

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

TOBY DIGRUGILLIERS,	:	Case No. 07-1358
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	
	:	
CONSOLIDATED CITY OF	:	On appeal from the United States
INDIANAPOLIS; METROPOLITAN	:	District Court for the Southern
BOARD OF ZONING APPEALS OF	:	District of Indiana, No. 1:06-cv-952
MARION COUNTY; and DEPARTMENT	:	
OF METROPOLITAN DEVELOPMENT	:	
OF MARION COUNTY, DIVISION OF	:	
COMPLIANCE,	:	
	:	
Defendants-Appellees.	:	

**PLAINTIFF-APPELLANT’S MOTION FOR PRELIMINARY INJUNCTION
OR, IN THE ALTERNATIVE, MOTION FOR EXPEDITED APPEAL**

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I. INTRODUCTION

Pursuant to Rule 8 of the Federal Rules of Appellate Procedure (“Rules”) and Rule 2 of the Seventh Circuit Local Rules (“Local Rules”), Plaintiff-Appellant Toby Digrugilliers respectfully moves this Court for a preliminary injunction enjoining the City of Indianapolis, during the pendency of this appeal, from enforcing against Plaintiff certain provisions of the City’s zoning code that discriminate against religious assembly uses and treat them on less than equal terms than nonreligious assembly uses in the same zoning district. In the alternative, if that motion is denied, Plaintiff moves the Court pursuant to Rule 2 and Local Rule 2 for an Expedited Appeal.

Each of Appellant’s motions is addressed separately below, preceded by a brief description of the procedural background and the applicable facts necessary for resolution of the motions by the Court.

II. PROCEDURAL BACKGROUND

This case involves a challenge to the constitutionality of portions of the City of Indianapolis Zoning Code brought by Plaintiff-Appellant Toby Digrugilliers, the pastor/trustee of Baptist Church of the Westside, a New Testament Church in Indianapolis, Indiana (the “Church”). The Church alleges that the City’s Zoning Code—both on its face and as applied—violates the First and Fourteenth Amendments to the United States Constitution and the Religious Land Use and Institutionalized Persons Act (“RLUIPA”).¹ At issue in this appeal (and, more specifically, in this motion) is the

¹ Plaintiff’s Complaint is attached at **Appendix A**.

Church's challenge to the City's discriminatory treatment of "religious uses"² in the zoning district where the Church is located, requiring religious assembly uses to obtain a variance before locating in that district, while nonreligious assembly uses are permitted as of right.

The Church's motion for preliminary injunction, which was filed contemporaneously with its complaint on June 16, 2006, asked the District Court for an order enjoining the City from taking further enforcement action against the Church for its alleged violation of the City's Zoning Code. On February 16, 2007, after full briefing³ and on a stipulated record⁴, the District Court issued its decision on the Church's motion, denying the petition for preliminary injunctive relief.⁵ On February 19, 2007, the Church filed an Emergency Notice of Appeal and Docketing Statement.

III. FACTS⁶

The Church leases property in the City where it regularly meets for worship and other church-related activities. The property is located in the C-1 zoning district, according to the City's zoning map.

² A "religious use" is defined in Section 735-751 of the City's Zoning Code as "a land use devoted primarily to divine worship together with reasonably related accessory uses, which are subordinate to and commonly associated with the primary use, which may include but are not limited to, educational, instructional, social or residential uses."

³ Plaintiff's Brief in Support of Motion for Preliminary Injunction is attached at **Appendix B**, the City's Response in Opposition is attached at **Appendix C**, and Plaintiff's Reply Brief is attached at **Appendix D**.

⁴ The Stipulation of Facts for Preliminary Injunction Hearing is attached at **Appendix E**. (The Joint Exhibits, however, are not included, as those Exhibits are not necessary for resolution of this Motion.)

⁵ The District Court's Entry Denying Plaintiff's Motion for Preliminary Injunction is attached at **Appendix F**.

⁶ The facts in this Section are from the Joint Stipulations of Fact for Preliminary Injunction Hearing. (App. E.)

