NO. _____

IN THE

Supreme Court of the United States

TREE OF LIFE CHRISTIAN SCHOOLS,
Petitioner,

v.

CITY OF UPPER ARLINGTON, OHIO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Tree of Life Christian Schools is a private school that assists parents and the Church in educating and nurturing young lives in Christ. Hampered by multiple campuses in old buildings, Tree of Life purchased a large building in the City of Upper Arlington, Ohio. Though the City's zoning code allowed nonprofit daycares, hospitals, out-patient surgery centers, periodicals, and offices as-of-right, the City refused to allow Tree of Life to operate the property as a religious school. After unsuccessfully requesting a conditional use permit and rezoning, Tree of Life sued under the Religious Land Use and Institutionalized Persons Act's ("RLUIPA") equal-terms provision.

The circuits are in disarray on the proper test for a RLUIPA equal-terms claim. The Sixth Circuit departed from RLUIPA's text and the Second, Tenth, and Eleventh Circuit's standards by requiring Tree of Life to show that the City provided not just a nonreligious assembly or institution with more favorable zoning treatment, but also that Tree of Life would serve the City's zoning interest in generating tax revenue equally well as that secular comparator. In so doing, it sided with varying equal-terms tests developed by the Third, Fifth, Seventh, and Ninth Circuits. The questions presented are:

1. What is the proper test for a RLUIPA equal-terms claim.

2. Whether Tree of Life established a facial or as-applied equal-terms violation here.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

There are no parties to the proceedings other than those listed in the caption. Petitioner is Tree of Life Christian Schools. Respondent is the City of Upper Arlington, Ohio.

Petitioner Tree of Life Christian Schools is an Ohio nonprofit corporation. Tree of Life has seven sponsoring churches. No other entity or person has any ownership interest in it.

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DECISIONS BELOW

Lower courts have entered seven opinions in this case. The district court's unreported opinion denying Petitioner's motion for a preliminary injunction is reprinted in the Appendix ("App.") at App.223a–62a.

The district court's ruling granting Respondent's first motion for summary judgment is reported at 888 F. Supp. 2d 883 (S.D. Ohio 2012) and reprinted at App.193a–222a. The Sixth Circuit's unpublished opinion reversing and remanding on the issue of ripeness is available at 536 Fed. App'x 580 (6th Cir. 2013) and reprinted at App.187a–92a.

The district court's subsequent ruling granting Respondent's motion for summary judgment is reported at 16 F. Supp. 3d 883 (S.D. Ohio 2014) and reprinted at App.145a–86a. The Sixth Circuit's opinion reversing the district court's summary-judgment order is reported at 823 F.3d 365 (6th Cir. 2016) and reprinted at App.105a–44a.

The district court's unreported ruling granting Respondent's motion for final judgment is available at No. 2:11-cv-09, 2017 WL 4563897 (S.D. Ohio Oct. 13, 2017) and reprinted at App.62a–104a. The Sixth Circuit's opinion affirming the district court's grant of final judgment is reported at 905 F.3d 357 (6th Cir. 2018) and reprinted at App.1a–61a.

STATEMENT OF JURISDICTION

On September 18, 2018, the Sixth Circuit issued its opinion affirming the grant of final judgment in Respondent's favor. On November 28, 2018, Justice Sotomayor extended the time to file a petition for a writ of certiorari to January 16, 2019. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT STATUTORY AND CODE PROVISIONS

RLUIPA's equal-terms provision states that "[n]o 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(b)(1) (emphasis added).

Other relevant RLUIPA provisions are reproduced at App.310a–15a. Excerpts from the City of Upper Arlington's code are reproduced at App.266a–309a.

INTRODUCTION

For over eight years, Petitioner Tree of Life Christian Schools has been stuck with a building it cannot use. The City of Upper Arlington, Ohio is adamant that the school's building house commercial activity to generate tax revenue, even though the City's zoning code does not require that, and the City would readily allow other non-profit activity at the site. So Tree of Life has had to turn away new students because its facilities have been inadequate for its mission, and the City refuses to allow the school to occupy the campus it purchased.

This impasse is detrimental to Tree of Life's religious ministry. Four separate campuses in the Columbus area make transportation unwieldy and alienate families with children of differing grade levels. What's more, two of Tree of Life's campuses are in churches, one of which has old facilities with bad electrical. They are not up to the task of delivering a high-quality, Bible-based education, nor implementing the technological innovation Tree of Life desires for its students.

The City's actions are illegal. In RLUIPA, Congress enacted an equal-terms provision that guarantees religious assemblies or institutions are not treated "on less than equal [zoning] terms with a nonreligious assembly or institution." 42 U.S.C. 2000cc(b)(1). But that promise has never been fully realized. A majority of lower courts from coast to coast condemn RLUIPA's equal-terms provision and refuse to enforce its straightforward command. They have added requirements to water down RLUIPA and allow local governments to do as they like.

The Sixth Circuit panel majority sided with the City, concluding that RLUIPA's equal-terms provision allows the City to treat religious nonprofits differently than secular nonprofits. In so holding, the Sixth Circuit created the eighth distinct circuit test interpreting how to apply the equal-terms provision. No two circuits use identical tests, though broadly speaking their approaches fall into two camps: courts that adopt a text-based approach and those, like the Sixth Circuit, that create their own, non-textual test.

As Judge Thapar observed in dissent, there "comes a time with every law when the Supreme Court must revisit what the circuits are doing. That time has come" for RLUIPA. App.61a. "Every circuit to address the issue has given its own gloss to the Equal Terms provision." *Ibid.* As a result, whether "a religious plaintiff can succeed under the Equal Terms provision thus depends entirely on where it sues." *Ibid.*

Not "only have the circuits split on the issue," continued Judge Thapar, "but many of them have also neutralized the Equal Terms provision." *Ibid.* "By importing words into the text of the statute, the courts have usurped the legislative role and replaced their will for the will of the people." *Ibid.* (citation omitted).

This Court should grant review, resolve the circuit morass, enforce RLUIPA's plain text, and halt the widespread discrimination against religious land uses that Congress sought to remedy nearly 20 years ago.

STATEMENT OF THE CASE

A. RLUIPA's history and purpose

This Court's decision in *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990), spurred Congress to pass RFRA, the Religious Freedom Restoration Act of 1993. After this Court struck down RFRA's application to the States in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), Congress looked for ways to protect religious liberty that fit within *Boerne*'s strictures. Congress held nine hearings on religious freedom over three years. Those hearings identified two areas in which greater free-exercise protection was indisputably needed: (1) religious land uses, and (2) institutionalized persons. U.S. Dep't of Justice, Report on the Tenth Anniversary of the RLUIPA (Sept. 22, 2010) at 3-4, https://bit.ly/2SavPpQ (hereinafter "DOJ RLUIPA Report").

The solution was RLUIPA. 146 Cong. Rec. S7774 (2000) (statement of Sen. Hatch); 146 Cong. Rec. H7190 (2000) (statement of Rep. Canady). Congressional hearings had unearthed "massive evidence" of widespread discrimination by local officials against religious organizations in land-use decisions. DOJ RLUIPA Report at 3. For instance, the House found that while some cities overtly exclude religious organizations, others "do so subtly. The motive is not always easily discernible, but the result is a consistent, widespread pattern of political and governmental resistance" to religious assemblies. H.R. Rep. No. 106-219, at 24 (1999), https://bit.ly/2Lr0ufT.

This proof of discrimination was so overwhelming that a broad spectrum of over 70 civil rights and religious groups supported the bill. DOJ RLUIPA Report at 4-5. Both the House and Senate passed RLUIPA by unanimous consent and President Clinton signed it into law to remedy—once and for all—a nationwide epidemic of discrimination against religious land uses. *Id.* at 2, 4.

1. Religious organizations are often unwelcome in any land-use zone and face numerous obstacles to using their property.

Religious organizations like Tree of Life do not fit comfortably into any land-use zone. Strictly speaking, they are not commercial, residential, or industrial. Municipalities often oppose them because they are tax-exempt, homeowners resist them for disrupting "community feel," and developers compete with them for land. When it comes to acquiring new property, religious organizations are often *persona non grata*.

This is true no matter where religious organizations locate. Municipalities ban them from commercial zones because they allegedly do not enhance tax revenue or economic development, put a damper on entertainment districts, or attract too little traffic. But if religious organizations turn to residential zones, localities accuse them of generating too much traffic, causing density and noise concerns, or even lowering property values. 146 Cong. Rec. 16698, 16698 (2000) (joint statement of Sen. Hatch and Sen. Kennedy); *River of Life Kingdom Ministries* v. *Vill. of Hazel Crest*, 611 F.3d 367, 386 (7th Cir. 2010) (en banc) (Sykes, J., dissenting).

Often, this discrimination against religious land uses (particularly new ones) is not overt but hidden. Localities may appear friendly to religious organizations by allowing them to locate in established residential neighborhoods. But in reality, all but the smallest religious institutions would need to buy several adjoining properties, knock down valuable homes, and erect new buildings. That is not practically or economically feasible, which is why Congress found that new or expanding religious organizations must search for property in commercial districts—just as Tree of Life did here. H.R. Rep. No. 106-219, at 18-19 (1999).

Even when codes facially allow secular nonprofits to locate in a zone, as the City's does here, municipalities have little trouble excluding religious organizations. Land-use determinations are notoriously case-by-case and based on easily manipulable criteria. All localities must do to keep a religious organization out of a zoning district is cite vague concerns like aesthetics, traffic, or not furthering the land-use plan. 146 Cong. Rec. 16698, 16698 (2000) (joint statement of Sen. Hatch and Sen. Kennedy).

That is why Congress decided concrete protections were necessary to stop pervasive discrimination against religious land uses. RLUIPA protects religious peoples' ability to assemble—a crucial aspect of their right to the free exercise of religion. *Ibid.*

2. RLUIPA's equal-terms provision is one of four ways that Congress protected religious organizations in zoning decisions.

Congress worked closely with the Department of Justice to draft four objective RLUIPA rules to protect religious organizations from land-use discrimination.

First, RLUIPA bars local government—in certain instances—from substantially burdening religious exercise through land-use regulations unless it satisfies RFRA's version of strict scrutiny. 42 U.S.C. 2000cc(a). Second, RLUIPA's equal-terms provision forbids localities from imposing or implementing land-use regulations in a manner that treats religious assemblies or institutions on less than equal terms with nonreligious assemblies or institutions. 42 U.S.C. 2000cc(b)(1). Third, RLUIPA bans localities from enacting or enforcing a land-use regulation that discriminates against assemblies or institutions based on their religion or denomination. 42 U.S.C. 2000cc(b)(2). Fourth, RLUIPA prohibits localities from totally excluding religious assemblies from their jurisdictions or unreasonably limiting religious assemblies, institutions, or structures within their bounds. 42 U.S.C. 2000cc(b)(3).

The equal-terms provision—over which lower courts are in such profound disagreement—requires localities to give religious assemblies or institutions (on paper and in practice) the same freedom as their best-treated nonreligious assemblies and institutions. This prophylactic rule makes sense given the record of systemic discrimination against religious organizations and because (1) the free exercise of religion is a

fundamental right, (2) government may not favor non-religion over religion, and (3) any law that treats religious organizations less well than their secular peers is not truly neutral or generally applicable. *Lighthouse Inst. for Evangelism, Inc.* v. *City of Long Beach*, 510 F.3d 253, 288 & n.36 (3d Cir. 2007) (Jordan, J., dissenting).[1] Once a religious organization shows a prima facie case of disparate treatment, the local government must show that its treatment of religious and nonreligious assemblies or institutions is—in fact—equal. 42 U.S.C. 2000cc-2(b).

These RLUIPA provisions are a vital means of enforcing free-exercise rules in the face of endemic discrimination against religious organizations. Local governments all too easily ascribe unequal treatment to nebulous zoning factors rather than faith. *Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 89-90 (1999) (prepared statement of Douglas Laycock), https://bit.ly/2Gt0a1r. So Congress directed the courts to construe RLUIPA in favor of "a broad protection of religious exercise" to the maximum extent permitted by its terms and the Constitution. 42 U.S.C. 2000cc-3(g). And Congress further clarified that RLUIPA provides for facial or

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[1] See Brian K. Mosley, Note, *Zoning Religion Out of the Public Square: Constitutional Avoidance and Conflicting Interpretations of RLUIPA's Equal Terms Provision*, 55 Ariz. L. Rev. 465, 494 (2013) (government cannot declare "the most prominent and desirable areas of town . . . wasted on religious uses" without unconstitutionally preferring "nonreligious assemblies").

as-applied claims by banning unequal treatment in the manner local governments "impose *or* implement a land use regulation." 42 U.S.C. 2000cc(b)(1) (emphasis added).[2]

B. The City's religious discrimination

The facts here are undisputed. Tree of Life is a private Christian school that ministers to students from pre-kindergarten through high school. The school opened in 1978, has grown from 47 to roughly 588 students, and now employs 136 people. For 40 years, it has assisted parents and the Church in educating and nurturing young lives in Christ.

Tree of Life's ability to carry out its religious mission has been hampered by campuses dispersed in multiple locations, including several churches. One church is eager for Tree of Life to vacate, and the other has an old building with facilities issues, including bad electrical. Limited space in both churches also bars the school from advancing its religious ministry by accepting more students or implementing needed technological upgrades. And families find it challenging to transport children of different grade levels to and from multiple campuses around the area.

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[2] RLUIPA broadly defines a "land use regulation" as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land)." 42 U.S.C. 2000cc-5(5).

So Tree of Life decided to find a home of its own. The school considered over 20 sites in Franklin County, Ohio. After searching more than two years, Tree of Life settled on a property located at 5000 Arlington Centre Boulevard in the City of Upper Arlington, Ohio. This former AOL/Time Warner building provided roughly 254,000 square feet of space in a central location. Purchasing the property would allow Tree of Life to consolidate its programs in one place, reduce transportation hurdles, and expand its ministry to serve more students.

Only one thing stood in the way: 5000 Arlington Centre Boulevard is located in the City's ORC "office and research district." Despite its name, the ORC District was not earmarked solely for for-profit activities but welcomed nonprofit daycares, hospitals, out-patient surgery centers, publishers, and offices as-of-right, and even churches as a conditional use. App.266a–70a. Because Tree of Life operates in much the same way as these assemblies or institutions, the school believed that it could work with the City to resolve any zoning issues.

Tree of Life contracted to buy the property, contingent on the City granting zoning approval. But the City has done everything in its power to keep out the school, claiming that religious schools do not generate property taxes. The City was adamant that a for-profit entity occupy the property, even though the zoning code contains no such requirement, no for-profit business showed serious interest in locating there, and AOL/Time Warner could keep the property vacant in perpetuity without issue. App.107a ("The government refused to strike a deal with TOL Christian Schools in hopes, apparently unfounded,

that the property's former occupant, AOL/Time Warner (or its equivalent), would return."). The City denied Tree of Life's requests for a conditional use permit or two types of rezoning.

With time running out on its contract, Tree of Life purchased the property to retain standing to bring this suit. 42 U.S.C. 2000cc-5(5) (requiring RLUIPA plaintiffs to have a property interest in the regulated land or a contract or option to acquire such an interest). Over eight years later, the City continues to keep Tree of Life from using its building as a religious school. Tree of Life has been forced to turn students away because it lacked space, and it lost existing students due to its scattered campuses. App.316a–20a. Meanwhile, the school's building sits virtually vacant, and nominal personal-income tax flows to the City.

C. Proceedings

Tree of Life filed suit in the U.S. District Court for the Southern District of Ohio and brought a RLUIPA equal-terms claim. It sought a preliminary and permanent injunction, declaratory relief, compensatory and nominal damages, and attorney fees and costs. At first, the district court found that Tree of Life was likely to succeed on the merits of its RLUIPA claim because nonprofit daycares and hospitals were allowed in the ORC district and religious schools were not. App.247a–51a. But the district court still denied a preliminary injunction because it believed potential harm to the City outweighed the harm to the school. App.261a.

Based on this lawsuit, the City amended its zoning code to exclude daycares from the ORC District and argued the lawsuit was not ripe because the school had asked the City for a conditional use permit but not rezoning. App.266a–76a. The district court granted summary judgment to the City for lack of ripeness. App.221a–22a. Tree of Life appealed and requested rezoning. While the appeal was pending, the City denied Tree of Life's first rezoning request, so the Sixth Circuit reversed the ripeness holding and remanded. App.190–92a.

Tree of Life requested a second type of rezoning, which the City also denied. The parties then cross-moved for summary judgment. On Tree of Life's facial equal-terms claim, the district court granted judgment to the City because "Upper Arlington treats both religious schools and secular schools the same." App.168a. The court analyzed Tree of Life's as-applied claim under the Third and Seventh Circuits' equal-terms tests, which look to the City's "regulatory purpose and accepted zoning criteria." App.170a. Because "[s]chools are not offices or research facilities, nor are they ancillary uses to those, such as coffee shops and daycares," Tree of Life lost. App.172a.

On the second appeal, the Sixth Circuit declared the City's zoning code "facially neutral" without analysis. App.122a. But, without adopting a specific equal-terms test, the court concluded there were genuine issues of material fact on the as-applied RLUIPA claim. App.116–20a. The court reversed and remanded to the district court to determine "whether the government treats more favorably assemblies or

institutions similarly situated with respect to maximizing revenue," such as nonprofit hospitals, outpatient care centers, and daycare centers. App.118a.

On remand for the third time, the parties filed cross-motions for final judgment. The district court again rejected Tree of Life's facial claim because the City "treats both religious schools and secular schools the same." App.84a n.6. As for the as-applied claim, the court declined to consider nonprofit daycares as comparators and sua sponte enjoined the City from readmitting them in the ORC District to justify keeping the school out. App.87a–89a. Alternatively, the district court discounted Tree of Life's experts' testimony that a religious school would generate more tax revenue than a nonprofit daycare and credited a City expert who testified that a daycare would generate more tax revenue per square foot. App.91a–97a. But this holding was irrelevant in light of the court's holding that although daycares compliment commercial businesses as ancillary uses, religious schools do not. App.97a.

Tree of Life pointed out that AOL/Time Warner's actual commercial use of the property as office space generated little tax revenue while operations were winding down. App.97a–98a; 264a–65a. But the district court said that a partial office use of the property could not serve "as a valid comparator" because otherwise "a city with the goal of maximizing revenue could [n]ever prevail." App.98a.

A divided panel of the Sixth Circuit affirmed. Based solely on the Sixth Circuit's second opinion, which provided no analysis, the majority upheld the district court's facial equal-terms ruling. App.15a–

16a. It proceeded to address Tree of Life's as-applied claim by lamenting that RLUIPA "provides no guideposts for what Congress meant by the term 'equal.'" App.17a.

So the majority turned to lower-court precedent and joined the Third, Seventh, and Ninth Circuits' "majority view" of the equal-terms test, but altered its language to ask whether a secular comparator is similarly situated in regard to the "legitimate zoning criteria" set forth in the ordinance. App.21a. It rejected the Eleventh and Tenth Circuit's standards because they hewed too closely to RLUIPA's text and did not focus on the government's zoning purpose. App.21a–23a. Though the majority essentially admitted that it was adding words to what Congress wrote, it reasoned that "'similarly situated with regard to legitimate zoning criteria' is simply the most reasonable interpretation of the undefined statutory words 'equal terms.'" App.23a.

Like the district court, the majority credited one of the City's experts over Tree of Life's experts because she calculated tax "revenue per square foot." App.35a. The majority recognized that "the daycare on which [the expert] based her calculations was a for-profit entity" but did its own calculations based on multiple experts' testimony and concluded that even nonprofit "daycares generate far more revenue on a per-square-foot basis than Tree of Life would." App.35a–36a. Moreover, the majority rejected using AOL/Time Warner's partial office use of the property as a secular comparator because "if a partial use is accepted as a valid comparator, then there can never be a case in which a city with the goal of maximizing revenue could ever prevail." App.30a (cleaned up).

Judge Thapar dissented because the majority failed to "give RLUIPA the effect its written text demands." App.37a. Rather than asking whether a permitted nonreligious entity is an assembly or institution, the majority asked whether an assembly or institution is "similarly situated" with respect to the City's interests. App.43a. Judge Thapar regarded that heightened-pleading standard as inappropriate given that RLUIPA's text imposes no such standard. App.43a–45a.

The question RLUIPA's equal-terms provision asks is whether a nonreligious assembly or institution is allowed in the district on less than equal terms with Tree of Life via facial inequality, gerrymandering, or selective application. App.47a–49a. Judge Thapar viewed daycares and hospitals, at least, as assemblies or institutions the zoning code treats better than Tree of Life by allowing them as of right while completely barring religious schools. App.52a–58a.

Similarly, Judge Thapar would have held that the City violated RLUIPA as-applied by denying Tree of Life's attempts to locate in the district while allowing daycares and hospitals to operate there at will. App.58a. Noting that every circuit to address the issue "has given its own gloss to the Equal Terms provision," frequently "neutraliz[ing]" the provision's terms, Judge Thapar urged this Court to grant review, resolve the split, and restore the plain meaning of RLUIPA's text. App.61a.

REASONS FOR GRANTING THE WRIT

Following a three-year investigation, Congress uncovered vast evidence that local governments routinely discriminate against religious organizations in making zoning decisions, sometimes in overt but often in hidden ways. RLUIPA was the remedy to stop both kinds of discrimination and protect religious citizens' right to assemble and freely exercise their religion. Yet most lower courts are reluctant to enforce RLUIPA's protection for religious land uses.

This aversion has produced a deep and mature split regarding what RLUIPA's equal-terms provision means. That section forbids government from imposing or implementing "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(b)(1). Focusing on RLUIPA's text, the Second, Tenth, and Eleventh Circuits ask whether (on paper and in practice) religious and nonreligious assemblies or institutions receive equal-zoning treatment. Conversely, the Third, Fifth, Sixth, Seventh, and Ninth Circuits center their RLUIPA inquiry on the government's zoning objectives by adding non-textual requirements. And they do so to excuse unequal treatment and deprive RLUIPA of the force Congress intended.

As Judge Thapar noted below, it is well past time for this Court to establish a uniform RLUIPA standard that actually shields religious organizations from unequal zoning treatment, the way Congress intended. Only a faithful application of RLUIPA's text is capable of doing that.

In RLUIPA, Congress intentionally required an objective comparison of the zoning treatment government accords religious and nonreligious assemblies or institutions because it knew that subjective zoning purposes are ripe for abuse. Any test that focuses on subjective zoning purposes neutralizes the equal-terms provision and condemns religious organizations to unequal zoning treatment.

I. Lower courts read RLUIPA's equal-terms provision in a multitude of flawed ways.

RLUIPA has been the law of the land for 18 years, but this Court has never addressed the equal-terms provision. Absent this Court's guidance, lower courts have read, and will continue to read, the equal-terms provision in flawed and conflicting ways. This Court should intervene. As Judge Thapar explained, it is untenable that whether "a religious plaintiff can succeed under the Equal Terms provision . . . depends entirely on where it sues." App.61a.

A. Eight circuits have construed RLUIPA's equal-terms provision in sharply conflicting ways.

Eight courts of appeals have rendered widely conflicting decisions on how to apply the equal-terms provision. No two circuits use identical tests, and none of them are completely consistent with the statutory text. But broadly speaking, their approaches fall into two camps: courts that adopt a text-based approach to RLUIPA's equal-terms provision, and courts that devise their own, non-textual versions of what "equal terms" means.

On the (mostly) text-based side are the Second, Tenth, and Eleventh Circuits. RLUIPA's text asks whether local governments (in theory or practice) treat religious assemblies or institutions on "equal terms" with nonreligious assemblies or institutions. 42 U.S.C. 2000cc(b)(1). To determine whether zoning terms are equal, the Second Circuit imports a similarly-situated concept and asks whether religious and nonreligious assemblies' or institutions' activities are "similarly situated with regard to their legality." *Third Church of Christ, Scientist, of N.Y.C.* v. *City of New York*, 626 F.3d 667, 670 (2d Cir. 2010).

The Tenth Circuit uses a similar test, but applies it using different nomenclature. The court inquires whether religious organizations are "treated less favorably than [a secular] similarly situated comparator." *Rocky Mountain Christian Church* v. *Bd. of Cty. Comm'rs*, 613 F.3d 1229, 1237 (10th Cir. 2010).

The Eleventh Circuit has developed the most comprehensive text-based approach. It uses the dictionary definitions of "assembly" and "institution" and—for facial claims—examines whether the zoning code "treats a religious assembly or institution differently than a nonreligious assembly or institution." *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1230 (11th Cir. 2004). For as-applied equal-terms claims, the Eleventh Circuit also imports a similarly-situated requirement: whether a municipality "differentially treats similarly situated religious and nonreligious assemblies" under a neutral zoning code. *Primera Iglesia Bautisa Hispana of Boca Raton, Inc.* v. *Broward Cty.*, 450 F.3d 1295, 1311 (11th Cir. 2006) (emphasis omitted).

None of these Circuits examine *why* the government treats comparable religious and nonreligious assemblies or institutions differently. All that matters is that disparate treatment occurs in the code or its application. But the Tenth and Eleventh Circuits have added the additional non-textual caveat that local governments may be able to justify an equal-terms violation under strict scrutiny. *Rocky Mountain*, 613 F.3d at 1237-38 ("[I]f an affirmative defense to the equal terms provision exists, only a strict scrutiny defense would apply here."); *Midrash Sephardi*, 366 F.3d at 1232 (a violation of the equal-terms provisions "must undergo strict scrutiny"). Tree of Life would likely prevail on its equal-terms claim in any of these jurisdictions, as the City cannot establish that barring the school from using its property serves a compelling interest in the least-restrictive manner available when secular nonprofits are allowed in the same zoning district.

In sharp contrast, the Third, Fifth, Sixth, Seventh, and Ninth Circuits do not view disparate treatment of religious and nonreligious assemblies or institutions as sufficient to establish an equal-terms violation. They tack on additional requirements that guard local governments' zoning objectives but have no foundation in RLUIPA's text.

The Third Circuit originated this trend by disagreeing with the Eleventh Circuit and sharply limiting what counts as a secular comparator. Not any nonreligious assembly or institution will do; the Third Circuit requires religious organizations to show "a secular comparator that is *similarly situated* as to the *regulatory purpose of the regulation* in question." *Lighthouse*, 510 F.3d at 264 (emphasis added).

Applying a similar but slightly different test, the Fifth Circuit clarified that the only relevant regulatory purposes are those in the zoning law's text. The court asks whether a nonreligious assembly or institution is "similarly situated with respect to the … purpose or criterion" that is "stated explicitly in the text of the ordinance." *Opulent Life Church* v. *City of Holly Springs*, 697 F.3d 279, 292-93 (5th Cir. 2012).

The Seventh Circuit considered the phrase "regulatory purpose" too vague and manipulable, so it modified the Third Circuit's standard to ask whether a nonreligious comparator is similarly situated as to the government's "accepted zoning criteria." *River of Life*, 611 F.3d at 371.

The Ninth Circuit then adopted both the Third and Seventh Circuits' tests, suggesting that courts apply them simultaneously. *Centro Familiar Cristiano Buenas Nuevas* v. *City of Yuma*, 651 F.3d 1163, 1172-73 (9th Cir. 2011) (considering whether religious and nonreligious assemblies or institutions are similarly situated as to the government's "regulatory purpose" and "with respect to accepted zoning criteria" as "necessary to prevent evasion of the statutory requirement") (cleaned up).

The Sixth Circuit rejected all seven tests and created its own, incorporating elements from the Third and Seventh Circuits' tests. App.19a–23a. The court substituted "legitimate zoning criteria" for "regulatory purpose" or "accepted zoning criteria" because, in the Sixth Circuit's view, the equal-terms test hinges on the government's purpose as stated in the "legitimate zoning criteria set forth in the municipal ordinance in question." App.21a.

The circuits also construe RLUIPA's burden-shifting requirement in sharply-conflicting ways. 42 U.S.C. 2000cc-2(b). Here, the Sixth Circuit required Tree of Life to produce expert testimony that "any other [permitted] land uses generate less revenue for the City than would Tree of Life" to even make out a prima facie case of discrimination. App.30a. But, as the Ninth Circuit has rightly explained, "[t]he burden is not on the [religious organization] to show a similarly situated secular assembly, but on the city to show that the treatment received by [a religious organization] should not be deemed unequal, where it appears to be unequal on the face of the ordinance." *Centro Familiar*, 651 F.3d at 1173.

