IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NEW GENERATION CHRISTIAN CHURCH, Plaintiff, v. ROCKDALE COUNTY, GEORGIA, Defendant.	)	Case No. _____ **ORAL ARGUMENT REQUESTED**

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

The Plaintiff, by and through its counsel, files this Motion pursuant to Rule 65 of the Federal Rules of Civil Procedure, and respectfully requests that this Court enter a preliminary injunction prohibiting the COUNTY OF ROCKDALE, GEORGIA ("Defendant") from enforcing or applying County of Rockdale Zoning Code Article III § 218.13(ccc) ("three acre limit") and Article I § 218-1, Table of Permitted Uses ("special permit provision"), and states as follows:

1. The facts of this case are as stated in Plaintiff's Verified Complaint, which is incorporated herein by reference.

2. Rule 65 of the Federal Rules of Civil Procedure authorizes the

District Court to grant preliminary injunctive relief.

3. Plaintiffs are likely to succeed on the merits. The three acre limit and special permit provision violate the Religious Land Use and Institutionalized Persons Act "(RLUIPA"), 42 U.S.C. § 2000cc(b)(1), because they treat Plaintiff New Generation Christian Church on less than equal terms with nonreligious assemblies or institutions. Plaintiff New Generation Christian Church is subject to a three-acre limit which prohibits a church from meeting in any district on property of less than three acres, while no other nonreligious assemblies or institutions are subject to the same limitation. Likewise, Plaintiff New Generation Christian Church is required to apply for a special use permit before locating within the Mixed-Use Development ("MxD") District while other secular assemblies and institutions need not apply for a special permit and may locate within the MxD District as of right. As explained more fully in Plaintiff's Memorandum of Law submitted herewith, this unequal treatment violates RLUIPA and also violates the Equal Protection Clause of the United States Constitution.

4. Plaintiff will suffer irreparable harm without an injunction in that its constitutional rights and its statutory rights under RLUIPA are violated by the three acre limit and special permit provision. Plaintiff has been forced to move from two separate locations in the County and is

currently meeting in a property of less than three acres and is thus fearful that it will be forced to vacate its current facility as well. In addition, Plaintiff's ministry and religious mission is hampered by the three acre limit and special permit provision's unequal treatment.

5. The Defendant will not be substantially harmed by the issuance of an injunction. Defendant's Zoning Code allows as permitted uses secular assemblies and institutions that are just as impactful on the land and that are similar in character and intensity of use to Plaintiff New Generation Christian Church, but does not similarly limit them to property of at least three acres nor require them to apply for a special use permit. Defendant cannot be harmed in any objective way by allowing Plaintiff New Generation Christian Church to locate on less than three acres or move into the MxD District without a permit when it allows virtually identical secular uses in the same zoning districts.

6. Issuance of an injunction is in the public interest as the protection of Plaintiff's constitutional and statutory rights are of the highest public importance.

WHEREFORE, Plaintiff respectfully requests that this Court tissue a Preliminary Injunction to enjoin the Defendant, Defendant's officers, agents, employees and all other persons acting in active concert with them, from

enforcing its three acre limit and special permit provision in the MxD District, so that:

(1) Defendant must not prohibit Plaintiff from operating its church in the zoning districts;

(2) Defendant must treat Plaintiff on equal terms with other secular or nonreligious assemblies or institutions;

(3) Defendant's three acre limit will not be used in any manner to infringe upon Plaintiff's rights; and

(4) Defendant's special permit provision will not be enforced in any manner to infringe upon Plaintiff's rights.

Dated this 21st day of June, 2012

s/ Erik W. Stanley
Erik W. Stanley*
Kansas Bar No.: 24326
estanley@telladf.org
ALLIANCE DEFENSE FUND
15192 Rosewood Street
Leawood, Kansas 66224
(913) 685-8000
(913) 685-8001 (facsimile)
Attorneys for Plaintiff

s/ Craig Bertschi
Craig Bertschi
Georgia Bar No. 055739
cbertschi@kilpatricktownsend.com
Kilpatrick, Townsend & Stockton LLP
1100 Peachtree Street
Suite 2800
Atlanta, GA 30309
(404) 815-6493
(404) 541-3128 (facsimile)
Local counsel for Plaintiff

David Cortman
Georgia Bar No. 188810
dcortman@telladf.org
Alliance Defense Fund
1000 Hurricane Shoals Road NE
Suite D-600
Lawrenceville, GA 30043
(770) 339-0774
(770) 339-6744 (facsimile)
Attorney for Plaintiffs

*Motion for *pro hac vice* admission pending

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PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

The Plaintiff, New Generation Christian Church, files this Memorandum of Law in support of its Motion for a Preliminary Injunction, and states as follows:

INTRODUCTION

Plaintiff believes that the Court will be aided by oral argument of the Motion for Preliminary Injunction.