On February 6, 2006, the Church received a letter from the City of Indianapolis zoning department indicating that the Church's "religious use" of its property violated the City's zoning code, as "religious uses" are not permitted in the C-1 zoning district without a variance (which the Church had neither applied for nor obtained).⁷ The City's letter threatened that if the Church failed to correct the (alleged) violation, further enforcement would result, including the issuance of citations, the assessment of administrative fees and a lawsuit "with fines up to \$2,500 for each violation plus court costs."

In its written response to the City's letter, the Church objected to the City's requirement that it must obtain special permission from the City to operate a church on its property, in light of the fact that functionally similar *nonreligious* assembly uses (including auditoriums, assembly halls, community centers, multi-service centers, museums, libraries, neighborhood centers, membership organizations or clubs, civic clubs, and certain types of schools) are permitted *as of right* in the C-1 district. The City refused to acquiesce, forcing the Church to file this lawsuit.

IV. ARGUMENT

A. Appellant's Motion for Preliminary Injunction

1. Standard for Preliminary Injunction

Pursuant to Rule 8 and Local Rule 8, the Church asks this Court to issue an injunction temporarily enjoining the City from enforcing the unconstitutional provisions of its Zoning Code against the Church while this appeal is pending.

⁷ A copy of the letter is attached as Exhibit A to Plaintiff's Complaint (App. A).

Rule 8(a)(2)(c) provides that this Court may issue an order “suspending, modifying, restoring, or granting an injunction while an appeal is pending.” This Court has previously applied this Rule to a district court’s denial of an application for a preliminary injunction. See *Aurora Bancshares Corporation v. Weston*, 777 F.2d 385 (7th Cir. 1985). In *Aurora*, the Court stated:

Rule 8(a) of the Federal Rules of Appellate Procedure authorizes us to grant a motion for an injunction pending appeal. If the district judge had denied the request for a preliminary injunction after the balancing of merits and harms required by our decision in *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380 (7th Cir.1984), we could review his decision and decide whether there was sufficient likelihood of overturning it and sufficient evidence of irreparable harm to the plaintiffs from denying interim relief not offset by irreparable harm to the defendants from granting it to warrant our issuing the preliminary injunction pending appeal.

Id. at 387 (citing *Adams v. Walker*, 488 F.2d 1064 (7th Cir.1973)).

2. The District Court’s decision

In the proceedings below, the Church petitioned the District Court for a preliminary injunction enjoining the City’s discriminatory and unfavorable treatment of religious uses in the C-1 zoning district. The District Court, relying heavily (but erroneously) on this Court’s decision in *Civil Liberties for Urban Believers (“CLUB”) v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003), denied the Church’s motion, holding that the Church had not demonstrated a substantial likelihood of success on the merits of its constitutional and statutory claims against the City. Specifically, the District Court held that the City’s treatment of religious uses in the C-1 district:

· does not violate the Church’s right to the free exercise of religion because the challenged provisions are neutral and generally applicable (App. F, at 8-14);

- does not violate the Church’s right to the free exercise of religion because the challenged provisions are neutral and generally applicable (App. F, at 8-14);
- does not violate the Church’s right to the freedom of speech because it is a content neutral zoning regulation that is narrowly tailored to serve a significant government interest, and leaves open adequate alternative avenues of communication (App. F, at 14-17);
- does not constitute a prior restraint on the Church’s speech, because the City’s variance procedures (which Plaintiff alleges afford unbridled discretion to the City) incorporate by reference Indiana law, and Plaintiff did not sue the State of Indiana (App. F, at 17-18);
- does not violate the Church’s right to equal protection because the City has legitimate and rational bases for its treatment of religious uses (App. F, at 18-20); and
- does not violate RLUIPA, because RLUIPA is merely a codification of the religious free exercise, freedom of speech and equal protection provisions of the Constitution, and since the Church’s rights as guaranteed by those provisions were not violated by the challenged zoning ordinance, then neither were its rights under RLUIPA violated (App. F, at 20-21).

