of the County Council. The statements were reported in a *Washington Post* article about the consequences, in terms of county revenue, of the growing number of tax-exempt "mega-churches" in Prince George's County. *See* Sudarsan Raghavan & Hamil R. Harris, *Tax Exempt and Growing, Churches Worry Pr. George's*, WASH. POST, Mar. 14, 2005, at A1. The article ran in March 2005, nearly two years after the County denied the 2003 W&S Application. J.A. 2357-58.

The quoted statements are not "contemporaneous" to the County's consideration of the 2003 W&S Application in July 2003. A statement is "contemporaneous" to a claimed act of discrimination when it occurs at or near the same time as the alleged act. *See* WEBSTER'S II NEW COLLEGE DICTIONARY 243 (1999). Fourth Circuit precedent mandates that the statements be made simultaneously, or nearly simultaneously, with the challenged act. *See Sylvia*

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extremely modest estimate.

Devel. Corp., 48 F.3d at 819 (holding that "contemporaneous statements" of decisionmakers are those reflected "on the record or in the minutes of their meetings"). The alleged act of discrimination occurred on July 29, 2003; the proffered statements were published on March 14, 2005—over 19 months later. The statements were not "contemporaneous" and should not have been admitted into evidence against the County.[15]

4. Denial of 2004 Subdivision Application.

Next, the district court found the denial of the 2004 Subdivision Application to be discriminatory. Again, this is a claim RHI never made, against a body (the Planning Board) that RHI did not sue. Furthermore, the denial of the 2004 Subdivision Application was based on the Planning Board's interpretation of what constituted the applicable "lot" for purposes of the lot coverage limitation. Its interpretation was affirmed by the Maryland courts.

5. Denial of 2005 W&S Application

The district court also found that the County's denial of the 2005 W&S Application was discriminatory. This denial occurred after RHI filed this action, and RHI never amended its complaint to allege that the denial of the 2005 Application violated the Equal Protection Clause or RLUIPA.

[15] It is no answer to state that the proffered statements were contemporaneous to the denial of the 2005 W&S Application. Even if they were—a point the County does not concede—RHI has never sought damages or injunctive relief on the basis

In summary, the district court's analysis of RHI's equal protection challenge to the denial of the 2003 Application is deeply flawed. The County is entitled to judgment as a matter of law or, at a minimum, remand for a new trial.

IV. RHI'S CHALLENGE TO THE ENACTMENT OF CB-83 IS UNRIPE AND MUST BE DISMISSED.

In land use cases, a plaintiff must exhaust state remedies by applying for a variance before bringing a federal challenge to a zoning action. *See Williamson Co. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190 (1985). This requirement applies to claims under RLUIPA, as well. Before bringing a statutory claim under RLUIPA, therefore, a plaintiff must create a dispute ripe for review by seeking, and being denied, a variance from the allegedly burdensome land-use regulation. *See Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 350-52 (2d Cir. 2005). Because RHI failed to seek a variance from the Prince George's County Board of Zoning Appeals, its challenge to the enactment of CB-83 is unripe and should have been dismissed by the district court.

A. Standard of Review

This court reviews de novo the ruling of the district court regarding ripeness. *See Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006). A decision is "ripe" when it is "substantively definitive enough to be fit for judicial decision." *Bryant Woods*

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of a claim that the 2005 denial was discriminatory.

Inn, Inc. v. Howard County, Md., 124 F.3d 597, 602 (4th Cir. 1997). In the context of land-use regulation, ripeness requires that a claim for accommodation, in the form of a variance or other relief, be denied. *See id.* Even if the plaintiff has failed to seek such relief, the court may nevertheless consider the claim if "hardship will result from withholding court consideration." *Id.*

B. RHI has failed to seek an accommodation in the form of a variance.

Maryland law grants zoning authority to the Prince George's County District Council. *See* Md. Code Ann. art. 28, § 8-110(a)(1) (Westlaw through Apr. 14, 2009); *Prince George's County v. Ray's Used Cars*, 922 A.2d 495, 497 (Md. 2007) (citing Md. Code Ann. art. 28, § 7-101 *et seq.*). The Prince George's County Board of Zoning Appeals is authorized to grant variances from the zoning ordinances created by the District Council, including lot-coverage limitations. *See* Md. Code Ann. art. 28, §§ 8-110(a)(1), 8-111(b)(3) (Westlaw through Apr. 14, 2009); P.G. County Code § 27-229(a)(1). Because these provisions gave RHI a mechanism to avoid the burden allegedly imposed by CB-83, it was obliged to pursue a variance before filing suit in federal court.[16] Since it failed to do so,