New Generation Christian Church ("New Generation") is a small church that has attempted to hold worship services on several different properties in Rockdale County, Georgia, but its efforts have been repeatedly

thwarted by the County and its Code of Ordinances ("Zoning Code").[1] Verified Complaint at ¶1. The Zoning Code requires that churches in all zoning districts meet on a minimum of three acres dedicated solely as a place of worship. *See id.* at ¶29. The County does not, however, similarly restrict other secular assemblies and institutions and these nonreligious organizations may freely locate on property of less than three acres. *See id.* at ¶30.

Additionally, the Zoning Code requires that churches within the Mixed-Use Development ("MxD") District obtain a special use permit before locating within the district, even though other social organizations and public assemblies may locate within the district as of right. *See id.* at ¶¶ 24-26. This unequal treatment of churches under the Zoning Code violates the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1(b)(1), as well as Plaintiff's constitutional rights.

As set forth below, New Generation has met all the requirements for the issuance of a Preliminary Injunction and respectfully requests that this Court issue the requested Preliminary Injunction.

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[1] The Zoning Code is a public document and can be accessed at http://library.municode.com/index.aspx?clientId=11481. All references herein to "Art. __ § __" refer to Chapter 218 of the Zoning Code, which is incorporated by reference, and can be accessed by following this link.

STATEMENT OF FACTS

Plaintiff hereby incorporates by reference the facts as set forth in Plaintiff's Verified Complaint filed contemporaneously with this Court on June 21, 2012.

ARGUMENT

The "basic framework for [a preliminary injunction are] the following four elements: '(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction were not granted, (3) that the threatened injury to the plaintiff outweighs the harm an injunction may cause the defendant, and (4) that granting the injunction would not disserve the public interest.'" *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1265 (11th Cir. 2001) (quoting *Am. Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1410 (11th Cir. 1998)). As demonstrated below, Plaintiff has met all the factors and this Court should issue the requested preliminary injunction.[2]

[2] Although Rule 65 generally requires a bond for the issuance of a preliminary injunction, the bond should be waived in this case. This Court has discretion to waive the bond requirement. *See Bellsouth Telecomm., Inc. v. MCIMetro Access Transmission Servs., LLC,* 425 F.3d 964, 971 (11th Cir.2005) (holding that district court acted within its discretion when it did not require a bond). Because there would be no harm to the County if an injunction is issued, and due to the inability of the Plaintiff to pay a bond given its small size and financial constraints (*see* Verified Complaint at ¶32), the bond requirement should be waived.

I. PLAINTIFF HAS A LIKELIHOOD OF SUCCESS ON THE MERITS.

Plaintiff has a likelihood of success on the merits of its claim that the County's Zoning Code Article III § 218-13 ("three acre limit") and Article I § 218-1, Table of Permitted Uses, ("special permit provision") violates RLUIPA, 42 U.S.C. § 2000cc-1(b)(1), also known as RLUIPA's "equal terms" provision, and that the three acre limit and special permit provision also violate Plaintiff's Equal Protection rights under the U.S. Constitution.[3]

A. The County's Three Acre Limit and Special Use Permit Violates RLUIPA.

Article III § 218-13(ccc) requires that "[i]n all zoning districts for places of worship . . . [a] place of worship shall be located on a minimum of three acres dedicated solely for the place of worship or on its own recorded lot of at least three acres in size. . . ." However, other secular institutions and assemblies are not similarly limited to property of at least three acres in size, including sports centers, day cares, libraries, performing arts centers, recreational clubs, and educational institutions. *See* Art. III § 218-13. This unequal treatment is a violation of RLIUPA's equal terms provision.