In sum, most lower courts, like the Sixth Circuit, focus not on the different treatment religious assemblies or institutions receive—as RLUIPA's text requires—but on the government's reasons for that differential treatment. An equal-terms violation occurs in these jurisdictions only if religious and secular assemblies or institutions impact the government's zoning goals in the same manner and to the same degree.

This atextual approach to RLUIPA's interpretation gives local governments too much leeway to articulate their zoning goals in a way that evades an equal-terms violation and any meaningful judicial scrutiny, especially when the court also shifts the burden of proof. Using this non-textual methodology, the Sixth Circuit held that Tree of Life failed to establish even a prima facie case of an equal-terms violation. App.36a.

B. Lower courts like the Sixth Circuit depart from RLUIPA's text to excuse unequal treatment, contrary to RLUIPA.

The Sixth Circuit candidly admitted that lower courts have glossed RLUIPA's text to provide the government with a non-textual "safe harbor." App.114a. But "safe harbor" is just a euphemism for allowing the government to give religious organizations less-than-equal treatment. Congress fashioned RLUIPA as a straightforward command that localities must grant religious assemblies and institutions the same land-use treatment as their secular counterparts. 42 U.S.C. 2000cc(b)(1). Yet lower courts have steadfastly refused to implement that order and searched for ways to evade it.

The courts of appeals' distaste for RLUIPA's equal-terms provision is blatant. They have maligned RLUIPA's plain text as giving religion "a free pass to locate where any secular institution or assembly is allowed," *Lighthouse*, 510 F.3d at 268, vilified it as extending "preferential treatment to religious entities," *Tree of Life*, 905 F.3d at 368, and complained that it "unduly limit[s] municipal regulation," *River of Life*, 611 F.3d at 370. Citing vague and untenable Establishment Clause concerns, lower courts have intentionally tried to limit the equal-terms provision's reach, characterizing it as "*too* friendly to religious land uses." *Tree of Life*, 905 F.3d at 368 (quoting *River of Life*, 611 F.3d at 370). And they have done so in defiance of Congress's explicit instruction that courts construe RLUIPA "in favor of a broad protection of religious exercise." 42 U.S.C. 2000cc-3(g).

Other nondiscrimination provisions do not face such judicial backlash, even though Congress often institutes more stringent legal protection for politically vulnerable classes than the Constitution demands. For example, Congress' extension of Title VII to disparate impact based on race extends the Equal Protection Clause's prohibition on intentional discrimination in government employment. And the Pregnancy Discrimination Act expands the definition of sex discrimination to include pregnancy discrimination, although pregnancy discrimination does not violate the Equal Protection Clause. Yet courts do not rewrite the text of these statutes. Sarah Keeton Campbell, Note, *Restoring RLUIPA's Equal Terms Provision*, 58 Duke L.J. 1071, 1095-96 (2009).

But it is painfully evident that lower courts disagree with Congress's determination that RLUIPA is necessary to prevent widespread discrimination against religious organizations in zoning. For instance, the Sixth Circuit opined—despite Congress's well-documented contrary evidence—that mere "rational-basis review" is sufficient to prevent municipalities from "assert[ing] sham [zoning] purposes to justify religious discrimination." App.20a. This extreme deference to local government is the exact problem Congress enacted RLUIPA to solve. *River of Life*, 611 F.3d at 388 (Sykes, J., dissenting) (too much "deference toward land-use regulation . . . is fundamentally inconsistent with RLUIPA" and the First Amendment's Free Exercise Clause). But no progress will occur on that score unless this Court intervenes to resolve the circuit conflict and set lower courts back on track.

Lower courts regularly substitute their own subjective notions of "equality" for the objective "equal terms" that RLUIPA requires. App.18a (adhering to RLUIPA's plain text "would be inconsistent with any definition of the term 'equal'"); *River of Life*, 611 F.3d at 371 (equality means "not equivalence or identity but proper relation to relevant concerns"). And the result is to neutralize the equal-terms provision. App.61a. (Thapar, J., dissenting). RLUIPA's equal-terms provision is chronically under-enforced and has been for almost two decades. Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 Fordham Urb. L.J. 1021, 1048–54, 1058–66 (2012).

This case is a perfect example. Lower courts should have quickly resolved this litigation in Tree of Life's favor. After all, the Sixth Circuit admitted that the City's "current zoning law allows (in fact, encourages) nonreligious assemblies or institutions to use 5000 Arlington Centre Boulevard: businesses most obviously, but also nonprofit organizations such as hospitals, outpatient care centers, and daycare centers." App.117a. That conclusion—that the City treats religious and non-religious entities on less-than-equal terms—shows a facial equal-terms violation. Yet the Sixth Circuit refused to say so, causing this lawsuit to drag on for over eight years while the school hemorrhages students and the City forgoes approximately $1 million in personal-income-tax revenue. App.34a (Tree of Life's employees would pay roughly "$125,000 annually in income taxes to the City"), App.316a–20a (Tree of Life has forfeited new students and lost existing students because it cannot occupy its own large, centrally located building).

This bizarre result was possible only because lower courts invented excuses for not granting Tree of Life equal-zoning treatment. The district court rewrote the City's zoning ordinance by injunction to keep Tree of Life from using nonprofit daycares as a nonreligious comparator. App.89a, 103a–04a. That maneuver nullified the equal-terms provision "by preventing plaintiffs from ever having valid comparators." App.53a. (Thapar, J., dissenting) And the district court labeled nonprofit daycares—but not Tree of Life—an "ancillary" use in the ORC District because they help "serve the working public" by providing a convenient drop-off point for parents with young children. App.88a; see also App.5a (the City supposedly allowed daycares in the ORC District so parents had a safe place to "drop off their children during work hours"). Of course, Tree of Life would serve as an equally convenient drop-off point for parents with older children. App.52a (Thapar, J., dissenting). So barring only a religious school from the District makes no sense.

On appeal, the Sixth Circuit refused to even address the City's facial equal-terms violation and remanded to give the City a chance to show that a nonprofit secular assembly or institution "would employ higher-income workers than" a religious school. App.119a. When the City failed to carry its burden, the Sixth Circuit tried to remedy the error by conducting its own tax-revenue-per-square-foot calculations. App.35a–36a. While the Sixth Circuit viewed the personal-income tax revenue generated by secular nonprofits as sufficient to justify including them in the ORC District, it allowed the City to exclude Tree of Life. App.28a–29a. But the school proved that it

would generate roughly the same range of personal-income-tax revenue (compared to a commercial entity) for the City as a secular nonprofit—if not more. App.32a–34a. The only difference is Tree of Life's religious identity.

In sum, even when religious assemblies or institutions like Tree of Life definitively prove they receive worse zoning treatment than nonreligious assemblies or institutions, they still lose. App.117a; *Opulent Life*, 697 F.3d at 293-94 (acknowledging that "other noncommercial, non tax-generating uses are permitted in the district" but remanding for the city "to come forward with the zoning criteria or regulatory objectives that it believes justify" banning a church). Some courts have even held that the remedy for barefaced equal-terms violations is not allowing religious assemblies or institutions into a zone but excluding any new secular comparators—even though existing secular assemblies and institutions presumably remain. *Petra Presbyterian Church* v. *Vill. of Northbrook*, 489 F.3d 846, 849 (7th Cir. 2007) (the village blatantly "discriminated in the industrial zone in favor of secular membership organizations" but the church "should have known" the village would amend its ordinance to "forbid[] all [new] membership organizations in the zone"); *Covenant Christian Ministries* v. *City of Marietta*, 654 F.3d 1231, 1242 (11th Cir. 2011) (same).

Absent this Court's review, lower courts will continue to rob the equal-terms provision of force. Seemingly even the most blatant unequal treatment of religious organizations in zoning meets with their approval. The "courts have forgotten this country's sacred vow and failed to give RLUIPA the effects its

written text demands." App.37a (Thapar, J., dissenting). This Court should resolve the circuit conflict regarding RLUIPA's equal-terms provision and give life to the text Congress actually wrote.

II. This Court should establish a uniform standard that follows RLUIPA's plain text and shields religious organizations from unequal treatment as Congress intended.

Congress wrote a straightforward equal-terms test that objectively compares the land-use treatment religious assemblies and institutions receive to that accorded nonreligious assemblies and institutions. 42 U.S.C. 2000cc(b)(1). But most lower courts complicate the RLUIPA analysis by focusing on the government's subjective zoning interests instead. Laycock & Goodrich, *supra*, at 1065. In so doing, they doom nearly all equal-terms claims to failure, as happened here.

Dissenting Court of Appeals judges have warned of this problem. *Lighthouse*, 510 F.3d at 293 (Jordan, J., dissenting) (centering the RLUIPA inquiry on municipalities' zoning objectives gives them "a ready tool for rendering RLUIPA section 2(b)(1) practically meaningless."); *River of Life*, 611 F.3d at 386 (Sykes, J., dissenting) (focusing on the government's regulatory zoning criteria "dooms most, if not all, equal-terms claims"); App.41a (Thapar, J. dissenting) (judicially-added-on RLUIPA requirements "prevent many religious groups from seeking the shelter that Congress sought to provide"). As Judge Sykes explained, the prevailing equal-terms test renders facial equal-terms violations unavailable and as-applied, equal-terms claims practically useless. *River of Life*, 611 F.3d at 387 (Sykes, J, dissenting).

Every zoning decision is at least nominally tied to the government's regulatory purpose or zoning interests. So that alleged hurdle is really no obstacle at all. Local governments have no trouble creating ways in which religious organizations do not serve their zoning objectives. *Id.* at 386. And courts have long given their justifications little scrutiny. That is why Congress enacted RLUIPA in the first place. Laycock & Goodrich, *supra*, at 1071 (RLUIPA was necessary to bring "the First Amendment to bear on the zoning process" because courts were slow to recognize discriminatory techniques applied to religious organizations); Terry M. Crist III, Comment, *Equally Confused: Construing RLUIPA's Equal Terms Provision*, 41 Ariz. St. L.J. 1139, 1160 (2009) (Congress believed that courts were not adequately seeing through pretexts for religious discrimination).

Lower courts have neutralized RLUIPA's equal-terms provision by employing a variety of non-textual techniques. The time is ripe for this Court to adopt a uniform equal-terms standard that comports with RLUIPA's text and shields religious organizations from unequal-zoning treatment.

A. RLUIPA's text asks a simple, objective question: are the land-use terms applicable to religious and nonreligious assemblies or institutions equal?

As the Eleventh Circuit explained and the Second and Tenth Circuits tacitly recognized, RLUIPA's equal-terms provision specifies a "direct and narrow focus." *Midrash Sephardi*, 366 F.3d at 1230. Congress intentionally avoided a subjective RLUIPA test by asking whether the enactment or implementation of

a zoning ordinance objectively results in a religious assembly or institution being treated on less than equal terms with a nonreligious assembly or institution. *Ibid.*; *Lighthouse*, 510 F.3d at 283 (Jordan, J., dissenting); *River of Life*, 611 F.3d at 382 (Sykes, J., dissenting), App.41a–42a (Thapar, J., dissenting).

RLUIPA's text thus directs a court to examine how a local government treats religious assemblies and institutions compared to secular assemblies and institutions. If the treatment is on "less than equal terms," this discriminatory treatment necessarily fails. Period. Nothing in the statute justifies taking the government's motives for treating religious organizations unequally into account. "Good reasons" do not unmake an equal-terms violation, nor does a lack of anti-religious animus. *Midrash Sephardi*, 366 F.3d at 1231 (focusing on the zoning ordinance's text); *Lighthouse*, 510 F.3d at 286 ("laudatory redevelopment aim[s]" do not forestall a RLUIPA violation) (Jordan, J., dissenting); *River of Life*, 611 F.3d at 382 ("reasons unrelated to religious discrimination" do not prevent unequal treatment).

Holding otherwise ignores Congress's explicit instruction that courts should interpret RLUIPA's free-exercise protections as broadly as possible. 42 U.S.C. 2000cc-3(g). Yet as explained in § I.A, above, the Third, Fifth, Sixth, Seventh, and Ninth Circuits make the equal-terms analysis turn on the government's zoning goals—a non-textual and irrelevant factor—and even the Second, Tenth, and Eleventh Circuits depart from the text by importing a similarly-situated requirement that Congress did not enact. This Court should grant review to end an enduring

circuit conflict and adopt a uniform equal-standard that gives "RLUIPA the effect its written text demands." App.37a (Thapar, J., dissenting).

RLUIPA itself identifies the comparison necessary to make an equal-terms claim: whether localities give nonreligious assemblies or institutions unequal zoning treatment compared to religious assemblies or institutions. *Midrash Sephardi*, 366 F.3d at 1230 ("the relevant 'natural perimeter' … is the category of 'assemblies or institutions'"); *Lighthouse*, 510 F.3d at 286 (Jordan, J., dissenting) ("churches are treated 'on less than equal terms' than the permitted nonreligious assemblies because churches are categorically prohibited"); *River of Life*, 611 F.3d at 389 (Sykes, J., dissenting) (asking whether the zoning code treats "a religious assembly or institution less well than a nonreligious assembly or institution"); App.42a (Thapar, J., dissenting) (equal terms claims compare the zoning treatment of religious and nonreligious entities "'assemblies' and 'institutions'").

If a code facially allows nonreligious assemblies or institutions in the zone but excludes religious assemblies or institutions, an equal-terms violation exists. The same is true if the code, as applied, welcomes a nonreligious assembly or institution in the zone but excludes a religious assembly or institution.

Localities may, of course, impose a wide variety of zoning regulations without running afoul of the equal-terms provision. They simply must do so in a truly neutral and generally applicable way: any zoning restriction that applies to religious assemblies or institutions must equally apply to nonreligious

assemblies or institutions. *Lighthouse*, 510 F.3d at 287 (Jordan, J., dissenting); Laycock & Goodrich, *supra*, at 1063.

So local governments are generally free to regulate based on maximum occupancy, traffic, parking, height, square footage, and other neutral zoning concerns. Congress merely required that localities refrain from imposing zoning restrictions on religious organizations they are not willing to impose on everyone else. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 545 (1993) (government cannot pursue its interests only against conduct motivated by religious belief).

That constraint makes perfect sense. Zoning concerns like building size and traffic flow are not unique to religious entities. If municipalities truly want to address these issues, they must do so across the board. Otherwise, disfavoring religion is all that results. Anthony Lazzaro Minervini, Comment, *Freedom From Religion: RLUIPA, Religious Freedom, and Representative Democracy on Trial*, 158 U. Pa. L. Rev. 571, 600 (2010) ("[P]roblems associated with religious land use are in fact issues confronted wherever land is used by a sizeable assembly or institution."). That is what happened in the City of Upper Arlington, when the City freely allowed other nonprofits to locate in the ORC District but not Tree of Life. And where the City required Tree of Life to prove that it would maximize tax revenue when commercial holders of largely vacant buildings are not held to the same standard.

B. Subjective RLUIPA tests that focus on localities' zoning goals do more than allow unequal treatment, they invite it.

Under the Third, Fifth, Sixth, Seventh, and Ninth Circuits' subjective tests, religious organizations may still lose even after showing that a nonreligious assembly or institution enjoys better zoning treatment. That is because these courts deem all-important the government's zoning motivations—some explicitly stated, some not. Reframing the equal-terms analysis in this most government-friendly way invites municipalities to treat religious organizations unequally, contrary to RLUIPA's plain text and Congress's explicit intent. H.R. Rep. No. 106-219, at 18 (1999) ("Land use regulations frequently discriminate by design, other times by their neutral application, and sometimes by both.").

Zoning goals are local government's playground. Municipalities regularly employ them to achieve a desired result. They are vague, nebulous, and readily susceptible to manipulation. *Id.* at 24 (localities' zoning standards "are often vague, discretionary, and subjective"). Congress rightly viewed zoning objectives with suspicion because local governments use them to make individualized assessments ripe for religious discrimination. *Ibid.* ("Land use regulation is commonly administered through individualized processes not controlled by neutral and generally applicable rules."). For good reason, this Court concluded that such case-by-case decisions fall outside of *Smith*'s general free-exercise rule. 494 U.S. at 884; *Lukumi*, 508 U.S. at 537.

An equal-terms test based on subjective zoning considerations dooms religious organizations to unequal treatment. In fact, municipalities could exclude religious organizations altogether—even where secular assemblies or institutions are allowed—so long as the municipality says they do not further its zoning objectives as well as nonreligious assemblies or institutions. *River of Life*, 611 F.3d at 387 (Sykes, J., dissenting). This "eviscerates the equal-terms provision" by labeling equal what Congress deemed unequal and giving localities a ready tool to discriminate against religion. *Ibid.*

Again, this case is a prime example. Rather than inquiring into equal-zoning treatment, the Sixth Circuit demanded that Tree of Life produce expert testimony showing that a religious school would serve the City's tax-revenue-generating interests to the same degree as uses the code allows. App.117a–119a. Tree of Life carried that elaborate burden but lost its RLUIPA case nonetheless. App.32a–34a. The Sixth Circuit strained to remedy the obvious errors in the City's expert witness testimony regarding per-square-foot tax revenue to rule against the school. App.35a–36a. But nothing in RLUIPA's text justifies such a convoluted battle of experts, let alone the Sixth Circuit relieving the City of its burden of persuasion. Laycock & Goodrich, *supra*, at 1065 (criticizing lower courts for turning equal-terms cases "into a battle of expert witnesses" opining about whether a secular assembly better serves the city's "regulatory purpose"); 42 U.S.C. 2000cc-2(b) (placing the burden of persuasion on the government once a RLUIPA plaintiff makes out a prima facie case).

A subjective equal-terms test wrongly allows courts to deem religious and nonreligious assemblies or institutions incomparable based on matters of degree. For instance, the City supposedly excluded Tree of Life from the ORC District for failing to maximize tax revenue. App.271a–73a. Yet the City allowed many secular non-tax-revenue-maximizing assemblies or institutions to operate in the ORC District as of right, including nonprofit daycares, hospitals, out-patient surgery centers, periodicals, and offices. App.266a–70a. And the City imposed no tax-revenue-maximization requirement on commercial entities at all, so a commercial entity could, for example, hold onto a vacant building as a tax write-off. Yet the Sixth Circuit held that as long as nonprofit daycares generated more tax revenue than nonprofit religious schools, no equal-terms comparison is possible. App.36a. It consequently refused to acknowledge even that Tree of Life made out a prima facie case of discrimination. *Ibid.*

Equal-zoning treatment cannot depend on such creative distinctions. It makes no sense to say, as the Sixth Circuit did, that the City needs to maximize tax revenue when it comes to Tree of Life but not when it comes to nonreligious assemblies or institutions already welcomed in the ORC District. Compare App.29a ("Income taxes are an important source of Upper Arlington's revenues and every effort will be made . . . to increase these tax revenues."), with App.28a–29a ("But Upper Arlington need not tailor its zoning regulations to squeeze every last dollar out of the permitted uses within the office district"). Only one thing justifies such unequal treatment—religious discrimination.

This Court should reject any standard that justifies such inequality. Experience proves that subjective equal-terms tests invite localities to discriminate against religious organizations. Adhering to RLUIPA's plain text is the only way to ensure they receive equal zoning treatment.

III. This case is an ideal vehicle to resolve an entrenched circuit conflict that impacts religious organizations nationwide.

The numerous conflicting circuit decisions show that the issues presented are recurring and create unnecessarily long and convoluted RLUIPA litigation. The Court should grant the petition and resolve that conflict now.

First, the circuit split is deep and mature, with eight circuits having put their gloss on RLUIPA's equal-terms provision. It is implausible that subsequent circuit decisions or *en banc* proceedings will resolve the conflict.

Second, Tree of Life's case presents a clean vehicle for this Court to resolve the entrenched circuit conflict regarding what the equal-terms provision means. None of this case's facts are in dispute. The only disagreement is over the appropriate legal test. Tree of Life has now waited over eight years to use its property as a religious school while the City diligently did everything possible to deny every zoning remedy the school tried to pursue. The school's long-term survival depends on this Court giving RLUIPA's equal-terms provision the potency Congress intended. It should do so now to clarify the legal protection available to religious organizations nationwide.

Third, as things stand, whether a religious organization prevails under the equal-terms provision "depends entirely on where it sues." App.61a (Thapar, J., dissenting). Tree of Life lost simply because its property sits in Ohio, not Florida. Congress intended RLUIPA to establish a uniform rule for zoning decisions. But that effort has been stymied for almost two decades by lower courts second guessing its wisdom. In most of the country, the equal-terms provision currently offers religious organizations no meaningful protection.

Fourth, further delay in resolving the conflict harms local governments, religious organizations, and the justice system. If the Sixth Circuit is correct, then local governments in at least three circuits are being denied the fullest discretion the law allows in their zoning system. And if those three circuits are correct, then five circuits are undermining Congress's policy choices in enacting RLUIPA. Either way, the justice system is producing widely divergent results.

Finally, despite Congress's clear dictates, a shocking number of lower courts decline to apply RLUIPA's plain text. In so doing, those "courts have usurped the legislative role and replaced their will for the will of the people." *Ibid.* (citing The Federalist No. 47, at 325 (James Madison) (J. Cook ed., 1961)).

Certiorari is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JANUARY 2019

APPENDIX

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RECOMMENDED FOR FULL-TEXT
PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0206p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TREE OF LIFE CHRISTIAN SCHOOLS,

Plaintiff-Appellant,

v.

CITY OF UPPER ARLINGTON, OHIO,

Defendant-Appellee.

No. 17-4190

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 2:11-cv-00009—George C. Smith,
District Judge.

Argued: July 31, 2018

Decided and Filed: September 18, 2018

Before: GILMAN, GIBBONS, and THAPAR,
Circuit Judges.

COUNSEL

ARGUED: Erik W. Stanley, ALLIANCE DEFENDING FREEDOM, Scottsdale, Arizona, for Appellant. Shawn Judge, ISAAC, WILES, BURKHOLDER & TEETOR, Columbus, Ohio, for Appellee. **ON BRIEF**: Erik W. Stanley, ALLIANCE DEFENDING FREEDOM, Scottsdale, Arizona, Philip W. Gerth, THE GERTH LAW OFFICE, LLC, Gahanna, Ohio, for Appellant. Shawn Judge, Mark Landes, ISAAC, WILES, BURKHOLDER & TEETOR, Columbus, Ohio, for Appellee.

GILMAN, J., delivered the opinion of the court in which GIBBONS, J., joined. THAPAR, J. (pp. 25–40), delivered a separate dissenting opinion.

OPINION

RONALD LEE GILMAN, Circuit Judge. This case arises out of a zoning dispute between Tree of Life Christian Schools (Tree of Life) and the City of Upper Arlington, Ohio. In 2001, Upper Arlington adopted a Master Plan to guide its zoning decisions. The Master Plan emphasizes the need to increase the City's revenue by attracting business development in the small portion of the City's land that is devoted to commercial use. To further the Master Plan's goals, Upper Arlington's Unified Development Ordinance (Development Ordinance) restricts the use of areas zoned as an office-and-research-center district (office district) to specific uses that are primarily commercial. The operation of schools, both secular

and religious, is a prohibited use within the office district.

Despite this prohibition, Tree of Life decided in 2010 to purchase a large office building on a 16-acre tract of land that is located within the office district (the Property) for the purpose of operating a pre-K through 12th-grade school. After failing to secure authorization from Upper Arlington to operate a school on the Property, Tree of Life filed suit in the United States District Court for the Southern District of Ohio, arguing, among other things, that the Development Ordinance violates the "equal terms" provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc(b)(1), by treating the school less favorably than comparable nonreligious land uses.

After two prior appeals to this court, the parties filed cross-motions for final judgment. The district court granted Upper Arlington's motion and denied Tree of Life's, holding that the Development Ordinance is no more onerous to Tree of Life than it is to nonreligious entities that generate comparably small amounts of revenue for the City. Because Tree of Life has not established a prima facie case under RLUIPA's equal terms provision, we **AFFIRM** the judgment of the district court.

I. INTRODUCTION

A. Factual background

1. *Upper Arlington's land-use policies*

Upper Arlington's Master Plan stresses the need for the City to create "new revenue" to "meet its

current capital needs and support its current level of services," noting that "commercial office use provides significantly more revenue to the City than any other land use." Commercial office use is authorized on less than five percent of the City's land. And because Upper Arlington is landlocked and fully developed, the preservation of its office districts for commercial use is of utmost importance to the City. The Master Plan also singles out personal income taxes as "an important source of Upper Arlington's revenues" and emphasizes that "every effort will be made to broaden and expand the City's employment base in order to increase these tax revenues."

In keeping with the Master Plan's emphasis on commercial office use and the generation of income-tax revenue, the City's Development Ordinance specifies that office-district zones within the City are meant to "provide job opportunities and services to residents and contribute to the City's economic stability." Upper Arlington, Ohio, Unified Dev. Ordinance § 5.03(A)(6), https://library.municode.com/oh/upper_arlington/codes/code_of_ordinances?nodeId=PT11UNDEOR. Permitted uses within the office district include "business and professional offices, research and development, book and periodical publishing, insurance carriers, corporate data centers, survey research firms, bank finance and loan offices, outpatient surgery centers, [and] hospitals." *Id*. As previously noted, both secular and religious schools are specifically prohibited uses. Places of worship are conditional uses, meaning that they are permitted in the office district, but only with approval from the Board of Zoning and Planning (the Board). *Id*. art. 5, tbl. 5-C.

Child daycare centers (hereinafter, "daycares") are also prohibited uses in the office district under the Development Ordinance as presently worded. Dev. Ordinance § 5.03(A)(6); *id*. art. 5, tbl. 5-C. But they were permitted prior to 2011, when the City Council amended the Ordinance to exclude them in response to this litigation. Upper Arlington, Ohio, Ordinance 52-2011 (Sept. 12, 2011). Chad Gibson, Upper Arlington's Senior Planning Officer, testified in a deposition that the City previously intended daycares to be an ancillary use in the office district, designed not to generate revenue but to "facilitate the general office district" by providing "a place where workers in the office complex could drop off their children during work hours in a safe environment." Although Gibson noted that "typically daycares are not massive in size," he acknowledged that the prior iteration of the Development Ordinance did not restrict their size, so a large daycare would have been a permitted use within the office district.

2. *Tree of Life purchased property within the office district.*

Tree of Life, a religious nonprofit corporation, operates a private Christian school that currently serves 532 students and has a workforce of 150 employees spread across three campuses throughout the Columbus, Ohio metropolitan area. The school believes that its lack of a unified campus inhibits its growth and limits its enrollment numbers. Accordingly, Tree of Life began searching in 2008 for a site where it could consolidate its campuses and serve a larger population of students.

In 2009, AOL/Time Warner, a media company that is not a party to this litigation, vacated a 254,000-square-foot office building—the largest in Upper Arlington—located on the Property. AOL/Time Warner generated significant revenue for Upper Arlington during the time that it occupied the Property through a combination of property taxes and income taxes levied on both the company and its employees. In 2001, for example, AOL/Time Warner accounted for 29% of all income-tax revenue collected by the City.

Tree of Life signed a purchase agreement for the Property in October 2009, and the sale was finalized in August 2010. The purchase agreement contained a contingency clause that allowed Tree of Life to cancel the purchase if, prior to the closing, it was unable to obtain Upper Arlington's approval for the rezoning of the Property to allow for the operation of a school. During the allotted time, Upper Arlington made no commitment to rezone the Property or otherwise authorize the operation of a school on the premises. Tree of Life nevertheless decided to move forward with the purchase.

3. *Upper Arlington declined to accommodate Tree of Life's desire to operate a school on the Property.*

Before acquiring the Property, Tree of Life filed a conditional-use application with Upper Arlington's Department of Development. The application stated that the property would be used as a church with an included school. The Board, however, rejected Tree of Life's characterization of its intended use of the Property, ruling that "the proposed primary use of the

property as a private school does not constitute a 'place of worship, church' as that term is used in [the Development Ordinance], and is therefore not a conditional use in the [office district]." The City Council upheld the Board's decision. In a separate set of rulings, the Board and the City Council also rejected Tree of Life's argument that a private school should be allowed as a permitted conditional use.