[16] RHI's state-court appeal of the Planning Board's denial of the 2004 Subdivision Application does not suffice to render RHI's challenge to CB-83 ripe. The state-court proceedings challenged only the ruling of the Planning Board that the ten percent lot-coverage maximum should be calculated based on the amount of Category 3 land, not the total amount of land owned. The circuit court could not, in those proceedings, have granted RHI a variance (which, in any event, RHI did

RHI's challenge is not sufficiently ripe for judicial review.

C. RHI will not suffer hardship if this court withholds adjudication.

RHI faces no fines or other adverse action if this court withholds consideration of its claims. If this court dismisses RHI's claims as unripe, the only hardship RHI will incur is the delay and relatively modest expense that will be involved in seeking a variance from the Board of Zoning Appeals. The Supreme Court has held, however, that this is not a sufficient hardship to justify review of an otherwise unripe claim. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 735 (1998). Nor can RHI claim hardship from the fact that this case has already been to trial. To begin, it would be fundamentally unfair to defendants if, once a case was tried, it could no longer be dismissed as unripe. And, more particular to this litigation, this case should be subject to retrial in any event, in light of the many erroneous rulings of the district court.[17]

V. CB-83, ON ITS FACE, DOES NOT IMPOSE A SUBSTANTIAL BURDEN ON RELIGIOUS EXERCISE IN VIOLATION OF RLUIPA.

RLUIPA prohibits the imposition or implementation of a land-use regulation that "substantially burdens" the religious exercise of an individual or group. RHI maintains that the enactment of CB-83 "substantially burdened" its religious

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not seek).

[17] In making this statement, the County does not abandon its position that it is entitled to judgment as a matter of law on all claims.

exercise by preventing it from building an adequate church facility and school. *See* J.A. 334 (Oxentenko testimony, characterizing 1.7 acre design submitted in 2004 Subdivision Application as a "desperation move" that would cause him to lose members).

A. RHI's challenge to CB-83 is facial, not as-applied.

In its order granting injunctive relief, the district court found CB-83 "unconstitutional and in violation of [RLUIPA] *as applied* to the Plaintiff." *Reaching Hearts Intl.*, 584 F. Supp. 2d at 797 (emphasis added). This ruling demonstrates, again, the district court's complete failure to understand the nature of RHI's claims. First, RHI did not claim that the enactment of CB-83 violated the Constitution. J.A. 10-11, 33. Second, RHI claimed that the *enactment* of CB-83, not its *application*, violated RLUIPA. J.A. 27, 33. RHI never challenged the application of CB-83, and apparently never intended to do so. Otherwise, it would have named the Planning Board—the body responsible for the application of CB-83—as a defendant and would have identified the denial of the 2004 Subdivision Application as one of its claims.

In light of the above, the district court's ruling that CB-83 was "unconstitutional … as applied" to RHI is erroneous. The only question before the district court was whether CB-83, on its face, substantially burdened RHI's exercise of its religion.

B. RHI's facial challenge to CB-83 is not cognizable under RLUIPA.

The claim raised by RHI is that CB-83, on its face, imposes a substantial burden on religious exercise. This question is nonsensical because RLUIPA does not contemplate facial challenges to neutral statutes of general applicability; it is concerned with the consequences of the *application* of such statutes to particular individuals or groups. *See Guru Nanak Sikh Socy.*, 456 F.3d at 987 ("By its own terms, it appears that RLUIPA does not apply directly to land use regulations, such as the Zoning Code here, which typically are written in general and neutral terms."). This is demonstrated by a brief review of RLUIPA's history.

RLUIPA can be traced to the 1963 decision of the Supreme Court in *Sherbert v. Verner*, 374 U.S. 398 (1963). *Sherbert* involved a claim by a Seventh Day Adventist who was denied unemployment benefits because she refused to work on Saturdays. *See id.* at 399-401. The Court found the denial a violation of the claimant's free exercise rights because it forced her to choose between her religious beliefs and state benefits. *See id.* at 404. Such a substantial burden on the exercise of religion, the Court held, could be countenanced only if it was justified by a compelling governmental interest. *See id.* at 403.