Similarly, Article I § 218-1, Table of Permitted Uses, requires that

[3] Plaintiff is only briefing selected claims in this Motion for Preliminary Injunction. Plaintiff does not waive any claims presented in the Complaint that it does not include in this Motion.

churches obtain a special use permit before locating within the MxD District. However, other civic and social organizations and public assemblies need not apply for a special use permit but are allowed as of right in the MxD District, including day care facilities, educational institutions, recreational centers, performing arts centers, civic and social organizations, and places of public assembly. *See* Art. I § 218-1, Table of Permitted Uses. This, too, is a violation of RLIUPA's equal terms provision.

RLUIPA states, "No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc-1(b)(1).[4] While this provision of RLUIPA "has the 'feel' of an equal protection law, it lacks the 'similarly situated' requirement that is usually found in equal protection analysis." *Midrash Shephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1229 (11th Cir. 2004.).

"There are four elements of an Equal Terms violation: (1) the plaintiff must be a religious assembly or institution, (2) subject to a land use regulation, that (3) treats the religious assembly on less than equal terms, with (4) a nonreligious assembly or institution." *Primera Iglesia Bautista*

[4] Importantly, RLUIPA requires a broad construction: "This Act shall be construed in favor of broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution." 42 U.S.C. § 2000cc-3(g).

Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295, 1307 (11th Cir. 2006). New Generation meets all of these elements.

1. New Generation is a Religious Assembly or Institution.

First, New Generation is a religious assembly or institution under RLUIPA's equal terms provision. RLUIPA does not expressly define the terms "assembly" or "institution" so "we construe those terms in accordance with their ordinary or natural meanings." *Id*. The common meaning of the term "assembly" is "a group of persons organized and united for some common purpose," or "a company of persons collected together in one place and usually for some common purpose…." *Midrash*, 366 F.3d at 1230 (citing dictionary definitions). The common meaning of the term "institution" is "an established society or corporation: an establishment or foundation, esp. of a public character." *Id*. New Generation plainly meets the definition of both an assembly and an institution. Indeed the Eleventh Circuit has explicitly stated that "churches and synagogues, as well as private clubs and lodges, fall within the natural perimeter of 'assembly or institution.'" *Id.* at 1231.

2. New Generation is Subject to Land Use Regulations.

Second, New Generation has been subjected to more than one "land use regulation." RLUIPA defines land use regulation as "a zoning or landmarking law, or the application of such law, that limits or restricts a claimant's use or

development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest…." 42 U.S.C. § 2000cc-5(5). New Generation has been subjected to the County's three acre limit and special permit provision, both of which are zoning laws.

3. The Land Use Regulation Treats New Generation on Less than Equal Terms with a Nonreligious Assembly or Institution.

The three acre limit, on its face and as applied, treats New Generation on less than equal terms with nonreligious assemblies and institutions that are just as impactful on the land in terms of character and intensity of use. Specifically, the Zoning Code allows for certain secular assemblies or institutions to locate on less than three acres, yet does not extend the same opportunity to churches. Sports centers, day cares, libraries, performing arts centers, recreational clubs, and educational institutions are not subject to a three acre limit. *See* Art. III § 218-13.

Additionally, churches are required to obtain a special use permit before locating within the MxD District, but nonreligious assemblies and institutions are not required to obtain a permit. Day care facilities, educational institutions, recreational centers, performing arts centers, and civic and social organizations, and places of public assembly may locate

within the MxD District as of right. *See* Art. I § 218-1, Table of Permitted Uses.

As discussed above in Section 1, the Eleventh Circuit broadly defines "assembly" as "a group of persons organized and united for some common purpose," and defines an "institution" as "an established society or corporation: an establishment or foundation, esp. of a public character." *Midrash*, 366 F.3d at 1230 (citing dictionary definitions).

The *Midrash* court held that "churches and synagogues, as well as private clubs and lodges, fall within the natural perimeter of 'assembly or institution.'" 366 F.3d at 1230. Day cares, within or without the home, are likewise places of assembly: "[F]or the purposes of a RLUIPA claim, '[l]oosely understood, a family day care home could qualify as an assembly.'" *Chabad of Nova, Inc. v. City of Cooper City*, 553 F.Supp.2d 1220, 1222 (S.D. Fla. 2008) (quoting *Konikov v. Orange Cty.*, 410 F.3d 1317, 1325 (11th Cir. 2005)). If private clubs, lodges, and day cares fall within the "natural perimeter" of an assembly or institution for the purposes of RLUIPA, the same can be said for libraries, educational institutions, recreational centers, performing arts centers, and civic and social organizations. Each one of these organizations is, at the very least, "a group organized and united for a common purpose" and, therefore, an assembly for RLUIPA purposes.