The bases offered by the District Court in support of the above conclusions are, essentially, two. First, the District Court’s conclusion that the City has not discriminated against religious uses or treated them on less than equal terms than nonreligious assembly uses rested upon its factual finding that religious assembly uses as defined by the City are not similarly situated to nonreligious assembly uses such that they are not comparable for purposes of analysis under the First and Fourteenth Amendment and RLUIPA.⁸ The

⁸ In support of this conclusion, the District Court found that (i) a “religious use” as defined by the City includes “reasonably related accessory uses ... which may include but are not limited to, educational, instructional, and social or residential uses,” while nonreligious assembly uses, also as defined by the City do not enjoy such favorable treatment (App. F, at 11); and (ii) a religious assembly, contrary to its nonreligious assembly counterpart, “directly affects [pursuant to restrictions in state law] the commercial viability of surrounding land by impacting its neighbors’ eligibility to engage in certain types of regulated business such as liquor stores and adult bookstores.” (App. F, at 12.) That is to say, pursuant to Indiana law, the presence of a church

second underlying premise upon which the District Court's conclusions rested is that this Court's decision in *CLUB* is controlling. (App. F, at 8-10, 15-16, 19.)

As elaborated below, the District Court's premises are erroneous, thus leading the Court to erroneous conclusions. Properly evaluated, Plaintiff's motion for preliminary injunction should have been granted by the District Court. The Church now asks this Court for the relief that was erroneously denied below.

3. The Church satisfies each element necessary for a preliminary injunction to issue.

a. The Church is likely to succeed on appeal.

The City's discriminatory and less than equal treatment of religious assembly uses in favor of nonreligious assembly uses impinges upon the Church's core First Amendment rights to the freedom of speech and the free exercise of religion, its right to equal protection of the laws, and the codified protections afforded by those constitutional provisions as found in RLUIPA. For the sake of brevity⁹, the Church has limited its discussion herein to two points. First, the fact that religious assembly uses are not identical or even similarly situated to nonreligious assembly uses is not relevant to the Church's speech and RLUIPA claims. Second, *CLUB* is not controlling, as the challenged provisions of the City's zoning code differ from the provisions in the City of Chicago's zoning code at issue in *CLUB*. Each is discussed below.

forces a buffer zone of a certain distance between the church and liquor licensed and adult entertainment establishments. See I.C. § 7.1-3-21-11; I.C. § 35-49-3-3.

⁹ The Church's comprehensive arguments as to why the City's unequal treatment of religious uses violates the Church's First and Fourteenth Amendment rights and RLUIPA are elaborated in detail in the briefs submitted in support of Plaintiff's motion for preliminary injunction. (App. B and App. D.)

1. To the extent there are differences between religious assembly uses and nonreligious assembly uses, those differences are not relevant to the Court’s determination of Plaintiff’s claims.

Under RLUIPA, governments may not promulgate zoning regulations that treat “a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.” 42 U.S.C. § 2000cc(b)(1). At a minimum, the equal terms provision of RLUIPA “codifies the *Smith-Lukumi* line of precedent.” *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004).

The text of RLUIPA’s Equal Terms provision provides no basis for a “similarly situated” requirement. Nothing in the text of RLUIPA states that the court should undertake the additional inquiry into whether the prohibited religious assembly is “similarly situated” to the non-religious assembly. For this reason, the Eleventh Circuit expressly rejected imposition of an Equal Protection “similarly situated” requirement as contrary to the text of § 2(b)(1). See *Konikov v. Orange County*, 410 F.3d 1317 (11th Cir. 2005). The court explained that, for “purposes of a RLUIPA equal terms challenge, the standard for determining whether it is proper to compare a religious group to a nonreligious group is not whether one is ‘similarly situated’ to the other, as in our familiar equal protection jurisprudence.” *Konikov*, 410 F.3d at 1324 (citing *Midrash*, 366 F.3d at 1230). Rather, “the relevant ‘natural perimeter’ for comparison is the category of ‘assemblies and institutions’ as set forth by RLUIPA.” *Konikov*, 410 F.3d at 1324; see also *Midrash*, 366 F.3d at 1230 (the “express provisions of RLUIPA ... require a direct and narrow focus” on whether “an entity qualifies as an ‘assembly or institution.’”)