In 1990, the Court considered whether *Sherbert*'s "substantial burden" test applied to the claims of former Oregon state employees, who had been fired for using peyote, a hallucinogen, in religious ceremonies. *See Employment Div. v.*

Smith, 494 U.S. 872, 874 (1990). The Court declined to apply the substantial burden test, ruling that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879 (internal quotation marks omitted). The Court distinguished *Sherbert* on the basis that the substantial burden test "was developed in a context that lent itself to individualized governmental assessment of the reasons for relevant conduct," and thus it "would not apply … to require exemptions from a generally applicable criminal law." *Id.* at 884; *see id.* (holding that *Sherbert* and similar cases "stand for the proposition that where the State has in place a system of individual exceptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason").

In response to *Smith*, Congress enacted the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to bb-4. *See City of Boerne v. Flores*, 521 U.S. 507, 512 (1997). RFRA codified the substantial burden test and required its application to all governmental action, even if the alleged burden on religious exercise resulted from a neutral law of general applicability. *See* 42 U.S.C. § 200bb-1; *City of Boerne*, 521 U.S. at 515. In *City of Boerne*, the Supreme Court held RFRA unconstitutional with respect to state and local governments. *See id.* at 532-36. Thereafter, Congress enacted RLUIPA, which requires application of the

substantial burden test to the imposition or implementation of land use regulations.

As the above history makes clear, the Supreme Court's substantial burden jurisprudence generally, and Congress' language in RLUIPA specifically, are intended to address the impact on religious exercise of a governmental body's discretionary *application* of a general regulatory scheme. *See* Statement of Senators Hatch and Kennedy, 146 Cong. Rec. S7774-01, at S7776 ("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 substantial burden or religious exercise.").

Finally, it should be noted that RHI could have, had it so desired, challenged the facial validity of CB-83 under the Free Exercise Clause. A statute, like CB-83, that is facially neutral may be found unconstitutional if it in fact accomplishes a "religious gerrymander" *i.e.*, it is discriminatory in intent and effect. *See City of Hialeah*, 508 U.S. at 534; *Midrash Shepardi*, 366 F.3d at 1233 (holding that a facially neutral law is subject to strict scrutiny review when it is "operatively non-neutral" with respect to religion). RHI elected not to raise any such constitutional claim. Throughout this litigation, RHI has claimed *only* that the enactment of CB-83 imposed a substantial burden under RLUIPA.

C. Assuming RHI's challenge to CB-83 is cognizable, it is without merit.

1. RHI cannot show that there is "no set of circumstances" in which CB-83 would not impose a substantial burden.

To the extent that RHI's claim that CB-83 is facially burdensome is even cognizable, it is without merit. As in all facial challenges, RHI can succeed only by demonstrating that there is "no set of circumstances" under which the CB-83 would not impose a substantial burden. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."); *see also Rust v. Sullivan*, 500 U.S. 173, 183 (1991) (a facial challenge will fail if an act "can be construed in such a manner that [it] can be applied to a set of individuals without infringing upon constitutionally protected rights"). *Accord Benning v. Georgia*, 391 F.3d 1299, 1303-04 (11th Cir. 2004) (holding that a facial challenge to the validity of RLUIPA could only succeed if the challenger could establish that there is no set of circumstances under which the Act would be valid).

Courts have repeatedly held that zoning regulations and requirements do not impose a "substantial burden" on religious institutions simply by requiring those institutions to do things—such as apply for special exceptions or building permits—that might cost time or money or might limit the use of land. *See, e.g.*,

San Jose Christian Coll., 360 F.3d at 1035 (holding that requirement that Christian college comply with zoning ordinance by submitting a complete application for zoning variance); *Guru Nanak Sikh Socy.*, 456 F.3d at 989 (refusing to hold that failure to provide a religious institution with a land use entitlement for a new facility for worship *necessarily* constitutes a substantial burden pursuant to RLUIPA). Such rules and limitations are simply a fact of life with which every property owner, religious or not, must deal. *See Civil Liberties for Urban Believers*, 342 F.3d at 761 (holding that "the costs, procedural requirements, and inherent political aspects" of zoning processes do not impose a substantial burden because "these conditions—which are incidental to any high-density urban land use—do not amount to a substantial burden on religious exercise"). Moreover, it is not at all clear—and RHI certainly presented no evidence on this point—that a ten percent lot-coverage limitation would be substantially burdensome to every religious landowner that might be subject to it.