During the course of this litigation, Tree of Life submitted an application to the Department of Development to request that the Development Ordinance be amended to permit private religious schools to operate in the office district. Gibson, as Upper Arlington's Senior Planning Officer, prepared a staff report recommending that the City Council reject the amendment. Among other criticisms of the proposed amendment, the report concluded that allowing private religious schools "within the City's extremely limited commercial areas is simply not necessary or beneficial to the City, and it is likely that negative long-term economic consequences will result." Based on this recommendation, the City Council denied the proposed amendment.

Tree of Life next filed an application requesting that the Property be rezoned for residential use. Echoing the reasons for his opposition to Tree of Life's first proposed zoning amendment, Gibson issued a staff report urging the City Council to reject this second proposed amendment as well. The report noted that the northern boundary of the Property "has the greatest opportunity for intense office use" in Upper Arlington and that rezoning the Property for residential use would therefore "be contrary to the City's long-term financial interests." Based on

Gibson's recommendation, the City Council rejected Tree of Life's second proposed amendment.

B. Procedural background

Tree of Life filed suit after Upper Arlington rejected its conditional-use application. The complaint alleged violations of (1) RLUIPA's substantial-burden and equal terms provisions; (2) the First Amendment's Free Speech, Assembly, Free Exercise, and Establishment Clauses; (3) the Fourteenth Amendment's Due Process and Equal Protection Clauses; and (4) Article 1, Section 7 of the Ohio Constitution. Tree of Life seeks both equitable relief to allow it to operate on the Property and compensatory damages for the harm that it has allegedly suffered as a result of Upper Arlington's refusal to accommodate the proposed school.

Shortly after filing suit, Tree of Life moved for a preliminary injunction based on its equal protection and RLUIPA equal terms claims. Although the district court found that Tree of Life was likely to succeed on the merits of its RLUIPA claim (but not on its equal protection claim), it concluded that the other preliminary injunction factors favored Upper Arlington. The court, after balancing all the factors, denied the motion.

Upper Arlington then filed a motion for summary judgment, arguing that the case was not ripe for adjudication because Tree of Life had not yet requested that the City rezone the Property to allow the school to operate there. The district court granted the motion, *Tree of Life Christian Sch. v. City of Upper Arlington*, 888 F. Supp. 2d 883, 897 (S.D. Ohio 2012), and Tree of Life appealed to this court. While Tree of

Life's appeal was pending, the school filed its first zoning-amendment application, prompting this court to remand the case to the district court. *Tree of Life Christian Sch. v. City of Upper Arlington (Tree of Life I)*, 536 F. App'x 580, 582–83 (6th Cir. 2013). Tree of Life filed its second zoning-amendment application following the remand.

On remand, both parties sought summary judgment, and the district court granted Upper Arlington's motion and denied Tree of Life's. *Tree of Life Christian Sch. v. City of Upper Arlington*, 16 F. Supp. 3d 883, 904–05 (S.D. Ohio 2014). The court held that because Upper Arlington excludes both secular and religious schools from the office district, the City's land-use regulations do not violate RLUIPA's equal terms provision. *Id.* at 899–900. With respect to Tree of Life's other federal claims, the court held that they were all either abandoned or legally deficient. *Id.* at 894 n.4, 900–04. The court declined to exercise supplemental jurisdiction over Tree of Life's state-law claim. *Id.* at 904. Tree of Life then filed a second appeal.

This court held on the second appeal that the district court erred in granting summary judgment in favor of Upper Arlington on Tree of Life's RLUIPA equal terms claim. *Tree of Life Sch. v. City of Upper Arlington (Tree of Life II)*, 823 F.3d 365, 366 (6th Cir. 2016). According to the court, Tree of Life created a genuine dispute of material fact by making unrebutted allegations that other entities permitted within the office district are "similarly situated [to the school] with respect to maximizing revenue." *Id.* at 371. The case was therefore remanded for the purpose of answering two specific questions: (1) "Are there

nonreligious assemblies or institutions to which the court should compare Tree of Life Christian Schools because they would fail to maximize income-tax revenue," and (2) "if so, would those assemblies or institutions be treated equally to [Tree of Life]?" *Id*. at 372.

On remand for the second time, the parties filed cross-motions for final judgment. Tree of Life argued, as it does in this third appeal, that daycares and partially used offices are similarly situated to the proposed school in terms of their minimal capacity to generate revenue for Upper Arlington. *See Tree of Life Christian Sch. v. City of Upper Arlington*, No. 2:11-cv-09, 2017 WL 4563897, at *9 (S.D. Ohio Oct. 13, 2017). Noting that the current version of the Development Ordinance does not permit daycares within the office district, the district court implied that Tree of Life's claim is moot if based on daycares as a comparator. *Id*. at *10. To avoid any possibility of Upper Arlington reverting to the prior iteration of the Ordinance, the court issued an injunction preserving the Development Ordinance's current ban on daycares in the office district. *Id*. at *16.

The district court alternatively held that daycares are not similarly situated to Tree of Life's proposed school. *Id*. at *13. In doing so, the court found that the analysis done by Upper Arlington's expert witness, Catherine Armstrong, was more persuasive than the analyses done by Tree of Life's expert witnesses. *Id*. Armstrong's report demonstrated that "a daycare located at the Property would generate seven times more tax revenue for the City than Tree of Life" would generate. *Id*.

The district court also held that "full use of one assembly or institution compared to the full use of another type of assembly or institution" is the proper lens through which to analyze RLUIPA equal terms claims. *Id*. at *14. Any other approach would be improper, according to the court, because a "city can set forth the regulatory purpose, but . . . cannot demand full use of a property to realize that purpose." *Id*. Having rejected both uses proposed by Tree of Life as comparators, the court entered final judgment for Upper Arlington. *Id*. at *16. This timely appeal followed.

II. ANALYSIS

A. Standard of review

After the second remand, the parties agreed to file cross-motions for final judgment and waive any oral presentation of evidence. This effectively amounted to a bench trial based on (1) a waiver of a jury trial under Rule 38(d) of the Federal Rules of Civil Procedure, and (2) a request that the court make findings of fact and conclusions of law based on a stipulated record pursuant to Rule (52)(a)(1). Our standard of review is thus controlled by *T. Marzetti Co. v. Roskam Baking Co.*, 680 F.3d 629, 633 (6th Cir. 2012) ("In an appeal from a judgment entered after a bench trial, we review the district court's findings of fact for clear error and its conclusions of law *de novo*.").

B. Preliminary matters

1. *Tree of Life's RLUIPA equal terms claim is the only one remaining.*

In addition to its RLUIPA equal terms claim, Tree of Life initially brought several other claims. This court upheld the district court's grant of summary judgment in favor of Upper Arlington on Tree of Life's equal protection and free exercise claims and held that Tree of Life had abandoned its state-law claim. *Tree of Life II*, 823 F.3d at 373. Prior to the second appeal, the district court also granted summary judgment in favor of Upper Arlington on Tree of Life's claims under the First Amendment's Establishment, Free Speech, and Assembly Clauses and the Fourteenth Amendment's Due Process Clause. T*ree of Life Christian Schools v. City of Upper Arlington*, 16 F. Supp. 3d 883, 902–04 (S.D. Ohio 2014). It further concluded that Tree of Life had abandoned its RLUIPA substantial-burden claim. *Id.* at 894 n.4.

This court did not address those rulings during the second appeal. *See Tree of Life II*, 823 F.3d at 373. Nor did Tree of Life argue in its brief in support of its motion for final judgment or in its briefing for this appeal that any of those claims remain pending. Among those abandoned claims is any challenge to the City's determination that Tree of Life is neither a church nor a place of worship, so the dissent's sua sponte resurrection of that argument strikes us as unwarranted. Dissenting Op. at 36–38. Accordingly, the only remaining claim in this lawsuit is the RLUIPA equal terms claim.

2. *Mootness*

During the second remand, the district court took the unusual step of sua sponte enjoining Upper

Arlington from amending the Development Ordinance to once again permit daycares in the office district. *Tree of Life Christian Sch. v. City of Upper Arlington*, No. 2:11-cv-09, 2017 WL 4563897, at *10, *16 (S.D. Ohio Oct. 13, 2017). Upper Arlington argues that the permanent injunction moots Tree of Life's claim insofar as it depends on daycares as a comparator. But Tree of Life persuasively answers that the injunction does not moot its claim because, in addition to equitable relief, the school also seeks compensatory damages for the harm that it has allegedly suffered on account of Upper Arlington's refusal to accommodate the proposed school. *See Brandywine, Inc. v. City of Richmond*, 359 F.3d 830, 835–36 (6th Cir. 2004) (holding that a zoning amendment mooted the plaintiffs' claims for declaratory and injunctive relief, but not their claim for monetary damages).

Upper Arlington next contends that Tree of Life abandoned its money-damages claim by failing to present any evidence or argument on that issue below. The litigation up to this point, however, has focused exclusively on the issue of liability. And this court's second remand directed the district court to focus solely on whether comparators exist that Upper Arlington treats more favorably than Tree of Life. *Tree of Life II*, 823 F.3d at 372. Tree of Life thus cannot be faulted for failing to introduce evidence and press its money-damages claim when the litigation agenda set by both this court and the district court has been directed entirely to the issue of Upper Arlington's alleged liability under RLUIPA. Accordingly, Tree of Life has not abandoned its

money-damages claim; nor did the district court's permanent injunction moot it.

3. *Whether Tree of Life has made out a prima facie case of a RLUIPA equal terms violation was not settled by the previous appeal.*

Tree of Life in turn argues that this court has already held that the school has made out a prima facie case of an equal terms violation under RLUIPA. We disagree. This court remanded the case to the district court because the City had failed to meet its burden at the summary judgment stage of showing that none of the permitted uses in the office district would generate less revenue for Upper Arlington than Tree of Life would. *Tree of Life II*, 823 F.3d at 371 (holding that Tree of Life's allegations in its verified complaint "create a genuine issue of fact as to whether the government treats more favorably assemblies or institutions similarly situated with respect to maximizing revenue, unless the government can demonstrate that no assemblies or institutions *could be* similarly situated" (emphasis in original)). In other words, because Upper Arlington did not refute the possibility of a viable comparator at the summary judgment stage, the remand afforded Tree of Life another opportunity put one forward.

4. *The district court was not bound by its preliminary injunction conclusion that Tree of Life was likely to succeed on the merits of its RLUIPA equal terms claim.*

When the district court denied Tree of Life's motion for a preliminary injunction, it concluded that the school was likely to succeed on the merits of its

RLUIPA equal terms claim, although it noted that "the likelihood of success is not overwhelming." Tree of Life argues that the court's decision at the preliminary injunction stage predetermined that the school had made out a prima facie case, and therefore that the court erred when it subsequently concluded otherwise.

As Upper Arlington points out, however, "findings of fact and conclusions of law made by a district court in granting a preliminary injunction are not binding at a trial on the merits." *United States v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004). And here, the district court *denied* Tree of Life's request for a preliminary injunction. The court therefore properly evaluated on a clean slate whether Tree of Life had presented a prima facie case after this court's second remand.

5. *The Development Ordinance is facially neutral.*

In response to our questioning at oral argument, counsel for Tree of Life contended that the school has not abandoned its position that the school constitutes a place of worship. This contention, however, will not be considered on appeal since it was not raised as an issue in Tree of Life's briefs. *See United States v. Johnson*, 440 F.3d 832, 845–46 (6th Cir. 2006) ("[A]n appellant abandons all issues not raised and argued in its initial brief on appeal." (citation omitted)).

Moreover, the argument is pretermitted because this court has already held that the Development Ordinance is facially neutral and thus not subject to a facial challenge. *Tree of Life II*, 823 F.3d at 373. That determination was not simply an "off-hand

comment" as characterized by the dissent, Dissenting Op. at 37 n.5, so the law-of-the-case doctrine controls. *See Moody v. Mich. Gaming Control Bd.*, 871 F.3d 420, 425–26 (6th Cir. 2017) (holding that, under the law-of-the-case doctrine, "we generally will not, for prudential reasons, consider issues addressed by a prior panel" absent "exceptional circumstances"). Because no such circumstances are present here, the dissent's "facial inequality" argument, Dissenting Op. at 35–38, is foreclosed.

C. RLUIPA's equal terms provision

We now turn to the central issue before us. In its opinion in the second appeal, this court noted a disagreement among the circuits about how RLUIPA's equal terms provision should be applied. *Tree of Life II*, 823 F.3d at 369–70. The court declined, however, to "definitively choose among the various tests used by other circuits." *Id.* at 370. Doing so was not necessary because the court held that a genuine dispute of material fact precluded summary judgment no matter which test the court applied. *Id.* Because Tree of Life now appeals a final judgment, we must decide upon a framework for analyzing the school's claim. Fortunately, the differences among our sister circuits' approaches are less substantial than they appear to be at first glance.

1. *A comparator must be similarly situated to the plaintiff with regard to the regulation at issue.*

The Eleventh Circuit has determined that a prima facie case under RLUIPA's equal terms provision requires proof that "(1) the plaintiff [is] a religious assembly or institution, (2) subject to a land use

regulation, that (3) treats the [plaintiff] on less than equal terms, [compared] with (4) a nonreligious assembly or institution." *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1307–08 (11th Cir. 2006). Because this is a clear and persuasive statement of the equal term provision's statutory requirements, we adopt *Primera Iglesia*'s statement of the elements. Only the third and fourth elements are at issue in this case. The key disagreement among the circuits is about what constitutes a proper comparator for the purpose of analyzing these elements.

"In matters of statutory interpretation, we look first to the text and, if the meaning of the language is plain, then 'the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Wysocki v. Int'l Bus. Mach. Corp.*, 607 F.3d 1102, 1106 (6th Cir. 2010) (quoting *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004)). But where a statute's text is ambiguous, we may consider "persuasive authority" such as "other statutes, interpretations by other courts, legislative history, policy rationales, and the context in which the statute was passed" in interpreting a disputed term. *In re Carter*, 553 F.3d 979, 986 (6th Cir. 2009).

RLUIPA's equal terms provision prohibits governments from "impos[ing] or implement[ing] 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(b)(1). This language provides no guideposts for what Congress meant by the term "equal." As the Seventh Circuit recognized in *River of*

Life Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367 (7th Cir. 2010) (en banc), "'equality' is a complex concept. The fact that two land uses share a dictionary definition doesn't make them 'equal' within the meaning of a statute." *Id.* at 371. Specifically, "equality," in the "mathematical or scientific" sense of the word, "signifies . . . equivalence or identity," whereas in other contexts, the term connotes a "proper relation to relevant concerns." *Id.* Because the statute does not specify the basis upon which religious and nonreligious land uses should be compared, we must seek to ascertain the type of comparison that Congress intended from other tools of statutory interpretation.

Did Congress intend for the statute to require municipalities to extend preferential treatment to religious entities? We think not. Such a requirement would be inconsistent with any definition of the term "equal," and it would likely run afoul of the First Amendment's Establishment Clause. See *id.* at 370 (noting that an interpretation of the equal terms provision that is "*too* friendly to religious land uses" might "violat[e] the First Amendment's prohibition against establishment of religion by discriminating in favor of religious land uses" (emphasis in original)).

At the other end of the policy spectrum, one could plausibly read the equal terms provision *in pari materia* with the Fourteenth Amendment's Equal Protection Clause. A plaintiff bringing an equal protection claim must be "similarly situated" to a comparator in "all relevant respects." *Paterek v. Village of Armada*, 801 F.3d 630, 650 (6th Cir. 2015) (quoting *United States v. Green*, 654 F.3d 637, 651 (6th Cir. 2011)). Tree of Life's claim would clearly fail

under such a framework because the Development Ordinance excludes both secular and religious schools from the office district. Indeed, the district court held that Tree of Life's equal protection claim failed for this very reason. *Tree of Life Christian Schools v. City of Upper Arlington*, 16 F. Supp. 3d 883, 900-01 (S.D. Ohio 2014).

Such a reading, moreover, would render the equal terms provision superfluous. Accordingly, no circuit employs such a cramped reading of the equal terms provision. *See, e.g., Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 266 (3d Cir. 2007) ("There is no need . . . for the religious institution to show that there exists a secular comparator that performs the same functions."); *Vision Church v. Village of Long Grove*, 468 F.3d 975, 1003 (7th Cir. 2006) ("[U]nder RLUIPA['s] [equal terms provision,] a plaintiff need not demonstrate disparate treatment between two institutions similarly situated in all relevant respects, as required under equal protection jurisdiction . . . ."); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1229 (11th Cir. 2004) ("[W]hile [RLUIPA's equal terms provision] has the 'feel' of an equal protection law, it lacks the 'similarly situated' requirement usually found in equal protection analysis.").

All of the circuits that have analyzed this issue have therefore taken a broader approach, with most holding that a comparator for an equal terms claim must be similarly situated *with regard to the regulation at issue. See Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1173 (9th Cir. 2011); *Elijah Group, Inc. v. City of Leon Valley*, 643 F.3d 419, 424 (5th Cir. 2011); *River of Life*,

611 F.3d at 371; *Lighthouse Inst.*, 510 F.3d at 266. The Third Circuit's approach, which compares entities in light of "the regulatory purpose," *Lighthouse Inst.*, 510 F.3d at 266 (emphasis omitted), differs slightly from the Seventh and Ninth Circuits' tests, both of which conduct the comparison in light of "accepted zoning criteria" advanced by the regulation, *Centro Familiar*, 651 F.3d at 1173; *River of Life*, 611 F.3d at 371. And the Fifth Circuit's approach, which evaluates comparators by reference to "the ordinance itself and the criteria by which it treats institutions differently," probably hews closer to the Third Circuit's approach than to the Seventh and Ninth Circuits' approach. See *Elijah Group*, 643 F.3d at 424.

Although it agreed with the general thrust of the Third Circuit's approach, the Seventh Circuit was concerned that a focus on "regulatory purpose" might invite jurisdictions to justify discrimination with sham purposes. *See River of Life*, 611 F.3d at 371. "'Purpose' is subjective and manipulable," the Seventh Circuit explained, "so asking about 'regulatory purpose' might result in giving local officials a free hand in answering the question 'equal with respect to what?' 'Regulatory criteria' are objective . . . ." *Id.*

The Seventh Circuit, however, offered no example of a regulatory purpose that a jurisdiction might assert as the basis for a zoning regulation that would not also be an accepted zoning criterion. And to the extent that municipalities might assert sham purposes to justify religious discrimination, that concern is addressed by the fact that all government classifications must satisfy rational-basis review. *See City of Cleburne v. Cleburne Living Center*, 473 U.S.

432, 440 (1985) ("[L]egislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

We thus conclude that the Third, Seventh, and Ninth Circuits' RLUIPA decisions cited above represent the majority view, with their respective tests essentially the same. Our only concern is that neither the Seventh Circuit nor the Ninth Circuit directly explain what the phrase *accepted* zoning criteria actually means. In the context of their analyses, however, the word "accepted" appears to connote lawful or proper zoning criteria as opposed to unlawful ones. With this in mind, we believe that the phrase "legitimate zoning criteria" best captures the idea that the comparison required by RLUIPA's equal terms provision is to be conducted with regard to the legitimate zoning criteria set forth in the municipal ordinance in question.

The Eleventh Circuit, in contrast, strays from the majority view, at least when it comes to facial challenges to land-use regulations, by paying no heed to the regulatory purposes behind zoning policies. In *Midrash Sephardi*, the court held that "the relevant 'natural perimeter' for consideration with respect to RLUIPA's prohibition is the category of 'assemblies or institutions.'" 366 F.3d at 1230. Under this test, if a zoning ordinance permits a particular secular assembly or institution—say, a private club—within a zone, an excluded religious assembly or institution could invoke RLUIPA to secure an exemption from the ordinance, but an excluded secular assembly or institution—say, a union hall—could not. *See id.* at 1231 (holding that a municipality's allowance for

private clubs within a zone meant that a house of worship must be permitted as well). The Seventh Circuit has criticized this test as conferring preferential treatment to religious assemblies and institutions. *River of Life*, 611 F.3d at 370–71.

Regardless, the Eleventh Circuit's unique and problematic test appears to apply only when the challenged regulation is discriminatory on its face. The ordinance at issue in *Midrash Sephardi* facially discriminated against religious institutions because it prohibited houses of worship in the town's business district and, unlike with other proscribed uses, barred such entities from seeking special-use exceptions. 366 F.3d at 1219 & n.3. In *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295 (11th Cir. 2006), however, the Eleventh Circuit clarified that when considering facially neutral land-use regulations, a "plaintiff bringing an as applied Equal Terms challenge must present evidence that a *similarly situated* nonreligious comparator received differential treatment under the challenged regulation." *Id*. at 1311 & n.11 (emphasis in original). And in *Konikov v. Orange County*, 410 F.3d 1317 (11th Cir. 2005) (per curiam), the Eleventh Circuit evaluated whether a comparator was similarly situated to a house of worship by considering whether permitted land uses had a "comparable community impact." *Id*. at 1327. Thus, when it comes to facially neutral land-use regulations, like the one at issue here, the Eleventh Circuit also requires that comparators be similarly situated with regard to the regulation at issue.

The Tenth Circuit, on the other hand, is an outlier even when it comes to facially neutral land-use

regulations. Rather than evaluating whether a comparator is similarly situated to a religious entity by reference to the land-use regulation's purpose, the Tenth Circuit weighs whether the uses, despite not being "identical," exhibit "substantial similarities" that would allow "a reasonable jury to conclude that [the entities] were similarly situated." *Rocky Mountain Christian Church v. Board of Cty. Comm'rs of Boulder Cty.*, 613 F.3d 1229, 1236–38 (10th Cir. 2010).

This test, in our opinion, lacks the clear guideposts that the other circuits have adopted for examining whether a comparator is similarly situated to a religious entity. Because the test is not couched in terms of the land-use regulation's purpose, a court applying it must determine which differences between entities are salient and which are insubstantial. The test therefore introduces significant subjectivity into the application of the equal terms provision. Accordingly, we adopt the majority approach, as discussed in the Third, Seventh, and Ninth Circuits' cases set forth above, and reject the Tenth Circuit's test.

In doing so, we note the dissent's critique that we (and all the other circuit courts that have analyzed the "equal terms" issue) have improperly imported the words "similarly situated" into the text of RLUIPA. Dissenting Op. at 29 & n.1. We respectfully disagree. The concept of "similarly situated with regard to legitimate zoning criteria" is simply the most reasonable interpretation of the undefined statutory words "equal terms." And interpreting ambiguous statutory language is a core function of the courts. *See United States ex rel. Jones v. Horizon*

Healthcare Corp., 160 F.3d 326, 336 (6th Cir. 1998) ("Interpreting ambiguous statutory language, of course, is the bread-and-butter work of the federal courts."); *cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

2. *The plaintiff bears the burden of making out a prima facie case.*

At times, Tree of Life seems to argue that Upper Arlington bears the burden of demonstrating that no conceivable permissible use in the office district is comparable to Tree of Life's proposed use. Contrary to Tree of Life's argument, however, RLUIPA's text makes clear that the plaintiff bears the initial burden of making out a prima facie case, and only if that precondition is satisfied does the burden of persuasion shift to the government. *See* 42 U.S.C. § 2000cc-2(b) ("If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of [RLUIPA's land-use provisions], the government shall bear the burden of persuasion on any element of the claim . . .").

Moreover, once a RLUIPA plaintiff makes out a prima facie case, the litigation battle must be waged on the terms set by the plaintiff. In other words, the government bears the burden to persuade the factfinder that the bases on which the plaintiff established its prima facie case are not supported by a preponderance of the evidence. *See id.* (setting forth RLUIPA's burden-shifting framework). But the

statute does not impose upon the government the additional burden of conjuring up and disproving additional bases not put forward by the plaintiff that might, had they been offered, support the claim. *See id.*

Tree of Life's suggestion to the contrary stems from this court's statement in the second appeal that the school's allegations "create a genuine issue of fact as to whether the government treats more favorably assemblies or institutions similarly situated with respect to maximizing revenue, unless the government can demonstrate that no assemblies or institutions *could* be similarly situated." *Tree of Life II*, 823 F.3d at 371 (emphasis in original). But the court made this remark in the context of evaluating whether Upper Arlington had produced sufficient evidence to justify a grant of summary judgment in its favor; the court was not dealing with the initial burden that Tree of Life bears in making out a prima facie case.

D. Upper Arlington did not violate RLUIPA's equal terms provision.

Tree of Life argues that the asserted regulatory purpose for the exclusion of the school from the office district—revenue maximization—is not a legitimate zoning criterion, and that Upper Arlington's assertion of that regulatory purpose is pretextual. In addition, the school puts forward nonprofit daycares, partially used offices, and publishers as comparators that are similarly situated to Tree of Life in their minimal capacity to generate revenue. We will address each of these arguments in turn.

1. Revenue maximization is a legitimate regulatory purpose.

As mentioned above, the Seventh Circuit added the "accepted zoning criteria" gloss to the various tests put forward for evaluating equal terms claims. *River of Life*, 611 F.3d at 371 (emphasis omitted). That court specifically identified "generating municipal revenue" as a legitimate regulatory purpose that can be pursued by separating residential and commercial uses within a jurisdiction. *Id*. at 373. And the court held that the ordinance at issue there did not violate the equal terms provision because the city "created a commercial district that excludes churches *along with* community centers, meeting halls, and libraries because these secular assemblies, like churches, do not generate significant taxable revenue." *Id*. (emphasis in original). Tree of Life's argument is thus in conflict with the decision that adopted the "accepted zoning criteria" standard for its equal terms test.

In support of its position, Tree of Life cites cases that have rejected revenue maximization as a *compelling state interest* in the context of challenges under RLUIPA's substantial-burden prong. *See Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1071 (9th Cir. 2011); *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1093 (C.D. Ca. 2003), *rev'd and remanded on other grounds*, 197 F. App'x 718 (9th Cir. 2006); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1227–28 (C.D. Cal. 2002); *see also* 42 U.S.C. § 2000cc(a)(1) ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the

religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest."). But neither the Seventh nor Ninth Circuit has held that a regulation must further a compelling state interest in order to constitute an accepted zoning criterion. *See Centro Familiar Cristiana Buenas Nuevas*, 651 F.3d 1163, 1171–73 (9th Cir. 2011); *River of Life*, 611 F.3d at 371. Nor has Tree of Life cited any authority that supports such a proposition.

Tree of Life also cites several state-court cases that express skepticism about revenue generation as a proper regulatory purpose in certain contexts. *See Griswold v. City of Homer*, 925 P.2d 1015, 1023 n.9 (Alaska 1996); *Bossman v. Village of Riverton*, 684 N.E.2d 427, 432 (Ill. App. Ct. 1997); *Oakwood at Madison, Inc. v. Township of Madison*, 283 A.2d 353, 357 (N.J. Super. Ct. Law Div. 1971). But other state courts—including higher courts in some of the very states whose lower courts Tree of Life cites—have approved of revenue maximization through zoning policy. *See Consol. Gov't of Columbus v. Barwick*, 549 S.E.2d 73, 75 (Ga. 2001) ("The City's stated interest in attracting revenue to the zoning district . . . constitutes a 'legitimate end of government' by ensuring the prosperity of the City by attracting business to the [zoning district]" (quoting *Craven v. Lowndes Cty. Hosp. Auth.*, 473 S.E.2d 308, 310 (Ga. 1993))); *Napleton v. Village of Hinsdale*, 891 N.E.2d 839, 854 (Ill. 2008) ("It was reasonable and legitimate

for Hinsdale to conclude that the continued vitality of its business districts required an appropriate balance between businesses that provide sales tax revenue and those that do not . . . ."); *Ward v. Montgomery Twp.*, 147 A.2d 248, 251–52 (N.J. 1959) (holding that a township's securement of "a new source of income [that] would serve the general economic welfare . . . through land use regulation will not warrant judicial condemnation as long as it represents an otherwise valid exercise of the statutory zoning authority").

Moreover, zoning is generally thought to be an area of "traditional state authority." *Rapanos v. United States*, 547 U.S. 715, 738 (2006). We are accordingly loath to reject revenue maximization as a legitimate zoning criterion on the basis of a handful of state-court decisions that touch upon the issue. Providing such a national answer to a traditionally state and local issue runs counter to the principles of federalism.