RLUIPA's legislative history belies the argument that as-of-right nonreligious uses are not assemblies analogous to religious uses. Indeed, the City allows the following uses as-of-right: auditoriums, assembly halls, community centers; multi-service centers, neighborhood centers; membership organizations or clubs, museums, libraries, civic clubs, and certain types of schools. The legislative history of RLUIPA compares religious facilities to "banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, places of amusement, recreation centers, lodges, libraries, museums, municipal buildings, meeting halls, and theaters." H.R. Rep. No. 106-219 at 19 (July 1, 1999). The fact that religious assemblies (if granted a variance) are permitted to have accessory uses that are not permitted (as of right) to nonreligious assemblies, or that the location of religious uses may alter the location of liquor-licensed and adult entertainment establishments under Indiana law (see fn. 8, *supra*) does not alter the analysis, or the ultimate conclusion: the City's treatment of religious assemblies on less than equal terms than nonreligious assemblies violates RLUIPA.¹⁰ For that reason alone (but also for the additional reasons set forth in Plaintiff's Briefs to the District Court), a preliminary injunction should issue enjoining the City from taking any further enforcement actions against the Church while this appeal is pending.

¹⁰ The text of RLUIPA's Equal Terms prohibition presents a flat ban, not a prohibition that can be overcome with a compelling interest addressed through narrowly tailored means (as is the case with the substantial burden provision of RLUIPA, the text of which indeed calls for such an analysis).

2. CLUB is not controlling.

The District Court throughout its opinion relied heavily on this Court's decision in *CLUB*. That reliance is erroneous, though, for the circumstances surrounding the dispute in *CLUB* are in sharp contrast to this case.

In *CLUB*, the version of the Chicago zoning ordinance that precipitated plaintiffs' lawsuit treated religious and nonreligious assembly uses differently. During (and in response to) the litigation, the City amended the ordinance, placing clubs, lodges, recreational buildings, meeting halls, and community centers on equal footing with churches by requiring all to obtain special use permits to locate in business and commercial districts. *Id.* In response to the plaintiffs RLUIPA/Equal Terms argument, this Court stated: "[T]he February 2000 amendments ... place[d] churches on an equal footing with nonreligious assembly uses, thereby correcting any potential violation of the [RLUIPA] nondiscrimination provision." *CLUB*, 342 F.3d at 762. The Court concluded: "[I]nsofar as Appellants cannot demonstrate on these facts that the [Chicago Zoning Ordinance] substantially burdens religious exercise, *and because the February 2000 Amendments to the CZO bring it into compliance with RLUIPA's nondiscrimination provision*, Appellants fail to make a sufficient showing on essential elements of their RLUIPA claims." *Id.* (emphasis added); see also *id.* at 773 (Posner, J., dissenting) ("Thus far I have been discussing the ordinance as it was amended in 2000 in virtual acknowledgement that its predecessor was in violation of the Constitution.")

The focus of this motion is the Church's claim that, in the C-1 zoning district, the City discriminating against the Church and treating it on terms that are less than equal

than those applied to nonreligious assemblies. As this was not an issue in *CLUB*, the District Court erred in relying on that case to deny Plaintiff’s request for a preliminary injunction.

b. The Church is likely to suffer irreparable harm if the petitioned temporary injunctive relief is not granted.

“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1973); see, also, *Citizens for a Better Environment v. City of Park Ridge*, 567 F.2d 689 (7th Cir. 1975) (“If there were a violation of First Amendment rights we would presume irreparable harm.”); *Murphy v. Zoning Comm’n of the Town of New Milford*, 148 F. Supp.2d 173 (D. Conn. 2001) (violation of RLUIPA “result[s] in a presumption of irreparable harm”) Satisfaction of the first prong of the preliminary injunction standard—demonstrating a likelihood of success on the merits of a First Amendment claim—necessarily satisfies the irreparable injury standard. See *Elrod*, 427 U.S. at 373. The Church has demonstrated a likelihood of success on appeal, and will thus suffer irreparable injury if the City is not immediately enjoined from enforcing the unconstitutional provisions of its Zoning Code while this appeal is pending.¹¹