RHI's challenge to the enactment of CB-83 boils down to a claim that it is substantially burdened by CB-83 because RHI is unable to use as much of its land as it would like, and less than it anticipated when it purchased the property. But this is no different than the situation of any landowner within 2500 feet of the Prince George's County side of the Rocky Gorge Reservoir. *See San Jose Christian Coll.*, 360 F.3d at 1035 (finding no substantial burden because, while

zoning ordinance "may have rendered College unable to provide education and/or worship at the Property, there is no evidence in the record demonstrating that College was precluded from using other sites within the city"). *Accord Lyng v. NW Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51 (1988) (holding that "[i]ncidental effects of government programs, which may interfere with the practice of certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs," do not impose a substantial burden in violation of the Free Exercise Clause).

Of particular relevance in this context is a decision of the Sixth Circuit concerning a claim that a limitation on the construction of churches in the city of Lakewood, Ohio, imposed a substantial burden under the Free Exercise Clause. *See Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983). There, a religious congregation purchased a plot of land in a residential neighborhood for the purpose of building a church. *See id.* at 304. Thereafter, the city enacted an ordinance prohibiting the construction of churches in residential neighborhoods and limiting such construction to certain zones comprising approximately ten percent of city land. *See id.* at 304-05. The Sixth Circuit held that the zoning ordinance did not impose a substantial burden on the congregation's religious exercise because "[n]o pressure [was] placed on the

Congregation to abandon its beliefs and observances." *Id.* at 307.[18] The Court concluded, "The lots available to the congregation may not meet its budget or satisfy its tastes but the First Amendment does not require the City to make all land or even the cheapest or most beautiful land available to churches." *Id.* This reasoning applies equally to RHI's facial challenge to CB-83. RLUIPA simply does not require a local government to forfeit its right to enact appropriate zoning codes simply because the enactment of such codes makes construction of a church in a particular location more expensive or more difficult.

2. RHI cannot show that CB-83 imposes a substantial burden as to it, particularly.

Because RHI possesses ample alternatives, RHI's proof fails even if, contrary to the ordinary rules governing facial challenges, this court considers the particular burden imposed on RHI by the enactment of CB-83. *See Westchester Day Sch.*, 504 F.3d at 349 (holding that a substantial burden does not exist if the landowner has alternatives that would allow it to overcome or bypass the denial of a zoning application); *Episcopal Student Found.*, 341 F. Supp. 2d at 704 ("[T]he Court fails to understand how Defendants' permit denial substantially burdens Plaintiff's religious exercise when the solution to a majority of Plaintiff's myriad

[18] The court noted that construction of a building for worship was not a fundamental tenet of the congregation's religious beliefs. *See id.* at 306-07. This finding seems not to have played a role in the court's substantial burden analysis, however.

constraints appears to lie within Plaintiff's control.").

First, RHI could seek a variance to the lot-coverage limitation from the Board of Zoning Appeals. As noted *supra*, the Board possesses authority to relieve the harsh effects of zoning ordinances when appropriate. Presumably, RHI could seek leave to build on up to 100 percent of its Category 3 land, providing it with 3.4 acres for its church and related buildings. RHI has never sought such a variance.

Second, RHI has never sought a W&S Category change just for the "back" portion of the frontage parcel. Such a category change, in conjunction with a variance to allow 50 percent lot coverage of all Category 3 land, would provide RHI with 3.5 acres of land on which to build. This is nearly the same amount that JFW found would provide ample space for a congregation of 600 people—the capacity on which RHI conditioned its purchase of the Property.

Even if neither of the above options were available to RHI, RHI has failed to demonstrate a substantial burden because it has not established that it could or would build on the Property if the ten percent limitation were removed. As noted above, RHI voluntarily abandoned any contention that it was entitled to a change of its W&S Category. Therefore, the injunctive relief it ultimately sought at trial—"reversal" of CB-83, J.A. 336—would have allowed it to build on 50 percent of the 3.4 acres of the frontage parcel that are in Category 3. Half of 3.4 acres is 1.7

acres. At trial, Oxentenko testified that a church built on 1.7 acres would be inadequate and would cause him to lose members—*i.e.*, that limiting RHI to that amount of land would be a substantial burden. Thus, under RHI's own allegations, it is in essentially the same position with CB-83 as without.