2. Upper Arlington's assertion of revenue maximization as the purpose of the Development Ordinance is not pretextual.

Tree of Life next contends that revenue maximization is a pretextual explanation for the exclusion of schools from the office district because the Development Ordinance permits nonprofits in the district from which the city cannot collect property taxes or entity-level income taxes. *See* Ohio Rev. Code §§ 5709.07, .12; Upper Arlington, Ohio, Revenue & Fin. Code § 203.02(C)(12)(d), https://library.municode.com/oh/upper_arlington/codes/code_of_ordinances?nodeI d=PT2REFICO_ CH203INTAEFJA12016. But

Upper Arlington need not tailor its zoning regulations to squeeze every last dollar out of the permitted uses within the office district to credibly claim that it has structured the Development Ordinance to generate more revenue than would be generated without the restrictions. Moreover, Upper Arlington's 2001 Master Plan specifically identified the generation of personal-income-tax revenue as a zoning goal:

> Income taxes are an important source of Upper Arlington's revenues and every effort will be made to broaden and expand the City's employment base in order to increase these tax revenues. . . . Encouraging development that helps attract well-paying jobs will enhance the income base. These jobs will in turn generate a higher level of income tax revenues, some of which can be targeted for regular maintenance of the City's infrastructure.

Because Upper Arlington is able to collect personal income taxes from a nonprofit's employees, the Development Ordinance's allowance for nonprofit entities in the office district does not contradict the asserted purpose of the regulation. Nor does Tree of Life argue that the Development Ordinance has been ineffective in generating revenue for the City. As previously noted, the prior occupant of the Property, AOL/Time Warner, accounted for 29% of all personal-income-tax revenue collected by the City in 2001. Accordingly, Tree of Life cannot credibly argue that the asserted purpose of the Development Ordinance is pretextual.

3. *Daycares are the only potentially valid comparator put forward by Tree of Life.*

Tree of Life put forward only daycares and partially used offices as comparators in its brief in support of its motion for final judgment. On appeal, the school also adds publishers as comparators and briefly mentions that outpatient-surgery centers are comparable. But the school's expert witnesses limited their analyses of potential comparators to daycares. Without any evidence that any other land uses generate less revenue for the City than would Tree of Life, they cannot be the foundation of a prima facie case.

As for partially used offices, the district court persuasively explained why they are not an acceptable comparator:

> [I]f a partial use is accepted as a valid comparator, then there can never be a case in which a city with the goal of maximizing revenue could ever prevail. A city can set forth the regulatory purpose, but a city cannot demand full use of a property to realize that purpose. Therefore, for purposes of the analysis of similar comparators, the Court finds it should look to the comparison of the full use of one assembly or institution compared to the full use of another type of assembly or institution.

Tree of Life Christian Sch. v. City of Upper Arlington, No. 2:11-cv-09, 2017 WL 4563897, at *14 (S.D. Ohio Oct. 13, 2017) (citations to the record and internal quotation marks omitted). Tree of Life argues that

because the Development Ordinance does not set a floor for the number of workers that a user of land can employ, partially used offices are valid comparators.

But this argument could be used to undercut almost any regulatory purpose behind a land-use ordinance. All zoning decisions require the regulatory authority to project the effects that a particular land use will have on the municipality. A municipality seeking to maximize revenue must project the type of labor force that a particular land use will attract. Similarly, a municipality that is concerned about traffic congestion and noise pollution must project how each particular land use will impact those conditions.

Irrespective of the regulatory goal, however, a municipality cannot guarantee that its predictions will be borne out once its policies go into effect. But municipalities cannot be faulted for zoning decisions that utilize the best data available to make good-faith predictions in the face of such inherent uncertainties. The assumption that, as a general matter, entities within an office district will operate at full capacity strikes us as an appropriate good-faith prediction.

Moreover, Tree of Life has offered no credible explanation for why an entity that requires only a small amount of square footage for its operation would choose to situate itself in (and pay for) a 254,000-square-foot building on a 16-acre tract of land. Tree of Life's only evidence that such a use might occur in the office district is that AOL/Time Warner used the Property at partial capacity as it wound down its operations there. But this short-term

situation is clearly distinguishable from the City's long-term zoning goals.

We therefore conclude that the district court correctly assumed for the purpose of its analysis that regulators can reasonably contemplate full usage of property when making zoning decisions. Accordingly, daycares are the only potentially valid comparator that Tree of Life has put forward.

4. ***Tree of Life presented no evidence suggesting that nonprofit daycares are similarly situated to its proposed school in terms of their capacity to generate revenue.***

Tree of Life retained two expert witnesses to make its case that nonprofit daycares are similarly situated to its proposed school in terms of their revenue-generating ability. Robert Siegel is an early-care and education consultant. Tree of Life asked him to estimate the number of employees required to operate a daycare located on the Property and the payroll that such a workforce would generate. The largest daycare with which Siegel was familiar serves 600 children. Accordingly, he based his estimates on the assumption that a daycare of that size would be housed at the office building on the Property. Siegel estimated that such a daycare would require 35,000 square feet of operating space.

He also determined that 170,000 square feet of the building on the Property is usable as a daycare. Thus, roughly 20% of the usable space on the Property would be devoted to the daycare that Siegel envisioned. Siegel noted, however, that the excess 135,000 square feet of usable space "opens [up] all

types of possibilities that would stabilize the [daycare], greatly improve program quality, and offer a marketplace advantage." He listed several of these ideas, including a "gymnasium, indoor playground, several larger multi-purpose rooms, a nurses' office, parent lounge, cafeteria, teacher's only area, nursing room, additional conferencing space for parent meetings, or a training room." Siegel did not, however, offer any estimate for how much of the excess space those amenities might occupy.

According to Siegel, a workforce of 159 people would be needed to care for 600 children. And this estimate does not appear to account for staffing of any of the "possibilities" that Siegel envisioned for the excess 135,000 square feet of usable space because his budget chart does not list employees who would staff those areas. Siegel estimated that a workforce of 159 people would generate an annual payroll of $3,154,470.

Tree of Life retained its second expert witness, a business and financial consultant named Rebekah Smith, for the purpose of calculating the amount of income-tax revenue that various land uses on the Property would generate for Upper Arlington. Specifically, she estimated the amount of income-tax revenue that Tree of Life's proposed school and Siegel's hypothetical daycare would generate. In doing so, she relied on the estimates of Tree of Life Superintendent Todd Marrah, who projected that the consolidated campus would serve 1,200 students with a workforce of 275 staff members, generating an annual payroll of $5,000,000, as well as Siegel's estimates noted above.

Smith estimated, based on those numbers, that Tree of Life employees would pay $125,000 annually in income taxes to the City. By comparison, she estimated that Siegel's hypothetical daycare would yield $83,987 in annual personal-income-tax revenue if operated as a for-profit entity and $78,862 if operated as a nonprofit entity. Smith concluded, based on those figures, that "Upper Arlington's tax benefit from the Tree of Life school operations would be better as compared" to Siegel's hypothetical daycare.

This analysis, however, is deeply flawed. It glosses over the partial use of the Property that Siegel's estimates reflect. Tree of Life paid AOL/Time Warner $26 per square foot for the 254,000-square-foot office building. One is hard-pressed to believe that a prudent operator of a daycare would pay approximately $5.7 million dollars for 219,000 square feet of excess space (254,000 square feet of total space minus 35,000 square feet for the hypothetical daycare) that would not be used as a daycare. (219,000 square feet of unused space x $26 per square foot ≈ $5.7 million).

The far more likely scenario is that the vast remainder of the office building would not remain vacant, but would be utilized by the landowner for productive uses other than the daycare. This would result in the Property as a whole cumulatively generating far more revenue for the City than Tree of Life would generate by itself. So an accurate picture of relative revenue-generating capacities cannot be ascertained simply by comparing the absolute amount of income-tax revenue that Tree of Life's full use of the Property would generate to the amount that

would be yielded by the 35,000 square feet contemplated for Siegel's hypothetical daycare.

Upper Arlington's expert witness, Catherine Armstrong, provides a far superior basis for comparing the two entities. Armstrong, the City's former Director of Finance and Administrative Services, used actual data from the City to show how much tax revenue is yielded by various land uses that are permitted in the office district versus that produced by daycares. Rather than presenting this data in absolute terms, as Smith did, Armstrong calculated the amount of annual revenue per square foot generated by the various entities that she analyzed. This approach allows for an apples-to-apples comparison between entities of different sizes. Armstrong's data show that an existing for-profit daycare generates $4.77 in annual revenue per square foot for the City as compared to $0.62 per square foot that Tree of Life would generate. All other uses that she considered would generate revenue at even higher rates.

Not unreasonably, Tree of Life criticizes Armstrong's analysis because the daycare on which she based her calculations was a for-profit entity that paid property taxes and entity-level income taxes, whereas Tree of Life, as a nonprofit, would not pay either type of tax. But by combining the data in the reports generated by Siegel and Smith with the methodology used by Armstrong, an accurate comparison is possible.

As mentioned previously, Siegel's payroll estimate was based on 35,000 square feet of used space. Smith estimated that a payroll of the size estimated by

Siegel would yield $78,862 in annual personal-income-tax revenue for the City from employees working at a nonprofit daycare. Those figures equate to $2.25 in annual revenue per square foot of used space, which is still more than three times the amount of revenue per square foot that Tree of Life would generate. That calculation is roughly the same as the amount of annual revenue per square foot that the daycare analyzed by Armstrong provides to Upper Arlington if one excludes the property taxes that the daycare pays ($9,300 in income taxes ÷ 3,919 square feet = $2.37 per square foot).

In sum, Tree of Life has not established a prima facie case under RLUIPA's equal terms provision because it has failed to identify a permitted land use that would generate a comparably small amount of revenue for the City. Even the largest daycare with which Tree of Life's own expert witness is familiar would use only 35,000 square feet of the existing 254,000 square feet of available space in the office building on the Property. The application of Armstrong's methodology to Siegel's and Smith's data leads to the inexorable conclusion that daycares generate far more revenue on a per-square-foot basis than Tree of Life would. Accordingly, the school's equal terms claim fails.

III. CONCLUSION

For all the reasons set forth above, we **AFFIRM** the judgment of the district court.

DISSENT

THAPAR, Circuit Judge, dissenting. Since the founding of this nation, religious groups have been able to "sit in safety under [their] own vine and figtree, [with] none to make [them] afraid." Letter from George Washington to the Hebrew Congregation in Newport, R.I. (Aug. 18, 1790). In keeping with that promise over two hundred years later, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA) to protect religious groups from discriminatory zoning laws. But the courts have forgotten this country's sacred vow and failed to give RLUIPA the effect its written text demands. Now our circuit does the same. I respectfully dissent.

I.

"[A] page of history is worth a volume of logic." *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). And the history of exclusionary zoning is sordid. Initially, the practice came about when local officials sought to divide land into districts with specific uses. But "[w]hat began as a means of improving the blighted physical environment . . . became a mechanism for protecting property values and excluding the undesirables." Christopher Silver, *The Racial Origins of Zoning in American Cities, in Urban Planning and the African American Community: In the Shadows* (June Manning Thomas & Marsha Ritzdorf eds., Sage Publications 1997) (internal quotation marks omitted) (quoting noted urban planner Yale Rabin). At first, municipalities passed

zoning codes that discriminated on their face. *Buchanan v. Warley*, 245 U.S. 60, 70–71 (1917). But the Supreme Court struck those down. *Id*. at 82. So local officials employed more covert methods in the hope of evading scrutiny. Rather than saying "no blacks allowed," zoning ordinances instead imposed minimum-size house requirements and excluded mobile homes and multiple-dwelling units in certain districts. Andrew H. Whittemore, *The Experience of Racial and Ethnic Minorities with Zoning in the United States*, 32 J. of Planning Lit. 16, 19 (2017). These ordinances effectively kept racial minorities out of "whites-only" neighborhoods. *See id*. But because municipalities cloaked these ordinances with neutral, bureaucratic concerns—such as noise, traffic, and taxable income—the courts largely upheld them. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926) (concluding that a municipality could exclude apartment buildings because they would destroy the "residential character of the neighborhood").

So in 1968, Congress stepped in and passed the Fair Housing Act to prevent municipalities from basing land-use laws on race, national origin, color, or familial status. 42 U.S.C. § 3604; *see also Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015) (holding that disparate-impact claims are cognizable under the Fair Housing Act). Courts could no longer countenance neutral language masking discriminatory zoning codes.

Within a matter of years, however, other discriminatory zoning practices surfaced—this time aimed at religious groups. Sometimes the

discrimination was overt. For example, when a Jewish group in Ohio submitted a land-use proposal, an objector at the subsequent zoning hearing told them: "Hitler should have killed more of you." H.R. Rep. No. 106-219, at 23 (1999). Similarly, a Pentecostal group that applied for a zoning permit heard in response: "Let's keep these God damned Pentecostals out of here." *Id*. Other cases featured more subtle bias. As they had done with racial minorities, municipalities clothed their objections to religious organizations with the same ordinary concerns: traffic, noise, and lost tax revenue. 146 Cong. Rec. 16,698 (2000) (joint statement of Senators Orrin Hatch and Ted Kennedy noting that "often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or not consistent with the city's land use plan'") (hereinafter Joint Statement). Instead of saying "no Muslims allowed," city planners complained of the traffic on Fridays when Muslims gathered to pray. Emma Green, *The Quiet Religious-Freedom Fight That Is Remaking America, The Atlantic* (Nov. 5, 2017), https://www.theatlantic.com/politics/archive/2017/11/rluipa/543504/; *see also* H.R. Rep. No. 106-219, at 23 ("[L]and-use regulators often refuse permits for Orthodox synagogues because they do not have as many parking spaces as the city requires for the number of seats.").

These mundane justifications were as effective in excluding religious groups as they were racial minorities. An ordinance based on traffic, for instance, prohibited churches because they generated too much traffic for a residential area but not enough traffic for a commercial area. Joint Statement at

16,698. As a result, "[z]oning codes frequently exclude[d] churches in places where they permit[ted] theaters, meeting halls, and other places where large groups of people assemble for secular purposes." *Id*. And when religious assemblies challenged these ordinances, the courts offered no relief, often upholding the laws because the government had "good reason" to exclude the religious. *See, e.g., Christian Gospel Church, Inc. v. City of San Francisco*, 896 F.2d 1221, 1223–26 (9th Cir. 1990) (upholding a zoning denial for a church); *Grosz v. City of Miami Beach*, 721 F.2d 729, 731–32, 741 (11th Cir. 1983) (upholding a zoning law that prohibited "organized, publicly attended religious services"); *see also First Assembly of God of Naples, Fla., Inc. v. Collier Cty.*, 20 F.3d 419, 420, 424 (11th Cir. 1994) (upholding zoning ordinance that permitted a church but denied its attached homeless shelter).

Recognizing these problems, Congress stepped in once more and unanimously enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA) to prevent municipalities from excluding religious assemblies or institutions—either overtly or covertly. Joint Statement at 16,698 ("Churches . . . are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation."). In doing so, Congress extensively documented the discrimination that RLUIPA targeted. *See River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 378–80 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) (describing the history behind RLUIPA); Sarah Keeton Campbell, Note, *Restoring RLUIPA's Equal Terms Provision*, 58 Duke L.J. 1071, 1079–85

(2009) (discussing the legislative record behind RLUIPA). Congress's attempt to address religious discrimination, however, has not been as effective. That fault lies not with Congress, but with the courts, which have added requirements into RLUIPA that prevent many religious groups from seeking the shelter that Congress sought to provide. Today, our circuit joins a host of others that have improperly written new demands into the statute's "Equal Terms" provision—to which I now turn.

II.

When interpreting a statute, we always start with its terms. *E.g., Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1658 (2018). And the Equal Terms provision is plain: "[n]o 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(b)(1). The statute thus requires a plaintiff bringing a claim to prove four elements: (1) the plaintiff is a religious assembly or institution, (2) subject to a land use regulation, (3) that, compared with a nonreligious assembly or institution, (4) treats the plaintiff on less than equal terms. *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cty.*, 450 F.3d 1295, 1307 (11th Cir. 2006). Because, as in this case, the first two elements are usually easily proven, I elaborate only on the third and fourth.

a. Nonreligious Assemblies or Institutions

All Equal Terms cases involve a comparison between a religious entity and a nonreligious entity. And Congress selected those entities for us:

"assemblies" and "institutions." 42 U.S.C. § 2000cc(b)(1); *see Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230–31 (11th Cir. 2004). But what are "assemblies" and "institutions"? Because the statute does not define those terms, courts must look to their natural and ordinary meaning. *FDIC v. Meyer*, 510 U.S. 471, 476 (1994); *Midrash Sephardi*, 366 F.3d at 1230; *see generally* Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417 (1899).

An "assembly" is "[a] group of persons gathered together for a common reason." *American Heritage Dictionary of the English Language* (4th ed. 2000); *see also Webster's Encyclopedic Unabridged Dictionary of the English Language* (1996) (defining assembly as "a group of persons gathered together, usually for a particular purpose, whether religious, political, educational, or social"). And that group of people typically has a degree of "affinity, organization, and unity around [that] common purpose." *River of Life*, 611 F.3d at 390 (Sykes, J., dissenting). Take a health club. People gather there for "exercise and athletic classes of various kinds, as well as sports and social-club meetings and team competitions." *Id*.

An "institution," on the other hand, is "[a]n established organization or foundation, especially one dedicated to education, public service, or culture." *American Heritage Dictionary of the English Language* (4th ed. 2000); *see also Black's Law Dictionary* (7th ed. 1999) (defining "institution" as "[a]n established organization, esp. one of a public character, such as a facility for the treatment of mentally disabled persons"). Institutions differ from assemblies, then, in their degree of formality and the

nature of their mission—serving the common good. Your local museum, legal aid services, or even the Girl Scout headquarters would all count as institutions.

By using such unambiguous and well-understood words, Congress made our job easy. Nevertheless, some courts have added a gloss onto this part of the statute. Rather than simply asking whether a nonreligious entity qualifies as an "assembly" or "institution," they have required plaintiffs to further show that the assembly or institution is also "similarly situated.[1] *Third Church of Christ*, 626 F.3d at 668; *River of Life*, 611 F.3d at 371; *Lighthouse Inst.*, 510 F.3d at 266. This gloss imposes a heightened pleading burden on the plaintiff.

There is one problem: Congress did not enact that burden. The Equal Terms provision prohibits local governments from treating a religious assembly or institution on less than equal terms than a

[1] Some circuits have required the plaintiff to show that it is "similarly situated for all functional intents and purposes." *Third Church of Christ, Scientist v. City of New York*, 626 F.3d 667, 668 (2d Cir. 2010). Other circuits narrowed the inquiry by asking that the plaintiff show that it is "similarly situated" as to the challenged law's "regulatory purpose." *Lighthouse Inst. for Evangelism v. City of Long Beach*, 510 F.3d 253, 266 (3d Cir. 2007). The Seventh Circuit then altered the test further, looking not at a plaintiff similarly situated as to the regulatory purpose but rather one similarly situated as to "accepted zoning criteria." *River of Life*, 611 F.3d at 371; *but see id.* at 386 (Sykes, J., dissenting) (arguing that "[t]he distinction between 'accepted zoning criteria' and the 'regulatory purpose' of exclusionary zoning is nonexistent or too subtle to make any difference"). Whatever form the requirement takes, courts have read words into the statute that Congress did not provide.

"nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). "Similarly situated" appears nowhere in that mandate. And it is not for courts to assume that Congress meant something other than what it said. *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms."). Congress knew about "similarly situated" standards from the Equal Protection context and chose *not* to incorporate them into RLUIPA. Peter T. Reed, Note, *What Are Equal Terms Anyway?*, 87 Notre Dame L. Rev. 1313, 1334 (2012); *see Midrash Sephardi*, 366 F.3d at 1229 ("[W]hile [the Equal Terms provision] has the 'feel' of an equal protection law, it lacks the 'similarly situated' requirement usually found in equal protection analysis."). And it is beyond our court's power to write standards into legislation, even if we think that the law would benefit as a result. Judges are not entrusted with the job of writing (or rewriting) statutes. Nor am I aware of an "add-a-gloss" canon that allows a court to circumvent its defined role when it suits us. While the majority cites *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), for the proposition that courts can read words into statutes, *Marbury* commands the exact opposite. Courts say what the law *is*, not what the law *should be*. *Id.*; *see* The Federalist No. 78, at 526 (Alexander Hamilton) (J. Cooke ed., 1961) ("The courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the legislative

body."). Congress gave us a plain text, and basic principles of statutory interpretation compel that we apply it as written.[2] *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) ("[W]hile it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text . . . .").

Moreover, even if the plain text of the Equal Terms provision were not enough, Congress told us in the

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[2] The majority states that "equal terms" is ambiguous without putting forth any reasons *why* it is ambiguous. Majority Op. at 16; *see Duncan v. Muzyn*, 885 F.3d 422, 425 (6th Cir. 2018) ("[S]imply calling something ambiguous does not make it so."). As I explain, the Equal Terms provision is clear. *See infra* Part II. Moreover, in rushing to find ambiguity, the majority replaces Congress's enacted text with its own preferences. As judges, we are not at liberty to use statutory ambiguity as a device to make policy from the bench. *Cf.* Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 Vand. L. Rev. En Banc 315, 316 (2017) ("There is nothing so liberating for a judge as the discovery of an ambiguity. For once a judge discovers an ambiguity . . . [t]he statutory text approved by Congress and (usually) signed by the President becomes an afterthought."); *see also Yates v. United States*, 135 S. Ct. 1074, 1097 (2015) (Kagan, J., dissenting) (criticizing the use of canons of construction to create ambiguity where the "statute's text and structure suggests none" (quoting *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2008))); *King v. Burwell*, 135 S. Ct. 2480, 2502 (2015) (Scalia, J., dissenting) ("[E]ven the most formidable argument concerning the statute's purposes could not overcome the clarity [of] the statute's text." (quoting *Kloeckner v. Solis*, 568 U.S. 41, 55 n.4 (2012))); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2134–59 (2016) (book review) (arguing against ambiguity-based decisions in statutory interpretation and suggesting a "best reading" approach to avoid policymaking by judges).

statute how to interpret the text. Congress explicitly stated that courts are to "construe the statute in favor of a broad protection of religious exercise, to the maximum extent permitted." 42 U.S.C. § 2000cc-3(g). This instruction should give courts pause about divining a "similarly situated" requirement into the Equal Terms provision. Yet courts that have applied the "similarly situated" gloss have done so *because* they believed the plain meaning was "overbroad."[3] *E.g., River of Life*, 611 F.3d at 370; *Lighthouse Inst.*, 510 F.3d at 268 (noting that under a plain meaning analysis, an ordinance that permitted a book club would also have to permit a "religious assembly with rituals involving sacrificial killings of animals").

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[3] Some courts have suggested that a plain meaning interpretation of the Equal Terms provision may create constitutional problems. *River of Life*, 611 F.3d at 370; *Lighthouse Inst.*, 510 F.3d at 267 n.11. If true, the constitutional avoidance doctrine might allow courts to give the Equal Terms provision a narrow reading to avoid the broader reading's constitutional problems. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). But the avoidance canon has a notable exception: Courts cannot narrow a statute if the narrower interpretation is "plainly contrary to the intent of Congress." *Id.* Congress gave such a contrary intent in RLUIPA when it instructed courts "to construe the statute in favor of a broad protection of religious exercise, to the maximum extent permitted." 42 U.S.C. § 2000cc-3(g). In any event, the parties here have not argued that the Equal Terms provision runs afoul of the Constitution, so I express no opinion on the matter. *See River of Life*, 611 F.3d at 391 (Sykes, J., dissenting) (noting that whether the Equal Terms provision exceeds Congress's authority "is an important and sensitive question that should not be resolved unless raised and fully briefed"); *but see* Campbell, *supra*, at 1094–99 (explaining why a plain meaning approach has no constitutional problems under § 5 of the Fourteenth Amendment).

Congress can only tell the courts what a statute means in so many ways. And when its legislatively-enacted instructions reinforce the plain meaning of the words it used, courts ought to listen. *See Yates*, 135 S. Ct. at 1101 (Kagan, J., dissenting) ("If judges disagree with Congress's choice, we are perfectly entitled to say so—in lectures, in law review articles, and even in dicta. But we are not entitled to replace the statute Congress enacted with an alternative of our own design.").

So long as a plaintiff can point to a nonreligious "assembly" or "institution," the plaintiff satisfies the third element. *See* 42 U.S.C. § 2000cc(b)(1) (requiring comparison with a "nonreligious assembly or institution"). The text requires nothing more. Neither should courts.

b. "Less Than Equal Terms"

Once the plaintiff has identified assemblies and institutions, it must then show that the challenged law treats the religious ones on "less than equal terms" than the nonreligious ones. When Congress adopted the Equal Terms provision, it did so amidst contentious interpretations of the Free Exercise Clause. *River of Life*, 611 F.3d at 380, 378–80 (Sykes, J., dissenting). Most circuits that have reached the issue agree that this background jurisprudence shows that a law can treat religious groups on "less than equal terms" in three ways. *Primera Iglesia*, 450 F.3d at 1308.

Facial inequality. First, a plaintiff can show less than equal treatment if the law treats religious assemblies or institutions differently than nonreligious assemblies or institutions by its very

terms. Consider an ordinance that permits social clubs but prohibits churches and synagogues. *Midrash Sephardi*, 366 F.3d at 1220. The nonreligious assemblies get in. The religious ones do not. The ordinance thus facially treats religious assemblies—churches and synagogues—on less than equal terms than nonreligious assemblies—social clubs. That is the disparate treatment that the Equal Terms provision prohibits. *Id*. at 1231.

Gerrymandered inequality. A plaintiff can also show less than equal treatment if the law in question, while facially neutral, nonetheless targets religion through a "religious gerrymander." *Primera Iglesia*, 450 F.3d at 1309 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993)). This occurs when the law separates permissible uses in a way that burdens "almost only" religious groups. *Id*. Imagine a law that bans all steeples on buildings. On its face, the law looks neutral. No building, religious or secular, can have a steeple. But if a plaintiff can show that the ban "almost only" targets religious assemblies because only religious buildings have steeples, then the plaintiff has successfully demonstrated that the law treats religious assemblies on "less than equal terms."

As-applied/selective inequality. Finally, a plaintiff can show less than equal treatment if the government selectively applies a facially-neutral law in a way that excludes religious assemblies or institutions. *River of Life*, 611 F.3d at 383 (Sykes, J., dissenting). Since the statutory terms do not make a distinction, courts have to look at whether the comparators actually received different treatment. Consider, for instance, an ordinance banning all assembly halls that can hold

more than 500 members. A megachurch with over 500 members applies for a zoning exception, and the city denies the request. But then an over-sized book club applies for an exception that the city grants. This time, the city has "implemented" the ordinance in a way that treats religious assemblies on "less than equal terms" than nonreligious assemblies. The city granted an exception to a nonreligious assembly (the book club) while refusing to do the same for a religious assembly (the church).

c. Burden Shifting

If the plaintiff makes out a prima facie case under the Equal Terms provision, RLUIPA shifts the burden to the government. 42 U.S.C. § 2000cc-2(b). The government could, for instance, argue that the plaintiff's selected comparators do not fit within the plain meaning of an "assembly or institution." Maybe the plaintiff selected hotels as a comparator. If so, a good argument that hotels do not actually qualify as "assemblies" could carry the day. *See River of Life*, 611 F.3d at 390 (Sykes, J., dissenting). Alternatively, the government might contend that the law does not treat the religious assembly or institution on "less than equal terms." This would be a near-impossible task when it comes to facial inequality cases. But in either gerrymandered or as-applied/selective inequality cases, the government could provide evidence showing that the law in question does not actually treat religious assemblies differently. Maybe other buildings use steeples such that a ban does not "almost only" target religious uses. Or, in as-applied/selective inequality cases, the government might have evidence showing that the plaintiff did in fact receive equal treatment compared to other

nonreligious assemblies or institutions. *See Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1173 (9th Cir. 2011). Indeed, that's where "similarly situated" *can* come into the analysis: not as a heightened pleading requirement on the plaintiff, but instead as a governmental rebuttal to an as-applied challenge. *Id*. With a truly neutral statute, courts can only analyze different treatment by digging into the context and determining whether the religious group really received "less than equal terms." *Cf. id*. at 1172; *see also River of Life*, 611 F.3d at 387 (Sykes, J., dissenting). RLUIPA puts the burden on the government, not the plaintiff, to make that showing.