¹¹ As a practical matter, the City has repeatedly refused throughout this litigation (and more specifically during the eight months that the Church’s preliminary injunction motion was pending) to agree not to take further enforcement action against the Church. Nonetheless, in an effort to eliminate the need to file this Motion, after the District Court issued its decision denying Plaintiff’s motion for preliminary injunction Plaintiff’s counsel contacted (by email) the City’s counsel to inquire as to whether the City’s position had changed. In a follow up telephone conversation, the City’s counsel indicated that, although she had not discussed the matter with City zoning officials recently, the City’s position (that it will not agree to refrain from taking further enforcement action pending this litigation) had not changed, and was unlikely to change.

- c. The City will not suffer harm, and any harm it may suffer is pale in comparison to the harm that will be suffered by the Church if a preliminary injunction is not issued.**

The harm to the Church involves the most fundamental constitutional rights of the Church's congregants. The Church will miss many opportunities for worship and ministry, for the reason that the City discriminates against religious uses in the C-1 zoning district. The City, on the other hand, has no legitimate interest in enforcing a facially unlawful zoning regulation that discriminates against religious uses in favor of functionally similar uses. The irreparable harm that the Church has suffered and will continue to suffer absent this Court's entry of a preliminary injunction outweighs any harm suffered by the City.

- d. The issuance of a preliminary injunction will benefit the public interest.**

The "public interest" requirement "takes on special importance in constitutional cases . . . where the outcome will undoubtedly affect countless persons." *Darryl v. Coler*, 801 F.2d 893, 898 (7th Cir. 1986). The public interest favors the protection of constitutional rights, including the free exercise of religion. *Back v. Bayh*, 933 F. Supp. 738 (N.D. Ind. 1996) ("Unconstitutional legislation is not in the public interest."). The Church will certainly not be alone in benefiting from an order of this Court that restores constitutionally protected religious worship, assembly and speech in the City of Indianapolis.

B. Appellant's Motion for Expedited Appeal

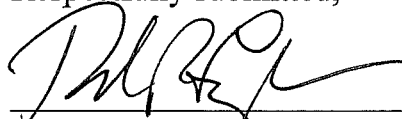
If the Court denies Appellant's Motion for Preliminary Injunction, Appellant moves the Court to consider this appeal on an expedited basis pursuant to Rule 2 and Local Rule 2. Because the issues presented in this case involve core First Amendment rights, and because the City is permitted to resume zoning enforcement proceedings against the Church at any moment, an expedited appeal schedule is appropriate. See, e.g., *Protect Marriage Illinois v. Orr*, 463 F.3d 604 (7th Cir. 2006) (expedited appeal granted in case involving ballot access dispute implicating First Amendment rights); *Highway J Citizens Group v. Mineta*, 349 F.3d 938 (7th Cir. 2003) (expedited appeal appropriate in case where plaintiffs were seeking to prevent opening of bridge); *Second City Music, Inc., v. City of Chicago*, 333 F.3d 846 (7th Cir. 2003) (expedited appeal granted in case involving licensing scheme implicating First Amendment). As stated above, this appeal presents urgent issues which need to be addressed promptly, necessitating consideration by this Court on an expedited basis.

V. CONCLUSION

Based on the foregoing, Plaintiff-Appellant respectfully requests that this Court issue a preliminary injunction enjoining the City, while this appeal is pending, from enforcing the unconstitutional portions of the City's Zoning Code and from taking any further enforcement actions against the Church. In the alternative, if preliminary relief is not granted, Plaintiff asks the Court to hear this appeal on an expedited basis.

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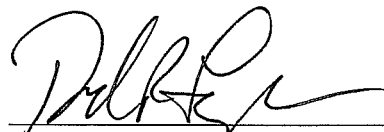
*Counsel for Plaintiff-Appellant
Toby Digrugilliers*

* Application for Admission pending

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Motion was served by electronic mail (one day prior to the anticipated filing date, in compliance with the reasonable notice requirement in Rule 8(a)(2)(C)) and by Federal Express this 22nd day of February, 2007, upon the following counsel for Defendants-Appellees:

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