3. CB-83 is narrowly tailored to serve a compelling state interest.

As noted previously, the County has a compelling interest in protecting its water sources. At trial, Dr. Shoemaker testified that a key focus of current reservoir management practices is the minimization of impervious surfaces surrounding the reservoir. J.A. 794. To this point, Dr. Shoemaker specifically testified that a ten percent lot coverage limitation is the "rule of thumb" for reservoir management because "at about 10 percent imperviousness, it appears that systems lose their ability to … absorb the impact." J.A. 795. Furthermore, a lot-coverage limitation of 50 percent would be "very detrimental" to a reservoir. J.A. 796. Ultimately, Dr. Shoemaker testified that the lot-coverage limitations contained in CB-83 were an appropriate means of protecting the Rocky Gorge Reservoir. J.A. 803.

RHI and the district court made much of the fact that Grutzmacher employed a 2,500 foot buffer when drafting CB-83, rather than the 1,320 foot buffer employed in Montgomery County. The district court concluded that the failure to use the smaller buffer indicated that CB-83 was not the least restrictive means to

accomplish the County's goal of protecting the Reservoir. *See Reaching Hearts Intl.*, 584 F. Supp. 2d at 789. As Grutzmacher explained, however, the 2,500 foot buffer was adopted in part because of the differences between streams and reservoirs, and in part to provide uniformity within the county code.

Even if a 1,320 foot buffer would have been a less restrictive means of protecting the Reservoir, RHI has not demonstrated that the effect on it would have been any different. Under CB-83, as modified in accordance with the M-NCPPC's recommendation, the buffer is measured at the lot line closes to the reservoir; thus, if any part of the property is within the buffer zone, the *entire* property is subject to the lot coverage limitation. RHI presented no evidence that the back lot line of the rear parcel is not within 1,320 feet of the Rocky Gorge Reservoir. Thus, even if CB-83 had been draft as the district court thought it should have been, the result as to RHI would have been no different.

VI. THE DISTRICT COURT ERRED IN DENYING THE COUNTY'S MOTION *IN LIMINE*.

In addition to fundamentally misunderstanding the case before it, the district court erred by admitting improper evidence for the jury's consideration. As an alternative to its claim that it is entitled to judgment as a matter of law, the County maintains that these errors require remand for a new trial.

A. Standard of Review

The admission or exclusion of evidence lies within the discretion of the district court; consequently, decisions regarding admission or exclusion of evidence are reviewed for abuse of discretion. *See United States v. Lancaster*, 96 F.3d 734, 744 (4th Cir. 1996) (en banc). Even if evidence is relevant, the district court should exclude it "if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006). An error in the admission or exclusion of evidence requires reversal when it affects a litigant's substantial rights. *See Schultz v. Capital Intern. Sec., Inc.*, 466 F.3d 298, 310 (4th Cir. 2006). Substantial rights are affected when the court "cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Bank of Montreal v. Signet Bank*, 193 F.3d 818, 834 (4th Cir. 1999).

B. The district court erred in denying the motion *in limine.*

When it filed its complaint, RHI had submitted neither the 2004 Subdivision Application nor the 2005 W&S Application, and accordingly it did not allege these rulings as violations of the Equal Protection Clause or RLUIPA.[19] RHI never amended its complaint to add claims related to the 2004 and 2005 denials. Prior to

[19] Indeed, RHI did not name the M-NCPPC, the body that ruled on the subdivision

trial, the County moved *in limine* to exclude evidence regarding the denial of the 2004 Subdivision Application and the denial of the 2005 W&S Application. The district court abused its discretion in denying this motion, and the County suffered prejudice as a result.

1. 2004 Subdivision Application.

RHI challenged on the *enactment* of CB-83, not its *application* by the Planning Board. Accordingly, evidence regarding the denial of the 2004 Subdivision Application should have been excluded. Such evidence simply was not relevant to RHI's claim that CB-83, on its face, imposed a substantial burden on religious exercise. Alternatively, even if relevant the evidence was misleading and confusing to the jury, which was given no guidance by the district court on how to treat evidence of the denial of the 2004 Subdivision Application.