One final point about the legal standard: because RLUIPA places the ultimate burden on the government, some courts have interpreted the text to include a strict scrutiny "safe harbor." 42 U.S.C. § 2000cc-2(b); *Midrash Sephardi*, 366 F.3d at 1232. For these courts, a zoning action that is a prima facie violation can be saved if the government can show that it satisfies strict scrutiny. But just as "similarly situated" does not appear anywhere in the Equal Terms provision, neither does "strict scrutiny" nor any other terms that might trigger a strict scrutiny analysis. And, again, when words do not appear in a statute, we should not add to what Congress *has* provided with what we think Congress *should have* provided. Congress could have told courts to apply strict scrutiny if the plaintiff makes out a prima facie case. In fact, Congress did exactly that—in a *different* provision in RLUIPA. Just a few lines above the Equal Terms subsection, Congress included a provision that prohibits governments from enacting

land-use regulations that substantially burden religious exercise unless they have a "compelling governmental interest" and the regulation is the "least restrictive means" of furthering that interest. 42 U.S.C. § 2000cc(a)(1). We thus know that Congress was aware of the strict scrutiny buzzwords and included *none* of them in the Equal Terms provision. *Centro Familiar*, 651 F.3d at 1171 ("The Constitutional phrases, 'substantial burden,' 'compelling governmental interest,' and 'least restrictive means' are all included in the 'substantial burden' provision, not the 'equal terms' provision."); *Lighthouse Inst.*, 510 F.3d at 269 ("[W]e find that Congress clearly signaled its intent that the operation of the Equal Terms provision *not* include strict scrutiny by the express language of [the Substantial Burden provision] . . . ."). We must respect that decision and refrain from adding it in ourselves. And that means that if governments do not carry their burden once shifted, RLUIPA holds them liable without exception.

III.

That brings us to this case. In order to generate more revenue for municipal services, the City of Upper Arlington enacted a land-use ordinance that partitioned parts of the City into office-district zones. The ordinance divided land uses into three categories. Some land uses were permitted outright, such as banks, beauty parlors, business offices, daycares, hospitals, and outpatient surgery centers. Others were strictly prohibited, including schools. And some had to apply to the City for a conditional use permit, such as places of worship.

In 2010, Tree of Life Christian Schools purchased an office building in an office-district zone. Tree of Life wanted to consolidate its three separate campuses into one central location. But Tree of Life ran into a problem: the ordinance prohibited its intended use. And the city was unwilling to grant it a conditional permit as a place of worship. So Tree of Life filed a complaint in federal court alleging, among other things, that the City's ordinance violated the Equal Terms provision.

a. Nonreligious Assemblies or Institutions

In its complaint, Tree of Life presented at least two possible nonreligious assemblies or institutions as comparators: hospitals and daycares. The first option is easy. Hospitals are formal establishments that provide a public good—namely, health care. Moreover, dictionaries define a hospital as a "charitable *institution*." *E.g., Merriam-Webster*, https: // merriam – webster .com /dictionary /hospital (2018) (emphasis added). So a hospital serves as a proper comparator under the Equal Terms provision.

Similarly, daycares are assemblies, and the parties do not argue otherwise. Parents drop their children off each day with the common purpose of leaving them with adult supervisors. And the daycare's activities center around a common purpose. From play time to nap time, everything in a daycare involves watching (and maybe even educating) the kids. As such, it's hard to escape the conclusion that a daycare counts as an assembly. *See River of Life*, 611 F.3d at 390 (Sykes, J., dissenting). So a daycare also serves as a proper comparator.

Even so, the City argues that daycares are not a proper comparator because its ordinance no longer allows daycares in that district. As it turns out, the City amended its ordinance to exclude daycares *after* Tree of Life filed this lawsuit, and the district court *sua sponte* issued an injunction prohibiting the City from adding them back in. Given these developments, the City now contends that the district court's injunction nullifies daycares as a proper comparator for purposes of this case. The City is wrong for two reasons. First, when Tree of Life applied for a conditional use permit, the ordinance allowed daycares without reservation while banning schools and requiring that "places of worship, churches" petition for approval. Tree of Life seeks compensatory damages for the harm it suffered because of this unequal treatment. And when a plaintiff seeks damages, courts focus on that harmful moment rather than looking at subsequent government actions. *See Brandywine, Inc. v. City of Richmond*, 359 F.3d 830, 835–36 (6th Cir. 2004) (holding that a subsequent zoning amendment did not moot claims for monetary damages). Otherwise, governments could always rewrite ordinances after-the-fact and avoid RLUIPA liability. Second, district courts cannot issue injunctions excising nonreligious assemblies from an ordinance to resolve an Equal Terms dispute. If they could, district courts could effectively nullify the Equal Terms provision by preventing plaintiffs from ever having valid comparators when bringing a claim. Plus, the proper remedy for Equal Terms violations is not to exclude the nonreligious but to include the religious. *Cf. River of Life*, 611 F.3d at 388 (Sykes, J., dissenting) ("The equal-terms provision is a remedy

against exclusionary zoning; reading it to require equality of treatment with *excluded* secular assemblies . . . gives religious assemblies no remedy at all.").

b. "Less Than Equal Terms"

Tree of Life has also presented evidence showing that the ordinance treats it on "less than equal terms" than nonreligious assemblies or institutions under both the facial inequality theory and the as-applied/selective inequality theory. I address each in turn.

Facial inequality. As noted above, an ordinance treats a religious assembly on "less than equal terms" if it makes a distinction on its face. And the City's ordinance does just that. The ordinance allows daycares and hospitals to set up shop while requiring that "places of worship, churches" apply for a conditional use permit. The ordinance thus requires religious assemblies to take extra steps that nonreligious assemblies do not have to take. This express distinction establishes unequal treatment. *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419, 424 (5th Cir. 2011); *Centro Familiar*, 651 F.3d at 1171.

The district court erred in holding otherwise. The district court thought that, because the ordinance treated all *schools* on equal terms, the ordinance did not facially violate RLUIPA. But that comparison is too narrow. The Equal Terms provision focuses on whether the ordinance treats religious assemblies and institutions on equal terms with all nonreligious assemblies and institutions. The comparators need

not be of the same species.[4] Any assembly or institution—here, church versus daycare or hospital—will do.

But the City advances another reason why the ordinance would survive a facial challenge. It contends that because Tree of Life's "proposed primary use" was to establish a private school, it does not qualify as a "place of worship, church" as that phrase is used in the ordinance. The ordinance, however, does not define "place of worship, church" or expressly exclude private religious schools from that category.

Nevertheless, the City argues that customary dictionary definitions prove that a school is not a place of worship. But the City did not actually provide any definitions. And a closer look at dictionaries reveals that the City's customary definition is not so customary. Most dictionaries define a "place of worship" as "a building where people gather to worship together." *E.g., Collins English Dictionary*, https://www.collinsdictionary.com/us/dictionary/english/place-of-worship (2018); *see also Merriam-Webster*, https://www.merriam-webster.com/dictionary/worship (2018) (defining "worship" as "honor[ing] or rever[ing] . . . a divine being"). And Tree of Life's mission is to "glorify God by educating students in His truth and discipling them in Christ." R. 2, Pg. ID 5.

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[4] Moreover, if we limited the comparators to schools, then municipalities would always have the upper hand because they can presumably place *public* schools wherever they see fit. So public, nonreligious schools would never actually face the prohibition at issue here. Private, religious schools, on the other hand, always would.

In doing so, Tree of Life "puts the Bible at the center" of its educational model and requires all students to evaluate their studies "through the lens of God's Word." R. 2, Pg. ID 5. So students and teachers gather together to honor God through education. That looks a lot like a "place of worship." In concluding otherwise, it appears that the City relied on its own subjective notions of worship—the exact unchecked discretion that RLUIPA prohibits. Campbell, *supra*, at 1082 ("[Z]oning laws are 'commonly administered through individualized processes not controlled by neutral and generally applicable rules.'" (quoting H.R. Rep. No. 106-219, at 24)); *see* Joint Statement at 16,699 ("Churches . . . are often frequently discriminated against . . . in the highly individualized and discretionary processes of land use regulation."). As such, the City's ordinance facially discriminates, and the City used the ordinance to discriminate against Tree of Life. The City is liable.[5]

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[5] In a prior appeal, this court made an off-hand comment about the ordinance being neutral for constitutional purposes. *Tree of Life Christian Schs. v. City of Upper Arlington*, 823 F.3d 365, 373 (6th Cir. 2016). That statement, however, did not constitute a holding. The court mentioned facial neutrality in only one sentence with no reasoning—and it did so in the *constitutional* context, not in the *Equal Terms* context. Because this court did not squarely consider whether the ordinance here was facially neutral, the law-of-the-case doctrine does not prevent us from holding otherwise. *Moody v. Mich. Gaming Control Bd.*, 871 F.3d 420, 425 (6th Cir. 2017) (noting that the law-of-the-case doctrine "does not extend . . . to issues not 'fully briefed [or] squarely decided in an earlier appeal'" (quoting *Burley v. Gagacki*, 834 F.3d 606, 618 (6th Cir. 2016))).

The majority claims that Tree of Life cannot succeed under a facial challenge because it abandoned any argument that it is a "place of worship." Majority Op. at 10. But the majority misses the bigger picture. Tree of Life brought one claim: under RLUIPA, the City's ordinance treated it on "less than equal terms" than nonreligious assemblies or institutions. And it advanced multiple arguments to support that claim. When the district court held that the ordinance did not violate the Equal Terms provision, that judgment subsumed all of those arguments.[6] Yet, on appeal, Tree of Life continues to press the same claim, supported (if not in the exact same words) by the same arguments. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."); *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992))). At oral argument, Tree of Life contended that it is a place of worship and that it has not abandoned its facial argument. Oral Arg. at 1:27–3:45. And Tree of Life's brief contains everything necessary for that argument. In making its as-applied argument, Tree of

[6] Because the district court used the wrong legal framework, we should at the very least remand to the district court to determine whether the ordinance is facially neutral under the Equal Terms provision.

Life also discussed all the necessary elements for the facial argument, just without the labels. *Cf. McNeal v. Kott*, 590 F. App'x 566, 569 (6th Cir. 2014) (holding that, in the qualified immunity context, "[o]ne does not forfeit [an argument] by making [other] arguments that, if accepted, establish [the first argument]"). Plus, in its opposing brief, the City classifies "Tree of Life [a]s a school, not a church" to argue that its ordinance is nondiscriminatory. Appellee Br. 5, 44. Therefore, in the court's analysis of the ordinance, the City's proffered classification of Tree of Life—as a school and not a place of worship—should not be beyond judicial review just because Tree of Life did not use "magic words" in its own brief. *See* Campbell, *supra*, at 1103 (criticizing Equal Terms jurisprudence that "removes a government's regulatory objectives from judicial scrutiny").

As-applied/selective inequality. Tree of Life also demonstrated that the ordinance violates the Equal Terms provision under an as-applied/selective inequality theory. Even assuming Tree of Life does not qualify as a "place of worship," it still faced a blanket ban, which other nonreligious assemblies and institutions did not. The ordinance bans schools, including Tree of Life. But the ordinance permits some nonreligious assemblies and institutions as of right—daycares and hospitals needed to do no more than set up shop in the district. So when the City denied Tree of Life's use—despite allowing daycares and hospitals without question—it treated Tree of Life on "less than equal terms" than nonreligious assemblies and institutions.

c. Burden-Shifting

The City makes two arguments to rebut Tree of Life's prima facie case. Both are unavailing.

Tax Revenue. First, the City argues that it did not treat Tree of Life unequally because every other comparator—daycares and hospitals included—produced far more tax revenue to the City than Tree of Life ever could. Thus, according to the City, it treated Tree of Life equally: revenue generation is what counts in zoning decisions under the ordinance, and Tree of Life produces less revenue. But that is only true if you let the City decide how to quantify revenue after the fact. For instance, one could measure revenue in total dollars. And under that metric, Tree of Life generates more tax dollars than the existing daycares in the district. But (at least in this case) the City does not want the courts to look at total dollars—only revenue *per square foot*. This tactic feels a lot like "heads the City wins, tails Tree of Life loses." And if cities can take a vague regulatory purpose and define the parameters during the course of litigation, they can always avoid RLUIPA liability. All they have to do is find the parameters that make them win. *See River of Life*, 611 F.3d at 371 (criticizing the use of regulatory purpose as a "guide to interpretation" because such a use would make RLUIPA turn on the subjective notions of local officials). Of course, if the ordinance itself mandated a particular way of calculating revenue, the case might be different. But here, the City's formula is something of a liability-avoiding chameleon.

Schools. The City also argues that, irrespective of tax revenue, it did not treat Tree of Life differently *because of* religion. Rather, the City prohibited Tree of Life because it was a *school*. And since the

ordinance prohibits *all* schools, the City did not treat Tree of Life on "less than equal terms" than any other school. That argument fails for two reasons. First, the City did not need to treat Tree of Life differently *because of* religion to violate the Equal Terms provision. RLUIPA has an entirely separate section dealing with discrimination *because of* religion. 42 U.S.C. § 2000cc(b)(2). The language of the Equal Terms provision, by contrast, requires no motive or bias. *River of Life*, 611 F.3d at 382 (Sykes, J., dissenting). The plain language targets *all* unequal treatment. Reading intent into the Equal Terms provision would make the separate Antidiscrimination provision superfluous. And that is something that ordinary principles of statutory interpretation forbid us from doing. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect . . . to every word Congress used.").

Nor does pointing to a blanket ban on schools suffice to show that the City's treatment of Tree of Life was equal. Here again, the City's argument hinges on limiting the relevant inquiry to comparing schools. But the Equal Terms provision broadens the inquiry to all assemblies and institutions—after all, Tree of Life made out a prima facie case by showing that it had been treated differently from a daycare or a hospital. So rebutting Tree of Life's prima facie case is not as easy as labeling Tree of Life a school and a daycare not a school. The City must justify treating schools differently from daycares or hospitals. And it has not done so.

Accordingly, the City did not meet its burden of rebutting Tree of Life's prima facie case. It is liable under RLUIPA, and I would reverse.

* * *

There comes a time with every law when the Supreme Court must revisit what the circuits are doing. That time has come. Every circuit to address the issue has given its own gloss to the Equal Terms provision. Whether a religious plaintiff can succeed under the Equal Terms provision thus depends entirely on where it sues. And not only have the circuits split on the issue, but many of them have also neutralized the Equal Terms provision. By importing words into the text of the statute, the courts have usurped the legislative role and replaced their will for the will of the people. *See* The Federalist No. 47, at 325 (James Madison) (J. Cooke ed., 1961) ("Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator." (quoting 1 Baron de Montesquieu, *The Spirit of Laws*)).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

TREE OF LIFE CHRISTIAN SCHOOLS,

Plaintiff,

-v-

THE CITY OF UPPER ARLINGTON,

Defendant.

Case No.: 2:11-cv-09

JUDGE GEORGE C. SMITH
Magistrate Judge Deavers

OPINION AND ORDER

This matter is before the Court on remand from the United States Court of Appeals for the Sixth Circuit. The parties have agreed to "submit this case on remand to the Court on 'motions for final judgment' and waive any oral presentation of evidence. The parties agree that the Court will consider the motions' briefing and record evidence and issue a final judgment based on its findings of fact and conclusions of law." (Doc. 95, Stipulations ¶ 1). The cross-motions for final judgment and the responses have been filed and the motions are now ripe for review. (*See* Docs. 96 and 97). For the reasons that follow, the Court **GRANTS** Defendant's Motion for Final Judgment and **DENIES** Plaintiff's Motion for Final Judgment.

I. Background

A. The Parties

1. Tree of Life Christian Schools

Plaintiff, Tree of Life Christian Schools ("Plaintiff" or "Tree of Life"), is a private Christian school located in Columbus, Ohio. Tree of Life has a current enrollment of 532 students and currently employs 150 staff, including teachers, coaches, administrators, and seasonal staff. The current annual payroll is approximately $2,535,301.00. (Doc. 96-4, Marrah Decl. ¶ 3). Tree of Life operates schools serving various grades ranging from preschool to twelfth grade at different locations around the Columbus metropolitan area, including the Northridge campus, Indianola campus, and Dublin campus. (Doc. 20, Stipulations ¶ 7). Tree of Life operates as a non-profit religious corporation under the laws of the State of Ohio, with its principal place of business located at 935 Northridge Road, Columbus, Ohio. (Doc. 2, Verified Compl. ¶ 8).

Tree of Life was originally founded in 1978, and organized as an Ohio not for profit corporation on or about April 10, 1981. (Doc. 20, Stipulations ¶ 3). The primary purpose of Tree of Life is "to assist parents and the Church in educating and nurturing young lives in Christ." (Doc. 2, Verified Compl. ¶ 16). Their mission statement reads: "In partnership with the family and the church, the mission of Tree of Life Christian Schools is to glorify God by educating students in His truth and discipling them in Christ. 'A cord of three strands is not easily torn apart.' (Ecclesiates 4:12)." (*Id*. ¶ 17). Tree of Life's vision

statement states: "As students are led to spiritual, intellectual, social and physical maturity, they become disciples of Jesus Christ, walking in wisdom, obeying His word and serving in His Kingdom." (*Id*. ¶ 18). Tree of Life describes their philosophy of education as "quintessentially and undeniably Christian," and believes this philosophy "puts the Bible at the center and asks the student to evaluate all he/she studies through the lens of God's Word." (*Id*. ¶ 19). Tree of Life requires all parents who enroll their children to certify that they agree with the mission, philosophy, and vision. All faculty and staff must also sign a statement of faith, and must be active members of a local "Bible-believing congregation." (*Id*. ¶¶ 21–22).

Tree of Life represented at the time it initiated this case that it had limited space in its current buildings for new students as the Indianola and Dublin campuses are located within existing church buildings of sponsoring churches of Tree of Life. Despite representing in 2011 that there were no long-term leases with these churches and that their facilities were old, there has been no recent representation or evidence submitted by Tree of Life that they cannot continue to operate at these current locations.

In 2006, Tree of Life began searching for property that would allow for expansion. After reviewing more than twenty sites and facilities within Franklin County, Tree of Life finally settled on the property located at 5000 Arlington Centre Boulevard in Upper Arlington, Ohio (hereinafter "the Property"). The Property contains an office building that is approximately 254,000 square feet and is centrally

located to serve all of Tree of Life's current families. The Property's size would allow for consolidation of preschool through twelfth grade at one location, reduction in staff and transportation costs, and accommodation of more students. Tree of Life ultimately purchased the property on August 11, 2010. (Doc. 2, Verified Compl. ¶¶ 39-50).

2. The City of Upper Arlington

Defendant, the City of Upper Arlington, Ohio, ("the City" or "Upper Arlington"), is a public body authorized under the laws of the State of Ohio, and acting under the color of state law. Upper Arlington is a suburban community that is a land-locked and fully developed. On March 26, 2001, the City issued a development plan ("the Master Plan") to provide guidance for its land use with "considerable emphasis on the need to cultivate the commercial use of land in order for the City to be financially stable." (Doc. 55-2, Gibson Aff. ¶¶ 2–3). All land and development in Upper Arlington is regulated by the Upper Arlington Unified Development Ordinance ("the UDO"), which employs "non-cumulative" or "exclusive" zoning. Article 5 of the UDO sets forth the regulations applicable to the use and development of land in Upper Arlington and establishes the zoning districts, including residential, commercial, planned, and miscellaneous. (Doc. 97-1, Current UDO).

B. Procedural History

Plaintiff initiated this case on January 5, 2011, with the filing of the Verified Complaint, alleging violations of its rights to free speech, free exercise of religion, peaceable assembly, equal protection, due process, and the establishment clause under the First

and Fourteenth Amendments to the United States Constitution and Article I, Section 7 of the Ohio Constitution, and alleging a violation of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). (*See generally* Doc. 2).

Plaintiff filed a Motion for Preliminary Injunction on January 28, 2011, seeking to enjoin Defendant, the City of Upper Arlington, from enforcing Article 5.01, Table 5-C of the UDO prohibiting Plaintiff from operating a religious school in the ORC Office and Research District. Plaintiff sought injunctive relief on two of its claims: violation of the RLUIPA and violation of equal protection. On April 27, 2011, this Court denied Plaintiff's Motion for Preliminary Injunction. (Doc. 23). Despite finding that Plaintiff demonstrated a potential likelihood of success on the merits of its RLUIPA claim, the Court found that the balance of harms did not strongly justify the issuance of a preliminary injunction.

Following discovery in this case, the parties filed cross-motions for summary judgment. On August 16, 2012, the Court issued an Opinion and Order granting Defendant's motion finding that the case was not ripe for review because Tree of Life had not petitioned the City to rezone the property at issue. (Doc. 70). Plaintiff appealed this decision to the United States Court of Appeals for the Sixth Circuit. While the appeal was pending, on December 21, 2012, Tree of Life submitted an application to the City seeking to amend the City's UDO to allow private religious schools as a permitted use in the ORC Office

and Research District.[1] On March 11, 2013, the Upper Arlington City Council ("City Council") denied

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[1] Rezoning is governed by Section 4.04 of the UDO titled "UDO and Official Zoning Map Amendments" which specifically provides:

> B. Amendment Process: Amendments may be initiated in one of the following ways:
>
> 1. By the filing of an application to BZAP [Board of Zoning and Planning] by the owner(s) of property within the area proposed to be affected or changed by said amendment;
>
> 2. By the adoption of a motion by BZAP; or
>
> 3. By the adoption of a motion by City Council and referral to BZAP.
>
> All text and map amendments shall follow the same procedure. City Council initiated text or map amendments shall be referred to BZAP for recommendation prior to Council consideration.
>
> C. Standards for Approval: The following criteria shall be followed in approving zoning map amendments to the UDO:
>
> 1. That the zoning district classification and use of the land will not materially endanger the public health or safety;
>
> 2. That the proposed zoning district classification and use of the land is reasonably necessary for the public health or general welfare, such as by enhancing the successful operation of the surrounding area in its basic community function or by providing an essential service to the community or region;
>
> 3. That the proposed zoning district classification and use of the land will not substantially injure the value of the abutting property;
>
> 4. That the proposed zoning district classification and use of the land will be in harmony with the scale, bulk,

the application. The Council provided several reasons for denying the application including that allowing private religious schools as a permitted use in the ORC Office and Research District would "significantly diminish expected tax revenues per square foot due to relatively low salaries and low density of professionals per square foot" and if private religious schools were permitted, but not non-religious schools, it would create a facial First Amendment problem. (*See* City Council Minutes, Doc. 81–7, Page ID# 2463).

Tree of Life moved to supplement the record on appeal with the denial of the rezoning and the Sixth Circuit granted that request and remanded the case to this Court "to determine in the first instance whether the claims are ripe." *Tree of Life Christian Schs. v. City of Upper Arlington*, 536 F. App'x 580, 583 (6th Cir. 2013).

Following remand, on October 17, 2013, Tree of Life submitted a second application to the City to

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> coverage, density, and character of the area the neighborhood in which it is located;
>
> 5. The proposed zoning district classification and use of the land will generally conform with the Master Plan and other official plans of the City;
>
> 6. That the proposed zoning district classification and use of the land are appropriately located with respect to transportation facilities, utilities, fire and police protection, waste disposal, and similar characteristics; and
>
> 7. That the proposed zoning district classification and use of the land will not cause undo [sic] traffic congestion or create a traffic hazard.

rezone its property. This time, Tree of Life sought to rezone only its 15.81–acre parcel from the ORC Office and Research District to residential. Upper Arlington's Senior Planning Officer, Chad Gibson, submitted a staff report to City Council on November 25, 2013, stating:

> Staff believes that the proposed rezoning is in direct opposition to numerous core Master Plan goals and objectives. The proposed zoning change would eliminate nearly 16 acres of extremely limited ORC–zoned ground, which will reduce the amount of office and research space within the City. The Master Plan clearly indicates that the Henderson Road corridor has the greatest opportunity for intense office use, and approving such a rezoning would be contrary to the City's long-term financial interests. The majority of land use categories within Upper Arlington currently permits schools, public or private, religious or secular. The applicant has failed to establish the necessity of changing the zoning of an established office park from commercial to residential given the potential detrimental impacts to the City.
>
> A K–12 school has inherent characteristics which can be intrusive and destructive to an office park. Traffic, including school bus circulation, loading and unloading, can be challenging for an area to accommodate. A large number of

> young drivers and parents arriving and departing at similar (peak) times can tax the roadways and related infrastructure, reducing the level of service for signalized intersections. After–school activities such as band and theater productions can also bring large number of parents and students to an area, often necessitating overflow parking demands. Outdoor events such as band practice can create noise impacts for office workers who are attempting to do business and/or serve clients. Furthermore, after reviewing the application, revised traffic study, and other materials, BZAP unanimously recommended against the proposed zoning map amendment.

(Doc. # 81-9, November 25, 2013 Staff Report to City Council, PAGEID# 2490).

Additionally, City Council heard from the Upper Arlington City Attorney who spoke to the seven points of analysis required for rezoning applications by Article 4.04(c) of the UDO. The focus of the analysis was that rezoning to eliminate commercially zoned property would be contrary to the Master Plan. Based on the staff report and the comments by the Upper Arlington City Attorney made during the December 9, 2013 City Council meeting, the Council denied Tree of Life's rezoning request. (*See* Doc. 81–11, Page ID# 2577–80, December 9, 2013 Upper Arlington City Council meeting minutes).

Following the denial of the second rezoning request, the parties agreed that there were no more administrative avenues to pursue and no genuine issues of material fact. Therefore, by agreement, the parties submitted cross-motions for summary judgment for the Court's consideration. (*See* Docs. 79 and 82). On April 18, 2014, this Court granted Defendant's Motion for Summary Judgment and denied Plaintiff's Motion for Summary Judgment. (*See* Doc. 86). The Court concluded that the City of Upper Arlington's UDO did not violate the Equal Terms provision of RLUIPA. Additionally, the Court found that the City's UDO does not violate the Equal Protection Clause of the Fourteenth Amendment, nor is it unconstitutionally vague. Finally, the Court held that the City's UDO did not violate the Free Exercise and Establishment Clauses of the First Amendment, nor was there any restraint on Plaintiff's exercise of free speech. The Court declined to exercise supplemental jurisdiction over Plaintiff's state law claims and those were dismissed without prejudice. (*Id.*).

Plaintiff filed a Notice of Appeal on May 8, 2014. (Doc. 88). The Sixth Circuit heard oral argument on April 29, 2015, and issued their decision on May 18, 2016, with the mandate following on July 27, 2016. (Docs. 89, 90). The Sixth Circuit found a genuine issue of material fact on the as-applied challenge of RLUIPA and reversed and remanded solely on that issue. The dismissal of Plaintiff's remaining claims were either not challenged or upheld. *Tree of Life Christian Schs. v. City of Upper Arlington*, 823 F.3d 365, 372 (6th Cir. 2016).

On remand, the Sixth Circuit provided the following instruction to this Court to answer the remaining questions of fact:

> Are there nonreligious assemblies or institutions to which the court should compare Tree of Life Christian Schools because they would fail to maximize income-tax revenue, and if so, would those assemblies or institutions be treated equally to TOL Christian Schools?

Id.

II. FINDINGS OF FACT

The City of Upper Arlington is landlocked and primarily residential, only 4.7% of its useable land area is zoned "Commercial," and only 1.1% is in office use. To maximize revenues, the City developed the Master Plan to maintain its "quality of life and attractiveness as a residential community, and meet its capital needs and fund city services." (Doc. 55-2, Gibson Aff. ¶ 4(c)). Therefore, full use of existing office space, as well as the development of additional office space, is critical for the City's financial stability. The purpose behind the Master Plan was to create opportunities for office development that emphasize high-paying jobs. (Doc. 55-2, Gibson Aff. ¶¶ 3–4). The regulatory purpose of the "ORC Office and Research District" in the City's Master Plan is set forth in Section 5.03(A)(6) of the UDO as follows:

> *ORC office and research district*: The purpose of this district is to allow offices

> and research facilities that will contribute to the City's physical pattern of planned, healthy, safe, and attractive neighborhoods. The ORC district should also provide job opportunities and services to residents and contribute to the City's economic stability. Permitted uses in the ORC district are: business and professional offices, research and development, book and periodical publishing, insurance carriers, corporate data centers, survey research firms, bank finance and loan offices, outpatient surgery centers, hospitals, and such permitted uses as are set forth or may in the future be set forth in Table 5-C. At least eighty-five percent (85%) of the gross floor area of any building located in an ORC district shall be exclusively dedicated to one of these permitted uses. The lesser of fifteen percent (15%) of the gross floor area or ten thousand (10,000) square feet of any building located in an ORC district may be dedicated to secondary conditional uses as listed in Table 5-C. Secondary conditional uses shall be subject to the conditional use review process set forth in UDO Subsection 4.05(F).