Despite the fact that day care centers, private clubs, lodges and other civic and social organizations are virtually indistinguishable in terms of objective land use or zoning criteria from a church, the Zoning Code imposes greater restrictions on churches than it does on similar nonreligous organizations. Churches are restricted to property of at least three acres in size, but sports centers, day cares, libraries, performing arts centers, recreational clubs, and educational institutions are not. *See* Art. III § 218-13. Churches are required to obtain a special use permit before locating in the MxD District, but day care facilities, educational institutions, recreational centers, performing arts centers, and civic and social organizations, and places of public assembly may locate within the MxD District as of right. *See* Art. I § 218-1, Table of Permitted Uses. Both Zoning Code provisions treat religious institutions and organizations less favorably than similarly-situated nonreligious institutions and organizations. This unequal treatment violates RLUIPA's equal terms provision.

Importantly, for purposes of RLUIPA's equal terms provision, the City's treatment of churches must be compared with treatment of other secular assembly uses in the pertinent zoning district where the church wants to

locate – not its treatment of churches in other districts.[5] Therefore, it is not a defense for the City to argue that it allows churches to locate in other zoning districts without seeking a special permit as is required in the MxD District.

The *Midrash* case and its progeny hold that if a violation of RLUIPA's equal terms provision is demonstrated, then the zoning ordinance is subject to strict scrutiny. *See Midrash*, 366 F.3d at 1232. Applying strict scrutiny in this instance, the County cannot demonstrate a compelling interest here that is advanced in the least restrictive means available. The County's three acre limit is not applicable to virtually identical uses in the same districts. Likewise, the County allows for virtually identical uses to the church to locate in the MxD District as of right. Allowing these substantially similar unrestricted uses undermines whatever interest the County might have to the same degree as a church (i.e. traffic, noise, etc.). As the court stated in *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008):

[5] This rule stems not only from the Supreme Court's holdings in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (examining only the permitted uses in Cleburne's R-3 zone) and *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 77 (1981) (holding that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place"), but also that of other federal courts. *See, e.g.*, *Digrugilliers v. City of Indianapolis*, 506 F.3d 612, 616 (7th Cir. 2007) ("The existence of alternative sites for a church is relevant only when a zoning code is challenged as imposing a 'substantial burden' on religious uses of land…under a different section of [RLUIPA] from the equal-terms section at issue in this appeal"); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991) (examining solely uses in C-3 zone in adjudicating equal treatment violation); *Islamic Ctr. of Miss., Inc. v. City of Starkville, Miss.*, 840 F.2d 293, 300 (5th Cir. 1988) (city could not refuse to issue a special exception to Islamic congregation on grounds it could locate elsewhere within the city).

> When strict scrutiny is applicable the government is generally not permitted to punish religious damage to its compelling interests while letting equally serious secular damage go unpunished. As the Supreme Court explained in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, "[i]t is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interests of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited."

Id. at 958; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 579 (1993) (holding that an underinclusive statute fails to truly promote an interest of the highest order and stating, "If the State's goal is important enough to prohibit religiously motivated activity, it will not and must not stop at religiously motivated activity.").

New Generation has demonstrated a likelihood of success on the merits of this part of its RLUIPA claim.

B. The County's Three Acre Limit and Special Permit Provision Violates the Equal Protection Clause.

The Equal Protection Clause provides in pertinent part, "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection o the laws," U.S. Const. amend XIV, § 1. This is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). As demonstrated above, the

County's Zoning Code treats churches differently than nonreligious assemblies and institutions.

When classifications are based upon a fundamental right, such as freedom of speech or free exercise of religion, they are subject to the strict scrutiny of the compelling interest test. *See Regan v. Taxpayers With Representation*, 461 U.S. 540, 546-47 (1983); *Cleburne*, 473 U.S. at 440; *Plyler*, 457 U.S. at 216. Here, both the three acre limit and the special permit provision in the MxD district fall on religious uses only. These provisions classify uses according to religion and thus are subject to strict scrutiny.

For those reasons listed in the RLIUPA section, *supra*, the County fails both requirements of the compelling interest test. It has no compelling interest in treating churches less favorably than nonreligious assemblies and institutions. Neither is the three acre limit nor the special permit provision narrowly tailored to further any such interest because the Zoning Code does not apply these constraints to secular assemblies and institutions that have the same effect on property as churches.