RHI used this erroneous ruling to full advantage, and to the detriment of the County's substantial rights. During trial, Thomas Kunjoo, an RHI witness, was allowed to testify about the denial of the 2004 Subdivision Application as though it were an action of the County. J.A. 531. And, during closing argument RHI argued that the denial of the 2004 Subdivision Application was an act of discrimination against RHI. J.A. 1095-96. Even worse, the substance of RHI's claim was that the 2004 Subdivision Application was denied because of some action of Councilman

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application, as a defendant in this litigation.

Dernoga, when in fact the Maryland courts have ruled that the denial was based on a correct interpretation of the zoning ordinances.

2. 2005 W&S Application.

Despite the fact that RHI never amended its complaint to add a claim based on the denial of the 2005 W&S Application, RHI presented testimony and argument regarding the denial, encouraging the jury to rule against the County on the basis of this denial. *See* J.A. 1096-97. This evidence should have been excluded on the basis of irrelevance. At the very least, it behooved the district court to carefully instruct the jury regarding how properly to consider the evidence. The district court failed in this duty. The end result was that the jury was allowed to find that the County discriminated in denying the 2005 W&S Application, even though such a claim was never made by RHI.

VII. THE JURY CHARGE FAILED TO INFORM THE JURY OF THE ACTIONS OF THE COUNTY WHICH WERE ALLEGED TO VIOLATE THE CONSTITUTION AND RLUIPA, AND THEREFORE FAILED TO ADEQUATELY INFORM THE JURY OF ITS DUTY.

The instructions given to the jury regarding RHI's equal protection and RLUIPA claims failed to provide the jury with proper guidance on how to decide those claims. As a consequence, it is impossible to discern whether the jury's verdict reflects that body's factual findings as to the claims actually raised by RHI, or as to other issues that were not a proper basis for liability.

A. Standard of Review.

The district court has broad authority to frame the jury charge; consequently, jury instructions given by the district court are reviewed for abuse of discretion. *See Buckley v. Mukasey*, 538 F.3d 306, 322 (4th Cir. 2008); *Volvo Trademark Holding Aktiebolaget v. Clark Machinery Co.*, 510 F.3d 474, 484 (4th Cir. 2007). A district court necessarily abuses its discretion when it makes an error of law. *See A Helping Hand, LLC v. Baltimore County, Md.*, 515 F.3d 356, 370 (4th Cir. 2008); *see also Volvo Trademark Holding Aktiebolaget*, 538 F.3d at 322 (noting that court reviews de novo the question of whether the instructions misstated the controlling law). Additionally, jury instructions are insufficient if they are "misleading," *United States v. Allen*, 491 F.3d 178, 187 (4th Cir. 2007), "highly confusing," *Patrolmen's Benevolent Assoc. v. City of New York*, 310 F.3d 43, 55 (2d Cir. 2002), or if they do not "fairly and adequately submit[] the issues in the case to the jury," *Washington v. Normandy Fire Protection Dist.*, 328 F.3d 400, 404 (8th Cir. 2003). If the County was prejudiced by the erroneous instruction, reversal is required. *See Buckley*, 538 F.3d at 322.

B. The jury instructions given by the district court were inadequate and prejudicial.

RHI alleged the following claims: (1) that the denial of the 2003 W&S Application violated the Equal Protection Clause (because it was motivated at least in part by discriminatory animus) and RLUIPA (because it imposed a substantial

burden on RHI's religious exercise), and (2) that the enactment of CB-83 violated RLUIPA (again, by imposing a substantial burden on RHI's religious exercise). RHI did not claim (1) that the *application* of CB-83 violated the Equal Protection Clause or RLUIPA (because RHI did not sue M-NCPCCP, the body that applied CB-83 to the 2004 Subdivision Application); or (2) that the denial of the 2005 W&S Application violated the Equal Protection Clause or RLUIPA (because RHI filed this action before it filed the 2005 Application).