(Doc. 97-1, UDO at 4). The purpose of the ORC Office and Research District serves a compelling state interest. A complete list of permitted uses appears in Table 5-C of the UDO. (Doc. 97-1, UDO Table 5–C at 15–19). Schools of any type are not permitted in the

ORC Office and Research District. (Doc. 55-2, Gibson Aff. ¶¶ 5–7). Schools are permitted in residential zones which comprise 95% of the developed land in the City. (*Id.* ¶ 8).

Section 5.01(B) of the UDO governs the rules of application. Section 5.01(B)(2), entitled "Permitted Uses," provides:

> Only a use designated as a permitted use shall be allowed as a matter of right in a zoning district and any use not so designated shall be prohibited except, when in character with the zoning district, such other additional uses may be added to the permitted uses of the zoning district by an amendment to this UDO. Only lawful uses shall be permitted and prior zoning approval of a use does not override state or federal laws.

(Doc. 97-1, UDO at 1). Section 5.01(B)(3), entitled "Conditional Uses," states:

> A use designated as a conditional use shall be allowed in a zoning district when such conditional use, its location, extent and method of development will not substantially alter the character of the vicinity or unduly interfere with the use of adjacent lots in the manner prescribed for the zoning district, and is not inconsistent or contrary to master plan objectives related to uses. To this end BZAP [Board of Zoning and Planning] shall, in addition to the development

> standards for the zoning district, set forth such additional requirements as will, in its judgment, render the conditional use compatible with the existing and future use of adjacent lots and the vicinity. Additional standards for conditional uses are listed in Section 6.10.

(*Id.*). The Property is the largest office building in Upper Arlington, located at 5000 Arlington Centre Boulevard, in the ORC Office and Research District. The commercial office building was previously occupied by AOL/Time Warner, and it generated substantial income tax and property tax revenues for the City. In 2001, it accounted for 29% of the City's income tax revenues. Time Warner ceased operations at this location in 2009. Requiring commercial use of this Property is consistent with the language and purposes of the ORC Office and Research District, as well as the Master Plan. (Doc. 18, Affidavit of Catherine Armstrong, Finance Director for Upper Arlington ¶¶ 4–7 (hereinafter "Armstrong Aff.")).

In early 2009, Upper Arlington officials became aware that Tree of Life was considering purchasing the commercial office building for use as a school. On March 16, 2009, Matthew Shad, Deputy City Manager for Economic Development in Upper Arlington, met with Don Roberts of CB Richard Ellis, the listing agent, and advised him that schools were not a permitted use for that building. (Doc. 62-2, Shad Aff. ¶¶ 4–7). On October 1, 2009, Tree of Life contracted to purchase the commercial office building, contingent upon zoning allowance. On November 11, 2009, Shad also advised the Tree of Life school

superintendent directly that schools were not a permitted use of the Property. (*Id*. ¶ 9).

Tree of Life then engaged in the following proceedings seeking permission to operate a school at the Property:

- December 21, 2009 – Conditional Use Permit Application filed with Upper Arlington requesting to "use the property for a place of worship, church and residential, to the extent that residential includes a private school." (Doc. 2, Verified Compl. Ex. A).
- December 28, 2009 – Mr. Gibson denied the Application stating "a private school is neither a permitted use nor a conditional use in the ORC, Office and Research District (*see* UDO Table 5-C Article 5.01)." He further instructed that "the applicant should submit a rezoning application if they wish to pursue a private school at this location." (Doc. 2, Verified Compl. Ex. B).
- January 5, 2010 – Tree of Life appealed Mr. Gibson's determination to the Board of Zoning and Planning ("BZAP"). And in a parallel track, Tree of Life wrote to Mr. Gibson asking for clarification as to "whether these uses, which are contained in the application, are, or are not, Conditional Uses in the ORC zoning district in the Upper Arlington UDO."[2] (Doc. 2, Verified Compl. Ex. C).

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[2] Mr. Gibson's initial letter dated December 28, 2009, determined that the Tree of Life school was not a residential use that could be considered as a conditional use in the ORC Office

- February 26, 2010 – Mr. Gibson confirmed that the BZAP hearing on March 1, 2010, would consider the conditional use application for "a private school with ancillary uses." He further stated that "At this time, no conditional use application has been submitted for a church at this site." (Doc. 2, Verified Compl. Ex. G).
- March 1, 2010 – BZAP held a public hearing and ultimately issued an Order upholding Mr. Gibson's determination "that the conditional use application proposing a private school in an ORC District was inappropriate and would not be scheduled for BZAP review." (Doc. 2, Verified Compl. Ex. D).
- April 2, 2010 – Tree of Life appealed the BZAP decision to City Council.
- April 26, 2010 – City Council held a public hearing on the appeal and ultimately voted to uphold the decision of the BZAP, finding "a private school is neither a permitted or conditional use in the Office and Research District and that rezoning is required if Appellant plans to pursue a private school at this location." (Doc. 2, Verified Compl. Ex. F).
- June 7, 2010 – BZAP held a public hearing on the parallel proceeding and concluded that "for purposes of the UDO, the proposed primary use of the property as a private school does not constitute a 'place of worship, church' as that term is used in Table 5-C of Article 5 of the UDO, and

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and Research District; however, there was no determination as to whether Tree of Life was a "Place of Worship" or a "Church."

is therefore not a conditional use in the ORC District." (Doc. 2, Verified Compl. Ex. I).

- June 18, 2010 – Tree of Life appealed the BZAP decision to City Council.
- August 11, 2010 – Tree of Life closed on the purchase of the Property with a purchase price of $6.5 million.
- August 16, 2010 – City Council held a public hearing and issued findings affirming the prior decisions that "for purposes of the UDO, the proposed primary use of the property as a private school does not constitute a 'place of worship, church' as that term is used in Table 5-C of Article 5 of the UDO, and is therefore not a conditional use in the ORC District." (Doc. 2, Verified Compl. Ex. K).
- Tree of Life appealed the final decision of the Upper Arlington City Council to the Environmental Division of the Franklin County Municipal Court, but ultimately withdrew that appeal.
- December 21, 2012 – Tree of Life submitted an application to the City seeking to amend the City's UDO to allow private religious schools as a permitted use in the ORC Office and Research District.
- March 11, 2013 – Upper Arlington City Council denied the application to amend the City's UDO to allow private religious schools in the ORC Office and Research District. (Doc. 81-7, Page ID# 2463, City Council Minutes).

- October 17, 2013 – Tree of Life submitted a second application to the City to rezone only its 15.81 acre parcel to residential.
- December 9, 2013 – City Council denied Tree of Life's rezoning request. (*See* Doc. 81- 11, Page ID# 2577– 80, Minutes of the December 9, 2013 Upper Arlington City Council meeting).

III. CONCLUSION OF LAW

Plaintiff, Tree of Life, initiated this case against Defendant, the City of Upper Arlington, asserting claims for violations of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), the right to free exercise of religion, the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause, the Free Speech Clause, the right to peaceable assembly under the First Amendment; the Establishment Clause, and Article I, Section 7 of the Ohio Constitution. The only remaining claim before the Court following remand from the United States Court of Appeals for the Sixth Circuit is Plaintiff's allegation that Upper Arlington's UDO violates RLUIPA.

The Sixth Circuit instructed this Court to resolve the following factual issues:

(1) Are there nonreligious assemblies or institutions to which the court should compare Tree of Life Christian Schools because they would fail to maximize income-tax revenue?

(2) If so, would those assemblies or institutions be treated equally to Tree of Life Christian Schools?

Tree of Life Christian Schs., 823 F.3d at 372.

The parties have filed cross-motions for final judgment on this remaining issue. Plaintiff seeks a finding that the Upper Arlington UDO as applied to Tree of Life violates RLUIPA's equal terms provision. And Defendant seeks a finding that there has been no violation of RLUIPA.

A. RLUIPA Claim

Plaintiff Tree of Life argues that Upper Arlington's UDO violates RLUIPA's "equal terms" provision, which is set forth in Section (b)(1) as follows: "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(b)(1). "The equal-terms section is violated whenever religious land uses are treated worse than comparable nonreligious ones, whether or not the discrimination imposes a substantial burden on the religious uses." *Digrugilliers v. City of Indianapolis*, 506 F.3d 612, 616 (7th Cir. 2007) (citing *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 1002–03 (7th Cir. 2006)). While this provision of RLUIPA "has the 'feel' of an equal protection law, it lacks the 'similarly situated' requirement usually found in equal protection analysis." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1229 (11th Cir. 2004). RLUIPA does not require a city to give religious assemblies and institutions more rights than other users of land in the same zones have. *River of Life Kingdom Ministries v. Village of Hazel Crest, Ill.*, 611 F.3d 367, 371 (7th Cir. 2010) (citing *Digrugilliers*, 506 F.3d at 615). "RLUIPA's

Equal Terms provision requires equal treatment, not special treatment." *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1313 (11th Cir. 2006). Further, "not just any imposition on religious exercise will constitute a violation of RLUIPA. Instead, a burden must have some degree of severity to be considered 'substantial.'" *Livingston Christian Schs. v. Genoa Charter Twp.*, 858 F.3d 996 (6th Cir. 2017) (citing *Int'l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1067 (9th Cir. 2011) (substantial burden "must impose a significantly great restriction or onus upon [religious] exercise")).

RLUIPA explicitly places the burden on the plaintiff to initially establish a *prima facie* case supporting its claim. 42 U.S.C. § 2000cc-2(b). Plaintiff must prove the following four elements to establish an "equal terms" violation of RLUIPA: "(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*, 450 F.3d at 1307. The statute does not define the meaning of "equal terms" and not all courts are in agreement as to its meaning. *See Roman Catholic Bishop of Springfield v. City of Springfield*, 760 F. Supp. 2d 172, 188, n. 11 (D. Mass. 2011) (comparing cases). The disagreement among the circuits "centers on how broadly to construe the phrase 'nonreligious assembly or institution'" and what is a similarly situated comparator. *Id.* at 188. The Eleventh Circuit requires a plaintiff to demonstrate unequal treatment as compared to any secular institution or assembly. *See, e.g.*, *Midrash*, 366 F.3d at 1230–31. The Third

Circuit has held that "a regulation will violate the [e]qual [t]erms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose*." *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 266 (3d Cir. 2007). The Seventh Circuit applied a modified version of the Third Circuit's test, concluding that the focus should be on secular assemblies or institutions similarly situated as to the "accepted zoning criteria" rather than the regulatory purpose. *River of Life*, 611 F.3d at 371.[3]

In addition to the aforementioned circuits, two additional circuit courts have addressed the equal terms provision of RLUIPA: *Elijah Group v. City of Leon Valley*, 643 F.3d 419 (5th Cir. 2011) and *Centro Familiar Cristiano Buenas Nevas v. City of Yuma*, 651 F.3d 1163 (9th Cir. 2011). The Fifth Circuit held that a zoning ordinance violated RLUIPA's equal terms provision because "it prohibits the Church from even applying for a SUP [Special Use Permits] when, e.g., a nonreligious private club may apply for a SUP." *Elijah Group,* 643 F.3d at 424. The court held that the equal terms provision of RLUIPA "must be measured

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[3] The Sixth Circuit had not yet adopted a test for evaluating a RLUIPA equal terms claim and in considering this case concluded "[w]e need not definitely choose among the various tests used by other circuits in order to resolve this case." *Tree of Life Christian Schs*., 823 F.3d at 370. This Court analyzed the different tests set forth by the Third, Seventh, and Eleventh Circuits in detail in a previous Opinion and Order. (*See* Doc. 23). The Court does not find it necessary to fully repeat the analysis with respect to the tests of each of the aforementioned circuits.

by the ordinance itself and the criteria by which it treats institutions differently." *Id*. The Fifth Circuit explicitly stated that it was not adopting any particular test adopted by another circuit, but its test appears to be similar to that used by the Third, Seventh, and Second Circuits who view the equal terms provision in light of the zoning criteria or purpose of the zoning ordinance.[4]

The Ninth Circuit also construed the equal terms provision, adopting the Third Circuit's approach along with the Seventh Circuit's refinement of the test. *See Centro Familiar*, 651 F.3d at 1172–73. The Ninth Circuit held that the "city may be able to justify some distinctions drawn with respect to churches, if it can demonstrate that the less-than-equal-terms are on account of a legitimate regulatory purpose, not the fact that the institution is religious in nature." *Id*. The court realized that "our analysis is about the same as the Third Circuit's" but also recognized that the Seventh Circuit's refinement of this test was appropriate. The court ultimately stated the test to be used as follows:

> The city violates the equal terms provision only when a church is treated on a less than equal basis with a secular comparator, similarly situated with respect to an accepted zoning criteria. The burden is not on the church to show a similarly situated secular assembly, but on the city to show that the

[4] *See Lighthouse Institute*, 510 F.3d at 264; *River of Life*, 611 F.3d at 371; *Third Church of Christ Scientist v. City of New York*, 626 F.3d 667, 669–70 (2nd Cir. 2010).

> treatment received by the church should not be deemed unequal, where it appears to be unequal on the face of the ordinance.

Id. at 1173.[5]

As framed by the Sixth Circuit for remand, this Court is challenged with resolving Plaintiff's as-applied equal terms RLUIPA claim.[6] There is no dispute between the parties that Plaintiff Tree of Life is a religious assembly or institution[7] and that it has

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[5] The Ninth Circuit noted that its test departed from that utilized by the Third Circuit in its burden shifting. The Third Circuit placed the burden on the church while the Ninth Circuit placed the burden on the government, once a *prima face* case is established. *Centro Familiar*, 651 F.3d at 1173.

[6] Plaintiff Tree of Life originally challenged Upper Arlington's UDO both on its face and as applied. This Court has previously found that Upper Arlington's UDO is facially neutral. The August 16, 2012 Opinion and Order specifically states:

> Plaintiff fails to explain how the UDO is unconstitutional on its face. There is no evidence that Upper Arlington's UDO allows other non-secular uses that are not permitted in the ORC Office and Research District to not seek rezoning. Upper Arlington has been consistent from the time it became aware that Plaintiff intended to purchase the commercial building that schools, both secular or non-secular, are not permitted in the ORC, Office and Research District.

(Doc. 70 at 20). This remains true. Upper Arlington treats both religious schools and secular schools the same. In fact, both secular and non-secular schools are permitted in over 95% of the City of Upper Arlington that is zoned residential.

[7] Many courts analyzing RLUIPA claims have found facilities used for religious education to fall under RLUIPA's

been subjected to a land use regulation, in this case Upper Arlington's UDO zoning law which prohibits all schools from operating in the ORC Office and Research District. The analysis therefore turns on whether Upper Arlington's UDO treats Plaintiff, a religious school, on less than equal terms with a nonreligious assembly or institution.

Again, The Sixth Circuit instructed this Court to resolve the following factual issues:

(1) Are there nonreligious assemblies or institutions to which the court should compare Tree of Life Christian Schools because they would fail to maximize income-tax revenue?

(2) If so, would those assemblies or institutions be treated equally to Tree of Life Christian Schools?

See Tree of Life Christian Schs., 823 F.3d at 372. The Sixth Circuit held that Tree of Life pled sufficient facts to allege that at least some assemblies or institutions permitted in the ORC Office and Research District are

> situated, relative to the government's regulatory purpose, similarly to TOL Christian Schools, i.e., they would fail to

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protection. *See Living Water Church of God v. Charter Twp. of Meridian*, 384 F. Supp. 2d 1123, 1129–30 (W.D. Mich. 2005) ("Plaintiff's use of the proposed facility for a religious oriented school and for other ministries of the church constitutes religious exercise"); *see also Castle Hills First Baptist Church v. City of Castle Hills*, 2004 U.S. Dist. LEXIS 4669, at * 38 (W.D. Tex. Mar. 17, 2004); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1213 (C.D. Cal. 2002).

> maximize income-tax revenue. *See* Verified Compl. ¶¶ 60–65 (identifying permitted uses of child day care centers, hotels/motels, hospitals, outpatient surgery centers, and business and professional offices). These allegations create a genuine issue of fact as to whether the government treats more favorably assemblies or institutions similarly situated with respect to maximizing revenue, unless the government can demonstrate that no assemblies or institutions *could* be similarly situated.

Id. at 371. Although the Sixth Circuit has not specifically adopted a test for evaluating an equal terms RLUIPA claim, it did advise, for purposes of remand, to focus on whether the assemblies or institutions being considered are similarly situated "with respect to maximizing revenue" which is the purpose of the ORC Office and Research District. *(Id*.). The Sixth Circuit did not suggest that the assemblies or institutions being considered be similarly situated in all relevant aspects.

Defendant argues that Plaintiff has failed to present any evidence of a similar comparator. Plaintiff cannot rely solely on the allegations in the Verified Complaint and must present sufficient evidence as the parties have agreed to brief the case for a final ruling on the merits. In its brief, Plaintiff has abandoned all other reference to like comparators, such as hospitals or outpatient surgery centers and instead focuses on daycare centers and partial office uses as similar comparators to Tree of

Life Christian School. Plaintiff argues that daycares and partial office use are two uses permitted in the ORC Office and Research District that fail to maximize tax revenue and are therefore similar comparators to a religious school.

1.Similar Comparator

As set forth above, the Sixth Circuit has defined a similar comparator as one that maximizes revenue to the City of Upper Arlington. *Tree of Life Christian Schs.*, 823 F.3d at 371 ("similarly situated with respect to maximizing revenue"). Therefore, Plaintiff must establish that a nonreligious assembly or institution permitted under the UDO generates less tax revenue than Plaintiff's intended use. Plaintiff has abandoned all but two comparators: daycares and partial office uses.[8] Plaintiff argues that both daycares and partial office uses are nonreligious institutions or assemblies allowed in the ORC Office and Research District that fail to maximize tax revenue and are therefore similar comparators to a religious school.

a. Daycares

Plaintiff argues that daycares do not maximize income-tax revenue, but would be allowed under the Upper Arlington UDO in the ORC Office and

[8] It is important to note that these are hypothetical comparators. Defendant provided Plaintiff with every zoning decision in the ORC district, as well as decisions from other districts, from January 22, 1991 through November 16, 2015, and not one of the decisions supports Plaintiff's argument. Plaintiff cannot identify a secular comparator similarly situated that actually received more favorable treatment under the UDO.

Research District. Plaintiff offers the expert reports of Robert Siegel and Rebekah Smith as evidence in support of this argument.

Defendant responds that daycares are not a permitted use in the ORC Office and Research District. Although they were a permitted use, daycares were ultimately removed as a permitted use in the district during the pendancy of this litigation. They were originally permitted in the district to serve an ancillary purpose, e.g. to serve the working public. (Doc. 17, Gibson Aff. ¶ 7). Since the Sixth Circuit remanded this case for consideration of evidence from the parties on similar comparators and the Court is now considering the entire record for purposes of entering final judgment, the Court can consider evidence from Defendant that they currently do not permit daycares in the ORC Office and Research District and are willing to enter into an agreed judgment prohibiting any such use in the district in the future.[9]

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[9] The Sixth Circuit noted that "Upper Arlington chose, during the pendancy of the litigation, to exclude daycares from the ORC District. *See* Ordinance 52-2011. But '[a] defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case.' *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 583 (6th Cir. 2012) . . . Here, the removal of daycares from the zone, absent an injunction that would prevent their permitting, would not remedy the alleged problem; Upper Arlington always could amend the UDO once again to allow daycares in the ORC district. *See* Gibson Depo., R. 55 at 66 (explicitly admitting that Upper Arlington could return to the earlier UDO at any time)." *Tree of Life Christian Schs.*, 823 F.3d at 371, n. 4.

The Court does not believe it necessary to enter an injunction prohibiting daycares from operating in the ORC Office and Research District as suggested by the Sixth Circuit, as there is no reasonable expectation that the activity will be resumed. *See Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990) ("Although voluntary cessation of wrongful conduct does not automatically render a case moot, 'the case may nevertheless be moot if the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated.'" (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953))). Nonetheless, the Court concludes that daycares are not permitted in the ORC Office and Research District and will enter such in the final judgment to prohibit any change in the future.[10]

Even if the Court were to consider daycares as permitted in the ORC Office and Research District, Upper Arlington argues that daycares are not similarly situated to schools because they operate differently and daycares do maximize tax revenue in the district.

The UDO defines "Child Day-Care Center" as:

> Child day-care: means administering to the needs of infants, toddlers, preschool children and school children outside of school hours by persons other than their parents or guardians, custodians or

[10] Defendant asserts that it "stopped permitting daycares, has no plans to permit daycares, and agrees to be prohibited from permitting daycares as a primary use in the ORC district." (Doc. 101, Def.'s Reply at 5).

relatives by blood, marriage, or adoption, for any part of the twenty-four-hour day in a place or residence other than the child's own home.

Child day-care center and type A home: means any place in which child day-care is provided, with or without compensation, for thirteen (13) or more children at one time, or any place that is not the permanent residence of the licensee or administrator in which child day-care is provided with or without compensation, for seven (7) to twelve (12) children at one time. In counting children for the purpose of this Ordinance, any children under 6 years of age who are related to a licensee, administrator, or employee and who are on the premises of the center shall be counted.

Child day-care home and type B home: means a permanent residence of the provider in which child day-care services are provided for one (1) to six (6) children at one time and in which no more than three (3) children may be under 2 years of age at one time. In counting children for the purpose of this Ordinance, any children under 6 years of age who are related to the provider and who are on the premises of the type B home shall be counted. A type B family day-care home does not include a residence in which the needs of children are administered to, if

> all of the children are siblings of the same immediate family and the residence is the home of the siblings.

(UDO, found at https://library.municode.com/oh/upper_arlington/codes/code_of_ordinances?nodeId=PT11UNDEOR_ART2DE; *see also* Doc. 55–9, June 20, 2011 City Report).

As the Court has previously established, the purpose of the UDO, specifically the ORC Office and Research District, is to maximize revenue. Revenue includes "[t]ax revenues generated in connection with the Property . . . of several varieties, including personal income tax on wages earned by employees working there, entity-level income tax on the net profits of the company(ies) located there, and property tax." (Doc. 97–2, Armstrong Decl. ¶ 3).

Both parties have submitted reports from their experts comparing potential revenue generated by daycare centers to the potential revenue to be generated by Tree of Life if operating at full capacity at the Property.

Plaintiff's first expert, Robert Siegel, researched child care centers and determined that the Property could operate a child care center of with a maximum capacity of 596 children. (Doc. 96–2, Siegel Report at 4). The center would employ 159 individuals, including teachers, assistants, substitutes, and administrative and service staff. Considering industry standards, Siegel calculated that the total payroll for the operation of this center would be $3,154,470.00 annually. (*Id*., calculations shown in chart at 5).

Plaintiff's second expert, Rebekah Smith, evaluated the total taxes collectable on the Property pursuant to the Ohio Revised Code and Upper Arlington Code of Ordinances: business income tax, property tax, and local income tax on wages. (Doc. 96–3, Smith Report at 4). The taxes are summarized by Smith as follows:

> The business income tax is levied on income reduced by exempt income to the extent otherwise included in income. Income is defined as net profit of the taxpayer. Upper Arlington's Code of Ordinances similarly describes a businesses' taxable income as the net profits from the operation of a business, profession, or other enterprise or activity. Net profit is defined as:
>
> > net gain from the operation of a business, profession, enterprise or other activity (whether or not such business, profession, enterprise or other activity is conducted for profit or is ordinarily conducted for profit) after provision for all ordinary and necessary expenses either paid or accrued in accordance with the accounting system used by the taxpayer for Federal Income Tax purposes.
>
> The tax rate applied to net profit is 2.5%. Both the ORC and the Upper Arlington Code of Ordinances provide an

> exemption from this tax for religious and/or charitable organizations.
>
> Ohio property tax is based on an assessed taxable value (35% of fair market value as determined by the county auditor), and the application of a specific millage rate (one mill is one tenth of one percent). It is my understanding that Ohio property tax law is intended to maintain relatively static property tax assessments during times of fluctuations in property values. This means that the millage rate is decreased to account for an increase in taxable value and is increased to account for a decrease in taxable value so that the overall property taxes paid to the county (and ultimately to the city) will remain relatively static. Similar to the business income tax, there are exemptions from property tax for religious and/or charitable organizations.
>
> Finally, a 2.5% municipal income tax (local income tax on wages) is imposed on anyone who earns income in Upper Arlington. In other words, all wages paid to employees working in the Building would be taxes at 2.5%.

(*Id*. at 4–5).

Ms. Smith considered the testimony of Tree of Life Superintendent Todd Marrah who stated if Tree of Life had the ability to use the Property to operates its school, it would be able to accommodate 1200

students. At capacity, Tree of Life would employ 275 staff members with an estimated payroll of $5,000,000. Tree of Life would not pay business income taxes since it is a non-profit entity. Therefore, Ms. Smith opined that Tree of Life would generate $125,000 in tax revenue on the wages. Ms. Smith further considered the information in Siegel's report and concluded if a non-profit daycare center were operated at the Property, the total payroll would be $3,154,470 annually generating $78,862 in tax revenue for Upper Arlington. If the hypothetical daycare center were for profit, Ms. Smith opined that the center would generate approximately $83,987 in tax revenue. (*Id*. at 6–7). Finally, Ms. Smith considered the actual tax data from the Property under previous owners and in 2009 Upper Arlington received $20,269 in revenue. Therefore, she concluded that "Upper Arlington's tax benefit from the Tree of Life school operations would be better as compared to the three alternate scenarios presented." (*Id*. at 7).

Defendant offers the expert opinion of Catherine Armstrong, the former Director of Finance and Administrative Services for the City of Upper Arlington. Based on her 21 years of employment in Upper Arlington, Ms. Armstrong rebuts the opinions of Plaintiff's experts arguing they did not fully understand the taxes in Upper Arlington, or made unfounded assumptions in their calculations. For example, Ms. Armstrong points out that Ms. Smith was incorrect in assuming that property taxes remain relatively static as that only pertains to voted levies. Ms. Armstrong also emphasizes that she used actual numbers from real businesses operating in Upper Arlington, not speculative numbers like Plaintiff's

experts. (Doc. 97–2, Armstrong Decl. ¶ 20–22).[11] Further, Ms. Armstrong points out that the numbers used by Plaintiff's experts would be a "never—before—seen" "giant daycare". (*Id.* ¶ 4(c)). Ms. Armstrong states that the "permitted use of a day care center would be ancillary to the main use of the building." (*Id.*). Ms. Armstrong created a chart illustrating the revenue to Upper Arlington per square foot for each permitted use, as well as daycare centers.[12] According to Ms. Armstrong, a daycare center would generate income of $4.77 per square foot, where as Tree of Life if operating at full capacity ("TOL Aspired"), would generate income of $.62 per square foot. Also, when the Property was operated by AOL/Time Warner, Ms. Armstrong averaged the income tax revenue for the 10 years and the income per square foot was $10.08. (*Id.* ¶ 22).

Upper Arlington also provided expert testimony from both Chad Gibson and Robert Weiler in support of previous motions filed with the Court. Chad Gibson also researched and opined on daycare centers. There are no daycares currently in the ORC Office and Research District. Of the daycares he was able to speak with located in Upper Arlington, the largest one who responded has an enrollment of 130 children. The

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[11] Ms. Armstrong considered 9 categories of uses for the Property, but Plaintiff has only offered evidence that two uses are similar comparators, therefore, the Court will only consider those for purposes of this analysis. (Doc. 97–2, Armstrong Decl. Ex. C).

[12] These calculations illustrate that the permitted uses maximize tax revenue much more than schools and justify the policy behind the City's UDO.

hours for the daycares are different from schools in that there are typically no activities after 6 p.m. on weeknights and on weekends. Therefore, based on his research, he opined that daycare centers are significantly different from schools, including down to their primary purpose which for schools is "to educate students" whereas for daycares it is "to serve the general working public by providing child care for young children." (Doc. 55-2, Gibson Aff. ¶ 17).