The County cannot even meet the much lower level rational basis test. Rational basis review requires the court to examine whether permitting the church to locate on property of less than three acres "would threaten legitimate interests of the [county] in a way that other permitted uses . . .

would not." *Cleburne*, 473 U.S. at 448.

The County has no rational basis for prohibiting churches from meeting on property of less than three acres when other similar uses are permitted on smaller portions of property. The County likewise has no rational basis for requiring churches to obtain a special use permit before locating within the MxD District, but permitting secular organizations of potentially even greater land-use impact to locate within the District as of right. Violation of the Equal Protection Clause is not justified and Plaintiff has established a likelihood of success on the merits of its Equal Protection claim.

II. PLAINTIFF WILL SUFFER IRREPARABLE INJURY ABSENT AN INJUNCTION.

New Generation's remedy at law is inadequate if preliminary 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 (1976). New Generation's "damages" here go far beyond money; it is losing worship and ministry opportunities because its meeting space is inadequate. *See* Verified Complaint at ¶¶61-63. These opportunities cannot be replaced. Indeed, it is currently meeting in a place where it is prohibited from meeting under the County's Zoning Code because it is less than three acres. *See* Verified Complaint at ¶¶57-60. The Church

fears that it will be required to vacate the property once again because of the application of the three acre limit. This is quintessentially irreparable harm.

As other courts have noted, "The fact that [New Generation's] free exercise rights in this case are based on statutory claims under the RLUIPA rather than on constitutional provisions does not alter the irreparable harm analysis." *Rocky Mountain Christian Church v. Board of County Com'rs of Boulder County*, 612 F.Supp.2d 1157, 1160 (D.Colo.2009) (citing *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("courts have held that a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA"); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2nd Cir. 1996) ("although plaintiff's free exercise claim is statutory rather than constitutional, the denial of the plaintiff's right to the free exercise of his religious beliefs is a harm that cannot be adequately compensated monetarily.")).

III. THE DEFENDANT WILL NOT BE HARMED BY AN INJUNCTION.

The County will not be harmed by an injunction in this case because the County specifically allows for secular assemblies and institutions to locate on less than three acres. Allowing such entities to operate on less than three acres affects the County to the same extent as allowing New Generation to operate its church in the same areas. Additionally, allowing

New Generation to locate within the MxD District without obtaining a special use permit affects the County to no greater extent than the County has already encountered by allowing all manner of civic and social organizations to locate within the MxD District as of right.

Any speculative harm the County may try to identify is offset by the harm to New Generation in being denied its constitutional and statutory rights.

IV. AN INJUNCTION IS IN THE PUBLIC INTEREST.

As the Eleventh Circuit stated: "the public has no interest in enforcing an unconstitutional Zoning Code." *KH Outdoor, LLC v. Trussville*, 458 F.3d 1261, 1271-72 (11th Cir. 2006). Instead, there is "significant public interest in upholding First Amendment principles." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002). Here, the public interest plainly weighs in favor of granting a preliminary injunction.

CONCLUSION

The County's three acre limit and special permit provision in the MxD District treats churches on less than equal terms with other secular assemblies and institutions that are functionally similar to a church. The three acre limit and special permit provision violate RLUIPA and the Equal Protection Clause on its face. Because Plaintiff has demonstrated a likelihood

of success on the merits of its claims and because it has met the other requirements, this Court should issue a preliminary injunction in this case.

Dated this 21st day of June, 2012.

s/ Erik W. Stanley
Erik W. Stanley*
Kansas Bar No.: 24326
estanley@telladf.org
ALLIANCE DEFENSE FUND
15192 Rosewood Street
Leawood, Kansas 66224
(913) 685-8000
(913) 685-8001 (facsimile)
Attorneys for Plaintiff

s/ Craig Bertschi
Craig Bertschi
Georgia Bar No. 055739
cbertschi@kilpatricktownsend.com
Kilpatrick, Townsend & Stockton LLP
1100 Peachtree Street
Suite 2800
Atlanta, GA 30309
(404) 815-6493
(404) 541-3128 (facsimile)
Local counsel for Plaintiff

David Cortman
Georgia Bar No. 188810
dcortman@telladf.org
Alliance Defense Fund
1000 Hurricane Shoals Road NE
Suite D-600
Lawrenceville, GA 30043
(770) 339-0774
(770) 339-6744 (facsimile)
Attorney for Plaintiffs

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