The instructions given by the district court failed utterly to provide the jury with the necessary guidance to decide the claims *actually raised* by RHI. With respect to the equal protection claim, the district court correctly instructed the jury that it was required to determine whether "the challenged governmental action," J.A. 1069, was taken for a discriminatory reason. The district court erred, however, in failing to identify what "challenged action" the jury was supposed to be evaluating. Instead, the court instructed the jury that it was to determine whether the County had "prevent[ed RHI] from building its church and school." This simply was not the correct question to put to the jury. *See, e.g.*, *Arlington Heights*, 429 U.S. at 265-66 (holding that the Equal Protection Clause is violated when "discriminatory purpose has been a motivating factor in *the* decision"). The erroneous instruction evidently stems from the mistaken belief of the district court that RHI had brought a disparate treatment, "pattern or practice" discrimination.

See Part III(B), *supra*.

The prejudice caused by this instruction is obvious. RHI alleged only a single act of discrimination in violation of the Equal Protection Clause: the denial of the 2003 W&S Application. Not only was the jury never instructed to rule on this claim, it also was given no means to distinguish this claim from the mass of other, irrelevant and misleading evidence the district court allowed RHI to present. Simply put, the district court's instructions were utterly inadequate to provide meaningful guidance to the jury.

The district court's instructions with respect to the RLUIPA claim suffered from the same defect. Rather than informing the jury that it could find a RLUIPA violation if RHI proved that the County imposed a substantial burden either by denying the 2003 W&S Application or by enacting CB-83, the district court told the jury to decide whether the County had imposed a substantial burden by "preventing [RHI] from using its property to build a church and church school." The jury was thus given no meaningful guidance on how to decide the issues.

Reversal and remand for a new trial is required by the erroneous instructions.

VIII. THE JURY'S AWARD OF DAMAGES IS NOT SUPPORTED BY THE EVIDENCE.

While the jury's damages award of $3.7 million was not the entire amount

RHI asked for, it is evident that the jury granted RHI nearly every item on its wish list. Several of these items should never have been submitted for the jury's consideration, and thus reversal and remand for a new trial on damages is required.

A. Standard of review

A damages award must be set aside when it is against the clear weight of the evidence. See Cline v. Wal-Mart Stores, Inc., 144 F.3d 294, 305 (4th Cir. 1998). A district court's denial of a motion for new trial or remittitur on the issue of damages is reviewed for abuse of discretion. *See Knussman v. Maryland*, 272 F.3d 625, 639 (4th Cir. 2001) (holding that a party is entitled to a new trial or a remittitur of damages when the award is against the weight of the evidence or is based on evidence which is false).

B. Several items of damages should not have been considered by the jury.

RHI itemized its damages in Exhibit 29. J.A. 2368. As detailed below, a number of these items of damages should have been excluded from the jury's consideration.

1. Attorney's fees

RHI sought, and evidently was awarded by the jury, $85,000 in attorney's fees. The bulk of these fees were incurred during RHI's *unsuccessful* challenges to the denials of the 2003 Application and the 2004 Subdivision Application. Such fees should have been excluded from the jury's consideration. To allow an award

of fees for proceedings in which the courts determined that RHI's position was without merit is tantamount to allowing the jury to overturn the rulings of the state court in violation of basic principles of federalism. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284-88 (2005) (discussing "*Rooker-Feldman* doctrine," which affirms that federal courts do not sit in appellate review of state court decisions).

2. Mortgage payments and insurance.

It also appears that the jury awarded RHI the $402,767 it has made in mortgage payments since purchasing the Property. Thomas Kunjoo testified for RHI that if it could not build on the Property, it *might* not be able to obtain refinancing. If RHI could not obtain refinancing, it *might* not be able to make the balloon payment due in March 2009. If RHI did not make the balloon payment, the seller *might* foreclose, in which case RHI *might* lose its investment. J.A. 509-10. Admission of this evidence allowed the jury to award damages based on nothing more than speculation. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) ("[D]amages may not be determined by mere speculation or guess."). For the same reason, RHI should not have been allowed to claim damages for property insurance.

3. Traffic studies, architecture fees, and engineering fees.

Finally, the jury apparently awarded RHI all, or nearly all, of the fees it

sought to perform traffic studies and for architectural and engineering fees. With respect to the traffic studies, RHI's theory evidently was that because the denial of the 2003 W&S Application was discriminatory, the traffic study (conducted in response to DER's recommendation, *see* J.A. 1621) was reimbursable as damages. This analysis fails, yet again, to account for the fact that the Maryland courts *affirmed* the denial of the 2003 W&S Application. Similarly, RHI seems to believe that the traffic study conducted in 2005 would not have been necessary if the County had not denied the 2003 W&S Application. Such a theory squarely conflicts with the affirmance of the 2003 denial by the state courts; in light of that ruling, RHI would have been required to submit a new application, with a new traffic study accounting for changes the design, regardless.