Robert J. Weiler, Sr., with the Robert Weiler Company Realtors and Appraisers served as an expert for Upper Arlington and was asked to evaluate the Property if used as a school or daycare. Robert Weiler's background is unique in that he has his Juris Doctorate and advanced degrees in real estate and finance. He has experience in consulting, developing, real estate, and owning daycare centers. He evaluated the purpose of the ORC Office and Research District and opined that "[t]he permitted uses for the district are tailored to meet the objectives of the district. While day care facilities are providing an important service to their clientele, they are not a significant revenue producer for the city in comparison with alternative office uses particularly involving the property located at 5000 Arlington Centre Boulevard." (Doc. 60–2, Weiler Expert Report at 1–2). He continued, "[a]lthough daycares are not significant revenue producers, daycares compliment a commercial use by providing child supervision for employees in the area." (*Id*. at 2).

After careful consideration of the findings and opinions of each of the aforementioned experts, the Court finds Defendant's expert, Catherine Armstrong, to be the most credible based on her 21

years of experience as the Director of Finance and Administrative Services for the City of Upper Arlington, her specific knowledge of this issue, and the use of real-world figures. Her findings show that a daycare located at the Property would generate seven times more tax revenue for the City than Tree of Life.

Therefore, based on the expert opinion of Catherine Armstrong, the Court finds that even if daycare centers were permitted in the ORC Office and Research District as an ancillary use, they would still generate more revenue to the City of Upper Arlington than Tree of Life. Additionally, the expert testimony of both Gibson and Weiler emphasize that even when daycare centers were permitted in the ORC Office and Research District, they were intended to be an ancillary use to compliment a commercial use, whereas a 1200–student K–12 school is not an ancillary use. Further, Tree of Life has failed to provide any evidence that a daycare center would have the same effect as a K–12 school, such as traffic patterns, extracurricular activities, etc. Accordingly, a daycare center is not similarly situated to a religious school with respect to maximizing revenue to the City.

b. Partial Office Uses

Plaintiff asserts that a business could purchase a building the size of the Property and use only part of it, or only staff it with a few employees, as there is no requirement that a building in the ORC Office and Research District be fully staffed. (Doc. 96–1, Pl.'s Mot. at 6). Plaintiff provides testimony that the Property went from generating personal and entity-level income tax revenue of $1,216,732.00 in 2005 to

only $20,269.00 in 2009 when the prior occupants AOL/Time Warner were decreasing employment at the site. (*Id*.) (citing Doc. 18, Armstrong Aff. ¶ 6); *see also* Doc. 56, Armstrong Dep. at 16). Plaintiff concludes that "[t]his partial use of the building was permissible under the UDO and the requirements of the ORC zoning district. Yet such partial use does not maximize income tax revenue generated by the City." (Doc. 96–1, Pl.'s Mot. at 6–7).

Defendant responds that the partial office use does not exist anywhere in the UDO, but is rather "an extrapolation from the fact that not all uses will operate at all times at peak capacity." (Doc. 101, Def.'s Reply at 8). Defendant argues, and the Court agrees, that "if a partial use is accepted as a valid comparator, then there can never be a case in which a city with the goal of maximizing revenue could ever prevail." (*Id*. at 8–9). A city can set forth the regulatory purpose, but a city cannot demand full use of a property to realize that purpose. Therefore, for purposes of the analysis of similar comparators, the Court finds it should look to the comparison of the full use of one assembly or institution compared to the full use of another type of assembly or institution. The Court has considered this in the analysis of daycares set forth above.

Tree of Life has failed to meet its burden of identifying a similar secular comparator treated more favorably under the City's UDO and therefore cannot establish a prima facie RLUIPA equal terms violation. *See Primera Iglesia*, 450 F.3d at 1313–14 (noting that "without identifying a similarly situated nonreligious comparator that received favorable treatment, Primera failed to establish a prima facie Equal Terms violation.").

2. Treated Equally

The Sixth Circuit has not adopted a test for deciding whether the equal terms provision of RLUIPA has been violated.[13] Both parties argue that their respective positions will prevail no matter what test this Court, and ultimately the Sixth Circuit, chooses to apply to the facts of this case. The Sixth Circuit declined to choose among the tests in prior appeals of this case stating that it "need not definitively choose among the various tests used by other circuits in order to resolve this case." *See Tree of*

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[13] The Sixth Circuit in *Livingston Christian Schs. v. Genoa Charter Twp.*, 858 F.3d 996, 1004 (6th Cir. 2017), recently heard a RLUIPA substantial burden case. The Court in *Livingston* recognized that "[t]he plaintiff's own actions have also been found relevant in determining whether a burden is considered substantial. Several circuits have held that, when a plaintiff has imposed a burden upon itself, the government cannot be liable for a RLUIPA substantial-burden violation. For example, when an institutional plaintiff has obtained an interest in land without a reasonable expectation of being able to use that land for religious purposes, the hardship that it suffered when the land-use regulations were enforced against it has been deemed an insubstantial burden." *Id.* at 1004; *see also Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007) (concluding that the plaintiff was not substantially burdened when it had imposed the burden upon itself by purchasing property in an industrial zone for use as a church after having been informed that its special-use application would be denied because the relevant zoning ordinance banned churches in that zone).

Although the case at bar involves an equal terms RLUIPA claim and not a substantial burden claim, it is worth noting that the alleged harm suffered by Plaintiff in this case was self-inflicted. Plaintiff was fully aware of the zoning restrictions when it purchased the building. Tree of Life was treated like any other school would have been, irrespective of religion.

Life Christian Schs., 823 F.3d at 370. The Sixth Circuit further recognized that some circuits

> require that a comparator be "similarly situated" to the plaintiff religious assembly or institution with regard to the regulation at issue or to its purpose. For instance, the Third Circuit restricts comparison to "secular assemblies or institutions that are similarly situated [to the religious assembly] *as to the regulatory purpose*." *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch,* 510 F.3d 253, 266 (3d Cir. 2007). The Second Circuit compares the plaintiff religious assembly to a nonreligious assembly "similarly situated for all functional intents and purposes of the regulation." *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419, 423 (5th Cir. 2011) (internal quotation marks omitted) (discussion *Third Church of Christ, Scientist, of N.Y.C. v. City of New York*, 626 F.3d 667 (2d Cir. 2010)); *see also Elijah Grp., Inc.*, 643 F.3d at 422–24 (describing how the various tests using "similarly situated' language differ, while declining to choose among them).

Id.

Both parties in this case have urged the Court to apply the Fifth Circuit's test set forth in *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279 (5th Cir. 2012). Plaintiff asserts that although the various

tests function similarly, "the clearest test that is most faithful to RLUIPA is the Fifth Circuit's test." (Doc. 96–1, Pl.'s Mot. at 8). Defendant seems to agree, stating that "[p]erhaps the most common test, however, exists in the Fifth Circuit." (Doc. 97, Def.'s Mot. at 14). This test also seems to be consistent with the instruction from the Sixth Circuit on remand as it requires a court to examine "the regulatory purpose or zoning criterion behind the regulation at issue" and "whether the religious assembly or institution is treated as well as every other nonreligious assembly or institution that is 'similarly situated' with respect to the stated purpose or criterion." *Opulent Life Church*, 697 F.3d at 292–93.

There is no dispute that the City of Upper Arlington made clear to Plaintiff long before the purchase of the Property that schools were not a permitted or conditional use in the ORC Office and Research District. The purpose of the "ORC Office and Research District" is set forth in Section 5.03(A)(6) of the UDO as follows:

> [T]o allow offices and research facilities that will contribute to the City's physical pattern of planned, healthy, safe, and attractive neighborhoods. The ORC district should also provide job opportunities and services to residents and contribute to the City's economic stability.

Permitted uses generally include, but are not limited to business and professional offices, research and development, book and periodical publishing,

insurance carriers, corporate data centers, survey research firms, and outpatient surgery centers.

The Court finds that Plaintiff's proposed use of the Property as a school is not consistent with the regulatory purpose of the ORC Office and Research District–to maximize income, whereas permitted uses such as banks, hotels/motels, and hospitals do serve that purpose. Plaintiff, a religious school, is treated the same as every other nonreligious assembly or institution, such as secular schools, that do not maximize tax revenue as they are all prohibited from the ORC Office and Research District. Therefore, regardless of what test is applied, there is no nonreligious assembly or institution similarly situated that is being treated better than Plaintiff. Thus, Plaintiff has failed to establish that is has been treated on less than equal terms with a similarly situated nonreligious assembly or institution. Accordingly, there has been no unequal treatment and no RLUIPA violation, merely a neutral application of the City's zoning laws.

B. Eminent Domain

Both the Sixth Circuit and Tree of Life made reference to eminent domain, however, the Court does not find that eminent domain is relevant to Plaintiff's RLUIPA claim.

The Sixth Circuit observed that the "government could ensure commercial use of the property at issue without violating the federal statute. Using eminent domain Upper Arlington could force TOL Christian Schools to sell the land to the government, and sell the land to a buyer that the government thinks offers superior economic benefits." *See Tree of Life Christian*

Schs., 823 F.3d at 372–77 (citing *Kelo v. City of New London*, 545 U.S. 469 (2005)).

Tree of Life, in arguing that the City's goal of maximizing tax revenue is arbitrary and unreasonable, asserts that the City is in effect "using its zoning code as a kind of eminent domain, prohibiting any use of the property it doesn't like. In so doing, it exercises the rights of a property owner without actually owning the property." (Doc. 96–1, Pl.'s Mot. at 3–4).

Regardless of whether the City had the ability to exercise its power of eminent domain over the Property in question, that is not an element of Tree of Life's RLUIPA claim and therefore not relevant to this case. Further, as noted by Judge White in her dissent, "the majority's discussion of eminent domain in inapposite. TOLCS purchased the property with knowledge of the existing zoning, and the City has no obligation to compensate TOLCS as a condition of its enforcement of its valid zoning regulations." *Tree of Life Christian Schs.*, 823 F.3d at 382, n. 12.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant's Motion for Final Judgment and **DENIES** Plaintiff's Motion for Final Judgment. Final judgment shall be entered in favor of Defendant the City of Upper Arlington.

Additionally, the judgment should reflect that the City of Upper Arlington agrees to an injunction that daycares are not a permitted use in the ORC Office

and Research District, nor will the UDO be amended to allow them in the district in the future.

The Clerk shall remove Documents 79 and 82 from the Court's pending motions list.

The Clerk shall remove this case from the Court's pending cases list.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

RECOMMENDED FOR FULL-TEXT
PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 16a0122p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TREE OF LIFE CHRISTIAN SCHOOLS,

Plaintiff-Appellant,

v.

CITY OF UPPER ARLINGTON,

Defendant-Appellee.

No. 14-3469

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 2:11-cv-00009—George C. Smith,
District Judge.

Argued: April 29, 2015

Decided and Filed: May 18, 2016

Before: BOGGS, SUHRHEINRICH, and WHITE,
Circuit Judges.

COUNSEL

ARGUED: Erik W. Stanley, ALLIANCE DEFENDING FREEDOM, Scottsdale, Arizona, for Appellant. Mark D. Landes, ISAAC, WILES, BURKHOLDER & TEETOR, Columbus, Ohio, for Appellee. **ON BRIEF:** Erik W. Stanley, ALLIANCE DEFENDING FREEDOM, Scottsdale, Arizona, Philip Gerth, Daniel J. Skinner, Todd A. Fichtenberg, GERTH & SKINNER, LLC, Columbus, Ohio, for Appellant. Mark D. Landes, Craig R. Mayton, Scyld D. Anderson, ISAAC, WILES, BURKHOLDER & TEETOR, Columbus, Ohio, for Appellee. Philip K. Hartman, Yazan S. Ashrawi, FROST BROWN TODD, LLC, Columbus, Ohio, James C. Becker, Columbus, Ohio, for Amici Curiae.

BOGGS, J., delivered the opinion of the court in which SUHRHEINRICH, J., joined, and WHITE, J., joined in part. WHITE, J. (pp. 13–25), delivered a separate opinion concurring in part and dissenting in part.

OPINION

BOGGS, Circuit Judge. Defendant-Appellee Upper Arlington (the government), a suburb of Columbus, Ohio, regulated the use of land owned by Plaintiff-Appellant Tree of Life Christian Schools (TOL Christian Schools). As a result of this regulation, TOL Christian Schools could not use its land to operate a religious school. TOL Christian Schools, after corresponding with and applying to the government on related proposals, applied to rezone

the property to allow use as a religious school. The government denied the application because such a use would not accord with certain aspects of the government's Master Plan. In its denial, the government focused on the Master Plan's provision that the government maintain zoning for commercial uses in order to maximize its income-tax revenue.

After the denial, TOL Christian Schools filed this suit. The suit primarily claims, under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5, that the government illegally failed to treat TOL Christian Schools on equal terms with nonreligious assemblies or institutions. After both parties moved for summary judgment, the district court granted summary judgment to the government. This was error.

Although the record in this case is complex, we can summarize our view briefly. TOL Christian Schools purchased the largest office building in Upper Arlington, unused at the time of the purchase, and attempted to negotiate with the government to open a religious school. The government refused to strike a deal with TOL Christian Schools in hopes, apparently unfounded, that the property's former occupant, AOL/Time Warner (or its equivalent), would return. Such a result, the government officials further hoped, would mark the first step in a plan to increase services by increasing personal-income-tax revenues without allowing multifamily, retail, or commercial use of land currently zoned for only single-family residential use.

Anticipating controversies similar to this one, and affirming its commitment to protecting religious

freedom, Congress enacted RLUIPA, which provides, among other things, that "[n]o 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(b)(1). Different circuits interpret this provision differently. Some circuits have held that a land-use regulation must treat "similarly situated" religious and nonreligious assemblies and institutions equally. The Eleventh Circuit has held that a government land-use regulation that discriminates against a religious assembly or institution in comparison to *any* nonreligious assembly or institution is invalid unless it is narrowly tailored to achieve a compelling government interest.

Under any approach, the issue in this case is whether the government treats nonreligious assemblies or institutions that would fail to maximize income-tax revenue in the same way it has treated the proposed religious school. That is a factual, not a legal, question. Federal courts may not resolve genuine issues of material fact on motions for summary judgment, even in proceedings for equitable relief. So, the district court's grant of summary judgment to the government was error. We reverse the judgment of the district court and remand. We explain more fully our reasoning below.

I

In 2009, AOL/Time Warner, a media company not party to this litigation, vacated an office building located at 5000 Arlington Centre Boulevard in Upper Arlington. The same year, TOL Christian Schools, a

school with several campuses across the Columbus area supported by local churches, began negotiations that would conclude in August 2010 with its purchase of the property at 5000 Arlington Centre Boulevard.

Upper Arlington is a primarily residential suburb. It has assembled various land-use and economic regulations in the Unified Development Ordinance (UDO). The UDO zones Upper Arlington. The UDO provides for seven criteria to "be followed in approving zoning map amendments to the UDO." UDO § 4.04(C). One of those criteria provides "[t]hat the proposed zoning district classification and use of the land will generally conform with the master plan." *Id.* § 4.04(C)(5).

The Master Plan focuses on regulating uses of land in order to increase the government's income-tax revenues. For this reason, it emphasizes the importance of using certain non-residential land as office space.[1] The government theorized that such land use will attract high-income professionals, whose income the government can tax. The zone for office use, under the UDO, is the "ORC Office and Research District" (ORC District). According to the UDO, the purpose of the ORC District is

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[1] The government implies that the Master Plan's purpose is straightforward and unitary. We assume as much without deciding. But we note that, even on the few pages of the Master Plan submitted in the record, it might be possible for reasonable minds to derive from the Master Plan's language different understandings of what uses conform. Such difference would make consistent compliance with the relevant UDO provisions difficult indeed.

> to allow offices and research facilities that will contribute to the City's physical pattern of planned, healthy, safe, and attractive neighborhoods. The ORC district should also provide job opportunities and services to residents and contribute to the City's economic stability. Permitted uses in the ORC district are: business and professional offices, research and development, book and periodical publishing, insurance carriers, corporate data centers, survey research firms, outpatient surgery centers, [and] hospitals . . . .

UDO § 5.03(A)(6). The ORC District includes 5000 Arlington Centre Boulevard.

Extended negotiation between TOL Christian Schools and the government preceded this case. On January 5, 2011, after negotiations had failed, TOL Christian Schools filed this federal case, alleging that Upper Arlington had violated RLUIPA's Equal Terms Provision, and seeking injunctive relief. After procedural developments in this case, including a previous appeal to this court, not now relevant, TOL Christian Schools "submitted a[n] . . . application to the [Government] to *rezone* its property. . . . from ORC Office and Research District to residential," in which zone the government allows land to be used for schools, religious or otherwise. *Tree of Life Christian Schs. v. City of Upper Arlington*, 16 F. Supp. 3d 883, 892 (S.D. Ohio 2014) (emphasis added). In response to this zoning amendment that TOL Christian Schools proposed, the government's senior planning officer, Chad Gibson, reported to the City Council that he

> believe[d] that the proposed rezoning is in direct opposition to numerous core master plan goals and objectives. The proposed zoning change would eliminate nearly 16 acres of extremely limited ORC-zoned ground, which will reduce the amount of office and research space within the City . . . [*A*]*pproving such a rezoning would be contrary to the City's long-term financial interests.*

Chad Gibson, Staff Report to Upper Arlington City Council (Nov. 25, 2013) (emphasis added). In addition, the City Attorney spoke to the City Council, focusing on the fact "that rezoning to eliminate commercially zoned property would be contrary to the master plan." *Tree of Life Christian Schs.*, 16 F. Supp. 3d at 892. Based on Gibson's report and the City Attorney's comments, "the Council denied [TOL Christian Schools]'s rezoning request" on December 9, 2013. *Ibid.*

On February 11, 2014, TOL Christian Schools moved for summary judgment on its claims in the district court. On March 6, 2014, Upper Arlington submitted both a memorandum opposing the motion of TOL Christian Schools and a cross-motion for summary judgment. On April 18, 2014, the district court granted summary judgment to the government, reasoning along the lines of Gibson's report. TOL Christian Schools timely appealed.

II

A

As a general matter, *municipalities* regulate land use. The *federal government*, by contrast, generally does not regulate local land use. But Congress has long concerned itself with the protection of religious freedom. As the Department of Justice has observed,

> despite the guarantee of religious freedom in our founding documents, individuals and groups have faced discrimination based on religion throughout our history. And throughout our history, Congress and the federal government have repeatedly acted to protect Americans from such discrimination. . . .
>
> For example, while it was passed largely in response to ongoing racial tensions, the landmark Civil Rights Act of 1964 included religion along with race . . . as categories in which persons are protected against discrimination in a host of areas . . . .

U.S. Dep't of Justice, *Report on the Tenth Anniversary of the Religious Land Use and Institutionalized Persons Act* 1 (Sept. 22, 2010).

"RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens . . . ." *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA). Congress sought to justify RFRA's regulation of states by its Fourteenth Amendment power to enforce the First Amendment. But, the Supreme Court held, "Congress had

exceeded" its authority to "enforce constitutional rights pursuant to § 5 of the Fourteenth Amendment" when it endeavored to "defin[e] those rights instead of simply enforcing them." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1236 (11th Cir. 2004) (emphasis omitted) (discussing *City of Boerne v. Flores*, 521 U.S. 507 (1997)). Because, in the Supreme Court's view, "RFRA contradict[ed] vital principles necessary to maintain separation of powers and the federal balance," the Court held that RFRA, as applied to the states, was unconstitutional. *City of Boerne*, 521 U.S. at 536.

After *City of Boerne*, Congress passed RLUIPA. RLUIPA, "enacted under Congress's Commerce and Spending Clause powers, imposes the same general test as RFRA but on a more limited category of governmental actions." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (2014).[2] By enacting RLUIPA, Congress directed federal courts to scrutinize municipal land-use regulations that function to exclude disfavored religious groups like TOL Christian Schools. "RLUIPA's land-use sections provide important protections for the religious freedom of persons, places of worship, *religious*

[2] Unlike RFRA, "RLUIPA, in an obvious effort to effect a complete separation from First Amendment case law," *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761–62, omitted "the reference to the First Amendment," *id.* at 2762, that was present in RFRA. In addition, RLUIPA provides that it "shall be construed in favor of a broad protection of religious exercise . . . ." 42 U.S.C. § 2000cc-3(g). The Court has acknowledged that the phrase "'exercise of religion,' as it appears in RLUIPA, must be interpreted broadly . . . ." *Hobby Lobby*, 134 S. Ct. at 2762 n.5.

schools, and other religious assemblies and institutions." U.S. Dep't of Justice, *supra* at 4 (emphasis added).

RLUIPA protects land use as religious exercise in several ways. For example, it limits government's ability to impose a land-use regulation "that imposes a substantial burden on" religious exercise. 42 U.S.C. § 2000cc(a)(1). In addition, RLUIPA prohibits land-use regulation that "discriminates against any assembly or institution on the basis of religion," *id.* § 2000cc(b)(2), or "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction," *id.* § 2000cc(b)(3)(B). The RLUIPA provision at issue here, often called the Equal Terms Provision, provides that "[n]o 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." *Id*. § 2000cc(b)(1).

B

All of our sister circuits that have interpreted the Equal Terms Provision have glossed the statutory language in a way that allows defendant governments some safe harbor for permissible land-use regulation. But they disagree about the "nonreligious assembly or institution" whose treatment by the government should be compared with the government's treatment of a religious assembly or institution.

The Eleventh Circuit's test in *Midrash Sephardi, Inc. v. Town of Surfside* is the oldest and most plaintiff-friendly. 366 F.3d 1214 (11th Cir. 2004). The Eleventh Circuit begins with a literal reading of the Equal Terms Provision's language: A valid

comparator could be *any* nonreligious assembly or institution. It is this understanding of what is a comparator, i.e., which secular land users are similarly situated to a religious assembly or institution, that is so plaintiff-friendly. To compensate, and as an off-setting consideration, the Eleventh Circuit borrows from the Supreme Court's Free Exercise jurisprudence a strict-scrutiny analysis: a land-use regulation does not violate the Equal Terms Provision if it is *narrowly tailored* to further a *compelling* government interest.

Other circuits, by contrast, require that a comparator be "similarly situated" to the plaintiff religious assembly or institution with regard to the regulation at issue or to its purpose. For instance, the Third Circuit restricts comparison to "secular assemblies or institutions that are similarly situated [to the religious assembly] *as to the regulatory purpose*." *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 266 (3d Cir. 2007). The Second Circuit compares the plaintiff religious assembly to a nonreligious assembly "similarly situated for all functional intents and purposes of the regulation." *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419, 423 (5th Cir. 2011) (internal quotation marks omitted) (discussing *Third Church of Christ, Scientist, of N.Y.C. v. City of New York*, 626 F.3d 667 (2d Cir. 2010)); *see also Elijah Grp., Inc.*, 643 F.3d at 422–24 (describing how the various tests using

"similarly situated" language differ, while declining to choose among them).[3]

We need not definitively choose among the various tests used by other circuits in order to resolve this case. Granting summary judgment to the government is erroneous under any test, because "summary judgment must be denied in a proceeding for equitable relief . . . where genuine issues of material fact exist." *Hasan v. Clevetrust Realty Inv'rs*, 729 F.2d 372, 374 (6th Cir. 1984); *cf. Hess v. Schlesinger*, 486 F.2d 1311, 1313 (D.C. Cir. 1973) (holding that, when

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[3] The Seventh Circuit observed that the Third Circuit's "use of 'regulatory purpose' as a guide to interpretation" presents several practical problems. *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010) (en banc). The regulatory-purpose test:

> (1) "invites speculation concerning the reason behind the exclusion of churches";
>
> (2) "invites self-serving testimony by zoning officials and hired expert witnesses";
>
> (3) "facilitates zoning classifications thinly disguised as neutral but actually systematically unfavorable to churches"; and
>
> (4) "makes the meaning of 'equal terms' in a federal statute depend on the intentions of local government officials."

Ibid.

Nonetheless, the Seventh Circuit adopted a test closer to that of the Second, Third, and Fifth Circuits than that of the Eleventh, although it "shift[ed] focus from regulatory *purpose* to accepted zoning *criteria*." *Ibid.; see also Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1172–73 (9th Cir. 2011) (following the Seventh Circuit's "accepted zoning criteria" test).

a plaintiff seeking an injunction raises a genuine issue of fact material to the defendant government's claim regarding its justification for a policy, summary judgment is inappropriate); *Windsurfing Int'l, Inc. v. Ostermann*, 534 F. Supp. 581 (S.D.N.Y. 1982) (holding that, where defendant's assertion depends on proof to be offered at trial, summary judgment is inappropriate).

III

Do TOL Christian Schools and the government genuinely dispute whether the government treated more favorably any other assembly or institution that, like TOL Christian Schools, failed to maximize the government's income? The government's current zoning law allows (in fact, encourages) nonreligious assemblies or institutions to use 5000 Arlington Centre Boulevard: businesses most obviously, but also nonprofit organizations such as hospitals, outpatient care centers, and daycare centers.[4]

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[4] The UDO formerly allowed daycares as permitted uses in ORC Office and Residential District. Upper Arlington chose, during the pendency of the litigation, to exclude daycares from the ORC District. *See* Ordinance 52-2011. But "[a] defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 583 (6th Cir. 2012) (quoting *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000)); *see also Ohio Citizen Action*, 671 F.3d at 583 (observing that "the defendant bears 'the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur" (quoting *Friends of the Earth*, 528 U.S. at 190)). Here, the removal of daycares from the zone, absent an injunction that would prevent their permitting, would not remedy the alleged problem; Upper

The government does not deny that the UDO would allow these other assemblies or institutions to use 5000 Arlington Centre Boulevard.[5] So the remaining question is whether these other assemblies or institutions, treated more favorably, are similarly situated. TOL Christian Schools has pled facts sufficient to allege that at least some of these assemblies or institutions are situated, relative to the government's regulatory purpose, similarly to TOL Christian Schools, i.e., they would fail to maximize income-tax revenue. *See* Verified Compl. ¶¶ 60–65 (identifying permitted uses of child day care centers, hotels/motels, hospitals, outpatient surgery centers, and business and professional offices). These allegations create a genuine issue of fact as to whether the government treats more favorably assemblies or institutions similarly situated with respect to maximizing revenue, unless the government can demonstrate that no assemblies or institutions *could be* similarly situated.

The religious land use that TOL Christian Schools proposes is, we assume without deciding, deleterious to the purpose of the regulation at issue (which we assume to be increasing income-tax revenue). But the

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Arlington always could amend the UDO once again to allow daycares in the ORC district. *See* Gibson Depo., R. 55 at 66 (explicitly admitting that Upper Arlington could return to the earlier UDO at any time).

[5] A government's small size or general anti-development regulations or political culture cannot protect it from valid RLUIPA claims on motions for summary judgment: A government's regulatory system that provides for unequal treatment violates RLUIPA even if no practical comparator has arisen.

nonreligious uses that the government concedes it would allow seem to be similarly situated to the regulation. Indeed, the comparisons that the government invites seem to compel the opposite conclusion, even on casual review.

For instance, the government suggested at oral argument that it would prefer that 5000 Arlington Centre Boulevard be used for an ambulatory care center or outpatient surgery center. But we cannot *assume* as a fact, and the government certainly has offered no evidence to show, that an ambulatory care center (or an outpatient surgery center, or a data and call center, or office space for a not-for-profit organization, or a daycare) would employ higher-income workers than TOL Christian Schools would (or result in less traffic or even in less outdoor noise, each an alternative rationale at one point proffered by the government for refusing TOL Christian Schools's application). The dissent engages in a vigorous factual analysis of these factors, but they are genuine issues of material fact that cannot be resolved on summary judgment. As such, the district court's grant of summary judgment to the government was error.

We remand to the court below to answer remaining questions of fact: Are there nonreligious assemblies or institutions to which the court should compare Tree of Life Christian Schools because they would fail to maximize income-tax revenue, and if so, would those assemblies or institutions be treated equally to TOL Christian Schools?

IV

Our obligation is to apply the statute enacted by Congress. We cannot contort its meaning. Under any

of our sister circuits' tests, RLUIPA does not allow the government to treat more favorably land uses that, like TOL Christian Schools, fail to maximize the government's income-tax revenue. The standard for judgment is objective: Are other assemblies similarly situated or are they not? It is not for us to decide this question, because the question is factual. Taking that position does not imply our acceptance of the Eleventh Circuit's strict-scrutiny standard. Nor does it imply intermediate scrutiny or rational basis. These standards of legal review and their attendant arguments do not apply at this stage in the litigation.