The jury should not have been allowed to award damages for architectural and engineering fees. RHI obtained value for these fees—a church design and related engineering services—that it retains even after the denial of the 2003 W&S Application. Thus, the jury's award of damages constituted a windfall to RHI.

IX. THE INJUNCTIVE RELIEF ORDERED BY THE DISTRICT COURT WAS IMPROPER.

The district court awarded two primary forms of injunctive relief to RHI. First, the court ordered the County to consider any future W&S category change application "without delay or religious discrimination." *Reaching Hearts Intl.*, 584

F. Supp. 2d at 797.[20] Second, the district court enjoined the application of CB-83 to RHI. Both forms of injunctive relief are improper.

A. Standard of review.

Challenges to the scope of injunctive relief are reviewed for abuse of discretion. *See Tuttle v. Arlington Co. Sch. Bd.*, 195 F.3d 698, 703 (4th Cir. 1999).

B. Order directing the County not to discriminate.

Although RHI sought damages for the denial of the 2003 Application, it carefully avoided any request for relief in the form of an order directing that the 2003 W&S Application be granted by the County Council. The reason for this is obvious: having appealed the denial of the Application to the state courts, RHI's ultimate remedy was with the United States Supreme Court, not with the federal district court. *See Exxon Mobil,* 544 U.S. at 284-88. However, the district court's order directing the County to consider "any" future application "without discrimination" has essentially the same effect as ordering the County to grant whatever application RHI might choose to submit, including a renewal of the 2003 Application. The Maryland courts have ruled that the County's reasons for denying the 2003 W&S Application were "legitimate" and "supported by the record." J.A. 1798. The district court found those very same reasons

[20] The district court also ordered that any application by RHI was to be considered by the County "without reference to the provisions of CB-83-2003." *Id.* This order is nonsensical, because the County is not the entity responsible for enforcing

discriminatory, and, indeed, concluded that the County had no non-discriminatory basis for denying the 2003 Application. It is impossible to imagine a basis on which the County might deny a future W&S category change application that would survive the scrutiny of the district court in the inevitable contempt proceeding by RHI.

Additionally, the order directing the County "not to discriminate" is insufficiently specific to satisfy the specificity requirement of Rule 65(d)(1)(C) of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 65(d)(1)(C) ("Every order granting an injunction must … describe in reasonable detail … the act or acts restrained or required."); *Mannington Mills, Inc. v. Shinn*, 877 F. Supp. 2d 921, 929 (D.N.J. 1995) ("Broad-based 'obey the law' injunctive relief is generally prohibited.").

C. Order against application of CB-83.

The district court's order with respect to CB-83 evidences, yet again, its lack of understanding of RHI's claims. The district court found CB-83 was "unconstitutional … as applied" to RHI. *Reaching Hearts Intl.*, 584 F. Supp. 2d at 797. As discussed previously, however, RHI did not challenge application of CB-83, which it could only have done by naming M-NCPPC as a defendant. Neither did RHI challenge the constitutionality of CB-83; it limited its challenge to a claim

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lot coverage limitations.

that the enactment of CB-83 imposed a substantial burden in violation of RLUIPA.

In light of this failure to understand RHI's claims, it is perhaps not surprising that the district court ordered improper injunctive relief as to CB-83. The district court enjoined "the Defendants" from "applying the provisions of CB-83-2003 to the property of the Plaintiff." *Id.* This relief is improper because "the Defendants"—Prince George's County and the County Council—have no role in the application of CB-83, and the entity with that responsibility, the Planning Board, was not named as a defendant, and RHI had never attempted to demonstrate that the Board is "in active concert or participation" with the County. Fed. R. Civ. P. 65(d)(2)(C).

CONCLUSION

In light of the errors detailed through the County's brief, relief is proper. Specifically, the County asks that this court reverse the denial of its motion for judgment as a matter of law and remand for judgment in favor of the County. Alternatively, the County requests vacatur of the jury's verdict and the award of injunctive relief and remand for a new trial as to liability and damages.

STATEMENT REGARDING ORAL ARGUMENT

The County respectfully requests oral argument.

Respectfully submitted,

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