For instance, the government claims that TOL Christian Schools can locate elsewhere in 95% of the land that exists in Upper Arlington. That claim, perhaps relevant to the intermediate-scrutiny defense of "other means," has no application here. The Equal Terms Provision forbids a locality from discriminating against religious institutions and assemblies, regardless of time, place, and manner. In other words, it is not a defense that a government discriminates against religious assemblies and institutions only in part, rather than all, of its jurisdiction.[6] Even the government's proffered rational basis for its regulation—we want A, we think

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[6] Just because *regulations* do not prevent a particular and protected use does not mean that such a use is factually possible. Here, the government points to the zoning of much of its land for residential use, where it allows owners to use land for schooling, religious or otherwise. But it may be functionally impossible for a school such as TOL Christian Schools to purchase and amalgamate such land, which could belong to many private owners.

land use B leads to A, thus we regulate to privilege land use B—does not satisfy RLUIPA's test.

Finally, we observe that the government could ensure commercial use of the property at issue without violating the federal statute.[7] Using eminent domain, Upper Arlington could force TOL Christian Schools to sell the land to the government, and sell the land to a buyer that the government thinks offers superior economic benefits. *See Kelo v. City of New London*, 545 U.S. 469 (2005); *see also* Christopher Serkin & Nelson Tebbe, *Condemning Religion: RLUIPA and the Politics of Eminent Domain*, 85 Notre Dame L. Rev. 1, 53 (2009) (arguing that eminent domain "provides local governments with an escape hatch to avoid the most severe applications of RLUIPA's zoning provisions"). But the city has not committed government funds to the theory that a traditional commercial office tenant—as yet unidentified—both could be attracted to use the land and also, if attracted, would increase tax revenues. Instead, they have placed the cost on TOL Christian Schools—perhaps to save the upfront cost of

[7] We reiterate that we assume without deciding that Upper Arlington's stated policy goal— regulating the use of land in order to maximize income-tax revenue—both reflects the essence of the statutory language and also presents no legal problems by itself, although some courts have found regulations of land use solely for the purpose of maximizing the local-government's tax revenues to be arbitrary and unreasonable. *See, e.g., Mindel v. Twp. Council of Twp. of Franklin*, 400 A.2d 1244 (N.J. Super. Ct. Law Div. 1979). We hold only that the regulatory scheme employed to affect that goal *may* violate RLUIPA and the facts disputed are material to the question of whether there has been a violation.

compensating an exercise of eminent domain, perhaps because there is no market for office space in Upper Arlington, and perhaps to exclude an unfamiliar or disfavored religious assembly.

V

TOL Christian Schools claims that Upper Arlington has violated its *constitutional* rights to equal protection and free exercise.[8] These claims are incorrect. Because facially neutral statutes such as the UDO might survive rational-basis review under the Equal Protection Clause and Free Exercise Clause,[9] Congress established enhanced protections for religious assemblies against land-use regulations. We apply RLUIPA by its statutory terms and find a genuine issue of material fact as to its applicability.

In conclusion, because we hold that there is a genuine issue of material fact as to the applicability of RLUIPA's Equal Terms Provision, we REVERSE the judgment of the district court, and REMAND for further proceedings.

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[8] TOL Christian Schools initially complained of violations of the Ohio Constitution, *see* Verified Compl. ¶¶ 167–73, but did not brief the issue on appeal, so we do not consider it.

[9] *See Emp't Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 877 (1990).

CONCURRING IN PART AND DISSENTING IN PART

HELENE N. WHITE, Circuit Judge, concurring in part and dissenting in part. I agree with my colleagues' disposition of the equal protection and free exercise claims, but respectfully dissent from the analysis and disposition of the as-applied equal-terms RLUIPA challenge. Whether the district court took too restrictive a view when it looked *solely* to secular schools as comparators is an open question in this Circuit. But assuming for argument's sake that the district court erred in its choice of standard, the City of Upper Arlington is still entitled to summary judgment because Tree of Life Christian Schools did not identify a secular comparator similarly situated with respect to the relevant zoning criteria that received more favorable treatment under the challenged Unified Development Ordinance. Dist. Ct. Op., PID 2744 (citing *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cty.*, 450 F.3d 1295, 1311 (11th Cir. 2006)). Nor has it identified or argued that there are questions of fact that bear on this issue. I would affirm the grant of summary judgment to the City.

I.

Upper Arlington (the City) is 10-miles square and almost 99% of its land is developed. Schools and churches are permitted in residential zones, which

comprise 95% of developed land within the City.[1] Commercially-zoned districts comprise 4.7% of the land and include areas zoned Office and Research Center District (ORC), which constitute a minuscule 1.1% of the land.[2] Churches are permitted as conditional uses in ORC-zoned areas but *all* schools are prohibited.[3]

The City's 2001 Master Plan, developed and implemented after lengthy study and seventeen public participation meetings at which residents gave input, notes that due to capital shortfalls,

> in order for the City to maintain its existing level of facilities and services, and **in order to provide for future capital needs**, it is critical for the City to enhance its revenues. **The revenue generated per acre from commercial use far exceeds the revenue provided by residential use.** In order to maximize revenues, the City was directed in the Master Plan to create opportunities for office

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[1] *See* Land Use Map, PID 149, and District Court Opinion, PID 2743.

[2] The City is approximately 6,336 acres and ORC-zoned districts occupy only 67 acres.

[3] Schools are prohibited in the ORC and all other commercially-zoned districts. The other commercial districts are the Office District (O), Neighborhood Business District (B-1), Community Business District (B-2), Conditional Business District (B-3), and Planned Shopping Center District (PB-3). Churches are permitted or conditional uses in commercial districts B-1, B-2, PB-3, O, and ORC.

> development that emphasize high-paying jobs . . . .

PID 2731-32 (emphasis added). In keeping with the Master Plan, the City's Unified Development Ordinance (UDO) describes the purposes of ORC zoning:

> to allow offices and research facilities that will contribute to the City's physical pattern of planned, healthy, safe, and attractive neighborhoods. The ORC district should also provide job opportunities and services to residents and contribute to the City's economic stability. Permitted uses generally include, but are not limited to, business and professional offices, research and development, book and periodical publishing, insurance carriers, corporate data centers, survey research firms, and outpatient surgery centers.

PID 1131/UDO art. § 5.04.

Against this backdrop, Tree of Life Christian Schools (TOLCS), a private religious school currently serving approximately 660 K-through-12 students and employing around 150 persons,[4] contracted in

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[4] TOLCS asserted that it employed 150 persons, and the district court used that figure in its opinion. Subsequently, however, TOLCS's counsel represented to the City's Board of Zoning Appeals that TOLCS employs 100 persons. PID 2227, 2635/supplemental record filed with leave following this court's remand.

October 2009 to purchase from Time Warner the largest office complex in the City, 5000-05 Arlington Centre Boulevard—a 15.8-acre, 254,000 square-foot two-building center in an ORC-zoned district.[5]

Although the City advised TOLCS months before it entered into the purchase agreement with Time Warner that schools are neither permitted nor conditional uses in the ORC and that site-specific rezoning would be required in order to operate a school there, TOLCS applied to the City for a conditional use permit, requesting to use the office complex "for a place of worship, church and residential, to the extent that residential includes a private school." After the City Council denied a conditional use permit, TOLCS sought to amend Table 5 of the UDO to allow private religious schools (but not other schools) as permitted uses in the ORC, and to change churches from conditional to permitted uses. The City Council denied TOLCS's request for reasons including that amending the UDO to allow only private religious schools in ORC-zoned areas would "raise a facial First Amendment problem." PID 2463, 2732.

The Time Warner-TOLCS purchase agreement contained a rezoning contingency period; nonetheless, TOLCS closed on the property on August 11, 2010,

[5] The property TOLCS purchased has been zoned commercial since 1970. Time Warner purchased the property in 2006 for $23 million dollars. TOLCS purchased the office complex from Time Warner for $6.5 million dollars.

without seeking site-specific rezoning. TOLCS filed this action in January 2011.

In October 2013, TOLCS sought, for the first time, site-specific rezoning of its office complex from ORC to R-Sd (residential suburban).[6] The City's Board of Zoning and Planning (BZAP) reviewed TOLCS's rezoning request, after which the City Council considered it at three meetings in November and December 2013. By that point, this action had been pending for well over two years, the parties had taken some discovery, and the administrative record included evaluations of TOLCS's prior requests.

City Staff reported to the City Council that the office complex now owned by TOLCS typically generated three types of income for the City: personal income tax on wages earned by employees (2%), entity-level income tax on net profits of company(ies) located there (2%), and property tax. The City's Director of Finance Catherine Armstrong had previously testified that TOLCS's office complex "is our largest commercial site and the income tax

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[6] The purpose of R-S residential zoning

> is to allow single-family dwellings in low-density residential neighborhoods. This district is further subdivided into four subdistricts R-Sa, R-Sb, R-Sc, and R-Sd, differing primarily in required lot area and yard space. Net densities range from 0.33 dwelling units per acre in the R-Sa District to 2 dwellings per acre in the R-Sd District. Permitted uses generally include, but are not limited to, single-family residential, institutional, cultural, recreation, and day care.

PID 2524/UDO § 5.02(A)(1).

generated from this property has always been significant." PID 1285, 1294. In 2001, the office complex generated 29% of the City's income tax revenues; over $3,000,000. In 2005, the office complex generated revenue from personal and entity-level income taxes totaling $1,216,732, which decreased to $20,269 in 2009, the year Time Warner vacated the office complex. Property tax revenue to the City from the office complex increased from $584,917 in 2005 to $646,219 in 2009.

In 2010, TOLCS's 150 or so employees combined earned $2,321,211.99,[7] which would translate to approximately $46,424 in personal income tax to the City, or about 1/10th the income tax (personal and entity-level) Time Warner generated in 2006.

Rezoning would also substantially change the character of the ORC district by allowing single family homes and schools in an office and research zone, eliminating over 20% of the City's existing ORC-zoned land, and permitting future owners to demolish existing buildings, which would further reduce revenue to the City. PID 2614/City Staff Report to City Council 11/23/2013.

In addition to the financial aspects of the proposed rezoning, staff addressed use concerns:

> A K-12 school has inherent characteristics which can be intrusive

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[7] TOCLS Superintendent Dr. Todd Marrah also projected that if TOCLS occupies the office complex, the student population could increase to 1300 and employees to 250, but he was not asked to project total employee wages should personnel exceed 150.

> and destructive to an office park. Traffic, including school bus circulation, loading and unloading, can be challenging for an area to accommodate. A large number of young drivers and parents arriving and departing at similar (peak) times can tax the roadways and related infrastructure, reducing the level of service for the signalized intersections. After-school activities such as band and theater productions can also bring large numbers of parents and students to the area, often necessitating overflow parking demands. Outdoor events, such as band practice, can create noise impact for office workers who are attempting to do business and/or serve clients.

PID 2490.

The City Attorney reported to the City Council that TOLCS met none of the seven standards the UDO requires for rezoning (quoted below, followed by the City Attorney's remarks in italics).

> 1. That the zoning district classification and use of the land will not materially endanger the public health or safety; [Finance Director Armstrong] testified in her deposition that the City had a decline in income in 2007, 2008, and 2009. The income in 2010 was comparable to the 2009 income and there was an increase in income in 2011. The City had a balanced budget during those years because

appropriations were not requested that would exceed estimated revenues.

The elimination of the estate tax and reductions in state funding further reduces available revenues and places additional stress on a tight budget situation. In order to continue to provide necessary services to the residents, the City needs to maximize revenues. Rezoning the Tree of Life property to residential does not maximize the revenue potential of one of the City's largest commercial office sites. The rezoning would permit a future owner to demolish the office buildings/school and build single family houses which would further reduce revenues.

2. That the proposed zoning district classification and use of the land is reasonably necessary for the public health or general welfare, such as by enhancing the successful operation of the surrounding area in its basic community function or by providing an essential service to the community or region;

The issue is not whether quality schools are necessary or if Tree of Life will be a good neighbor, but whether the City needs more residentially zoned land. Approximately 90% of the

City . . . is already zoned for residential uses, including schools. Tree of Life has failed to establish the necessity for more residentially zoned land.

3. That the proposed zoning district classification and use of the land will not substantially injure the value of the abutting property;

   Tree of Life's argument concerning St. Andrews and Wellington [both schools] are an "apples to oranges" comparison. Both . . . are located in purely residential districts that specifically contemplate schools. Tree of Life proposes to put a school in an office and retail district that does not contemplate such a use. Abutting commercial owners could not have anticipated such a school use possible when they acquired their properties.

4. That the proposed zoning district classification and use of the land **will be in harmony with the scale, bulk, coverage, density, and character** of the area the neighborhood [sic] in which it is located;

   The AOL office workers were in harmony with the commercial character of the Henderson Road corridor. Residential uses, including

600 students attending a K-12 school, are not . . .

5. That the proposed zoning district classification and use of the land will **generally conform with the Master Plan and other official plans of the City**;

   Rezoning to eliminate commercially zoned property is contrary to the Master Plan [which] seeks to "Enhance the City's revenue sources" and "Expand the amount of office space in the City".[sic] Tree of Life is asking Council to eliminate over 20% of the City's existing ORC zoned land. Commercial office comprises only 1.1 percent of the City's total land area. Zoning should be based on a comprehensive plan taking into consideration the best interests of the community. It should not be done on a piecemeal based on the desires of an individual property owner.

6. That the proposed zoning district classification and use of the land are **appropriately located with respect to transportation facilities**, utilities, fire and police protection, waste disposal, and similar characteristics; and

   The revised traffic study is still deficient in addressing the change in traffic conditions resulting from a

> school. Staff is also concerned whether adequate study has been made if the property were redeveloped for residential or other uses permitted in the R-Sd district.
>
> 7. That the proposed zoning district classification and use of the land **will not cause undue traffic congestion or create a traffic hazard.**
>
> It is questionable whether Tree of Life's promise that no athletic events or evening activities would be held at the site would be enforceable.

UDO § 4.04(c) (emphasis added)/PID 2391; 12/9/13 City Council Mtg. Minutes/PID 2578-79.

The City Council denied TOLCS's rezoning request, which prompted the parties to file cross-motions for summary judgment, the disposition of which led to this appeal.

II.

RLUIPA's equal terms provision provides: "No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less then equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). This statutory command . . . allows courts to determine whether a particular system of classifications adopted by a city *subtly or covertly departs from requirements of neutrality and general applicability.*'" *Primera Iglesia*, 450 F.3d at 1307 (quoting *Midrash Sephardi, Inc. v. Town of Surfside*,

366 F.3d 1214, 1232 (11th Cir. 2004) (emphasis added)).

To establish a prima facie case under the equal terms provision, a plaintiff has the burden of showing that 1) it is a religious assembly or institution, 2) subject to a land use regulation, that 3) treats it on less than equal terms, with 4) a nonreligious assembly or institution. *Primera Iglesia*, 450 F.3d at 1307. It is TOLCS's burden to identify a similar secular comparator treated more favorably under the UDO. *Id.* at 1313—14 (Noting that "without identifying a similarly situated nonreligious comparator that received favorable treatment, Primera failed to establish a prima facie Equal Terms violation.").

A.

As TOLCS acknowledges on appeal, the circuits generally are in accord "that valid comparators for RLUIPA purposes are secular assemblies or institutions that impact the accepted zoning criteria, or regulatory purpose, to the same or greater extent than the religious assembly or institution at issue." Reply Br. 8. *See Eagle Cove Camp & Conference Ctr. Inc. v. Town of Woodboro, Wi.*, 734 F.3d 673, 683 (7th Cir. 2013) ("In determining whether a claim exists under the equal terms provision, we look to the zoning criteria rather than the purpose behind the land use regulation") (citing *River of Life Kingdom Ministries v. Village of Hazel Crest, Ill.*, 611 F.3d 367, 371 (7th Cir. 2010) (en banc)); *Centro Familiar Cristiano v. Village of Yuma*, 651 F.3d 1163 (9th Cir. 2011) (observing that "our analysis is about the same as the Third Circuit's: we look to see if the church is

'similarly situated as to the regulatory purpose'" or to the Seventh Circuit's refinement of the regulatory purpose test "to avoid inappropriate subjectivity by requiring equality with respect to 'accepted zoning criteria,' such as parking, vehicular traffic, and generation of tax revenue."); *Third Church of Christ v. City of New York*, 626 F.3d 667, 670 (2d Cir. 2010) (church and two secular institutions were similarly situated "for all functional intents and purposes relevant here."); *River of Life Kingdom Ministries*, 611 F.3d at 371 ("The problems . . . with the 3d Circuit's test can be solved by a shift of focus from regulatory *purpose* to accepted zoning *criteria*. 'Purpose' is subjective and manipulable . . . 'Regulatory criteria' are objective–and it is federal judges who will apply the criteria to resolve the issue."); *Lighthouse Inst. for Evangelism*, 510 F.3d 253, 266 (3d Cir. 2007) (comparator must be similarly situated). *But see Elijah Group v. City of Leon Valley*, 643 F.3d 419, 424 (5th Cir. 2011) (declining to adopt the test of any other circuit and holding that RLUIPA's equal terms provision "must be measured by the ordinance itself and the criteria by which it treats institutions differently."), and *Primera Iglesia*, 450 F.3d 1295 (11th Cir. 2011) (comparators are determined based on whether challenged ordinance is facially neutral or facially discriminatory; if the latter, any nonreligious assembly or institution can be a comparator and strict scrutiny applies. If the challenged ordinance is facially neutral, however, claims are classified as either 1) those that challenge ordinances of general applicability but that nonetheless target religion

through a religious gerrymander, or 2) those that challenge discriminatory application.)[8]

The parties did not attempt to resolve the legal standard below; nor do they do so on appeal. Each maintains that it prevails under any of the standards. Further, TOLCS does not challenge the City's zoning criteria; rather, it argues that it is treated unfavorably compared to similarly situated comparators with respect to those criteria. Finally, neither party argued to the district court, and neither argues on appeal, that there are questions of fact with regard to the various uses or zoning criteria that preclude summary judgment.

B. Similarly Situated Comparators

TOLCS acknowledged below that secular schools are proper comparators, and does not dispute the district court's determination that the UDO treats *all* schools equally, i.e., prohibits *all* schools in ORC districts. It also acknowledges that churches are permitted as conditional uses in ORC districts. TOLCS's argument is that while secular schools are proper comparators, they are not the only proper comparators, and the district court erred in not considering day-care centers, charitable office uses,

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[8] The majority's references to the Eleventh Circuit's test for determining comparators, Maj. Op. at 3 and 7, are unnecessary given that TOLCS does not argue for application of that test. TOLCS simply argues that, contrary to the district court's determination that only secular schools are proper comparators to TOLCS, none of the circuits (including the Eleventh Circuit) require that secular comparators be *identical* to the religious plaintiff, only similarly situated. Appellant Br. 22, 24.

and hospitals as additional comparators, which, it asserts, are similarly situated with respect to the zoning criteria but treated more favorably.[9]

In September 2011, after TOLCS brought the instant action, the City Council passed an ordinance amending the UDO to remove daycare centers from the category of permitted uses and designate them as prohibited uses in the ORC district. TOLCS asserts that the district court erred in not considering daycares as a valid comparator because its damages claim cannot be mooted by the City's voluntary cessation of unlawful conduct, and because the amended UDO still violates RLUIPA by allowing hospitals and non-profit uses in the ORC district. The City asserts that daycare centers are not a proper comparator because they are no longer allowed, but even assuming they are, they are not similarly situated with respect to the relevant zoning criteria. We turn to that question.

1. **Child Day-Care Centers**

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[9] TOLCS asserts that the "fatal flaw" in the City's attempts to distinguish it from day-care centers, charitable office uses, and hospitals, is that

> the City's desire to maximize tax revenue from the use of Tree of Life's property translates to nothing more than a vague set of hopes and dreams. The City . . . created the ORC district in the hopes that it would generate tax revenue for the City but it drafted the district requirements in an imprecise, overly broad, and impractical way that allows for uses in the ORC district that undercut its stated purpose and criteria to the same or greater extent than Tree of Life's use.

Reply Br. 15.

The UDO defines "Child Day-Care" as:

> administering to the needs of infants, toddlers, preschool children and school children outside of school hours by persons other than their parents or guardians, custodians or relatives by blood, marriage, adoption, for any part of the 24 hour day in a place or residence other than the child's own home.

PID 1025. Child Day Care may be provided at a permanent residence or other location:

> **Child Day-Care Center and Type A Home**: means any place in which child day-care is provided, with or without compensation, *for 13 or more children at one time*, or any place that is not the permanent residence of the licensee or administrator in which child day-care is provided, with or without compensation, *for seven to 12 children at one time*. In counting children for the purpose of this ordinance, any children under six years of age who are related to a licensee, administrator, or employee and who are on the premises of the center shall be counted.
>
> **Child Day-Care Home and Type B Home**: means *a permanent residence* of the provider in which child day-care services are provided for *one to six children at one time* and in which no more than three children may be under two years of age at one time. In counting children for the purpose of this ordinance, any children under six years of age who are related to the

> provider and who are on the premises of the Type B home shall be counted. A Type B family day-care home does not include a residence in which the needs of children are administered to, if all of the children are siblings of the same immediate family and the residence is the home of the siblings.

PID 1026.

TOLCS's reliance on the testimony of Senior Planning Officer Gibson and Robert Weiler, one of the City's experts, to support that child day-care centers are similarly situated to its 660-student school because *some* centers would not maximize tax revenue to the City, is unavailing. Both Gibson and Weiler testified or averred that, *in keeping with the UDO's description of ORC zoning as including* "*services*," day-care centers were permitted as *ancillary*, complementary services in support of primary uses like offices, not because they generate significant tax revenue for the City in and of themselves. Similarly, coffee and barber shops are permitted uses in the ORC as ancillary uses.[10]

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[10] UDO § 5.01(B) provides that only uses designated as permitted shall be allowed as a matter of right in a zoning district and any not so designated shall be prohibited . . . PID 2008. Schools are not designated as permitted in the ORC and are thus prohibited.

ORC uses designated as permitted include banks, business and professional offices, corporate data centers, hotels and motels, hospitals, insurance carriers, outpatient surgery centers, periodicals and book publishing, research and development in

Weiler explained:

> Although daycares are not significant revenue producers, daycares compliment [sic] a commercial use by providing child supervision for employees in the area. In addition, the surveyed daycares in the city of Upper Arlington serve only between 40 to 130 children. Additionally, having built and owned daycares including a current interest in a daycare located on Sawmill Road in Columbus, few daycares are in excess of 10,000 SF as compared to [ ] school[s] that are routinely substantially larger.

PID 1765. A 600-student K-12 school is not an ancillary service for the convenience and support of the employees who work in the area's offices and commercial establishments

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information or medical technologies, survey research firms, barber shops and beauty parlors, and coffee shops.

Expressly prohibited ORC uses include adult book stores, adult motion-picture theaters, amusement arcades, animal boarding, automotive service establishments, bowling alleys, candy stores, pool or billiard rooms, department stores, drug stores, dry-cleaning shops, fast-food restaurants, funeral homes, grocery and supermarket stores, laundromats, liquor stores, massage parlors, meat and fruit markets, motor-vehicle wash facilities, movie theaters, night clubs, pharmacies, publishing, radio and TV studios, skating rinks, soda fountains, variety stores, and tattoo parlor or body-piercing studios.

TOLCS also asserts that day-care centers are proper comparators because *some* are *large* and licensed to accept as many as 1,000 children. Appellant Br. 12–13, n.4. It relies on two exhibits, the first[11] of which lists six day-care centers located in Arizona, Missouri, Kansas, and South Carolina that "care for children outside of school hours" and have capacity to serve from 416 to 965 children. The second exhibit consists of charts listing the twenty-five largest day-care centers in Ohio, which have capacities to serve from 282 to 467 children. But TOLCS points to no day-care facilities in the City or the immediate area. The size of the six day-care centers in four states far from Ohio seems no more relevant than the size of day-care centers in Europe. Similarly, the list of the largest day-care centers in Ohio provides no information about the communities they serve, other than their names. The City is entitled to devise a master plan and ordinances that take into account the size of the community and its actual experience with commercial and other users of land.

Additionally, most of the twenty-five largest Ohio day-care centers TOLCS offered are named either "school," "learning center," "child development center," "head start," or "children's center," suggesting that the facilities provide both day-care and schooling. Assuming these centers would have qualified as child day-care centers permitted under the UDO, TOLCS failed to present evidence that any

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[11] *See* PID 115, the declaration of a legal assistant at the Alliance Defense Fund who avers that she conducted research regarding the size of day-care centers across the country.

day-care comparator seeking to locate in the City's ORC would serve anywhere near the 660 students TOLCS serves (it is uncontroverted that the largest day-care center in the City served 130 children). TOLCS's proposed 660-student K-through-12 school would constitute a much more intensive use than a day-care center by virtue of its size, the age range of its students, and the traffic and noise it would generate during peak times and during after-school and weekend activities. In sum, TOLCS failed to show that the day-care comparators are similarly situated with respect to the accepted zoning criteria, and are no more consistent with office use, research use, supporting commercial activities, *and supporting, ancillary, services* than TOLCS.

2. **Hospitals**

TOLCS asserts that hospitals are proper comparators because *some* hospitals in the Columbus area are nonprofit and do not generate property tax for the City, Appellant Br. 13, 36, and therefore inclusion of hospitals in the ORC undermines the City's objective of generating revenue. But TOLCS overlooks that income tax, not property tax, is the largest source of revenue for the City, and hospitals typically employ many highly-skilled and educated professionals who tend to command large salaries. Thus, that some hospitals are non-profit and do not pay real-estate taxes is unimportant when compared to the revenue non-profit hospitals generate in income taxes. Appellee Br. 25.

The majority observes that "we cannot *assume* as a fact, and the government certainly has offered no evidence to show, that an ambulatory care center (or

an outpatient surgery center . . .) . . . would employ higher-income workers" than TOLCS. Maj. Op. at 10. I disagree for two reasons. First, the majority discounts the City's institutional knowledge of which land uses generate most revenue for the City. Second, it is TOLCS's burden to come forward with a similarly situated comparator, *Primera Iglesia*, 450 F.3d at 311, and TOLCS offered no evidence that it would generate comparable to that generated by a hospital or medical center, nonprofit or not. Further, TOLCS does not argue that questions of fact should have precluded summary judgment or that we should remand for further factual development.

3. **Charitable Offices**

Finally, TOLCS asserts that charitable offices generate no property tax and that nothing in the UDO would preclude a charitable organization from staffing an office, say, with only twenty employees, which would not generate much income tax for the City. Appellant Br. 13, 36. But the density of non-profit office use and the salaries of non-profit professionals are more compatible with the ORC's permitted uses and economic goals than a K-12 school and its accompanying noise and traffic.

IV.

In sum, the majority requires not equal treatment, but special treatment, for the proposed religious use. *See, e.g., Primera Iglesia*, 450 F.3d at 1313–14 (citing *Midrash*, 366 F.3d at 1231–32, and *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003) ("[N]o . . . free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise.")) I would

affirm the grant of summary judgment to Upper Arlington on the basis that TOLCS failed to present a secular comparator that is similarly situated with respect to the relevant zoning criteria.[12] *See, e.g.*, *Eagle Cove Camp & Conference Ctr. Inc.*, 734 F.3d at 683; *Centro Familiar Cristiano*, 651 F.3d at 1172–73.

[12] I further observe that the majority's discussion of eminent domain is inapposite. TOLCS purchased the property with knowledge of the existing zoning, and the City has no obligation to compensate TOLCS as a condition of its enforcement of its valid zoning regulations. TOLCS has not shown that there are no feasible uses for the property. Indeed, it derives income by leasing out a portion of the space.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

TREE OF LIFE CHRISTIAN SCHOOLS,

Plaintiff,

-v-

THE CITY OF UPPER ARLINGTON,

Defendant.

Case No.: 2:11-cv-009

JUDGE GEORGE C. SMITH
Magistrate Judge Deavers

OPINION AND ORDER

This matter is before the Court on the parties cross-motions for summary judgment. (*See* Docs. 79 and 82). Responses have been filed and the motions are now ripe for review. For the reasons that follow, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

I. BACKGROUND

A. Tree of Life Christian Schools

Plaintiff, Tree of Life Christian Schools ("Plaintiff" or "Tree of Life"), is a private Christian school located in the Columbus, Ohio, metropolitan area serving approximately 660 students, and employing

approximately 150 people. Tree of Life is currently scattered across four campuses in different locations of the metropolitan area, including the Northridge campus, Indianola campus, Dublin campus, and Westerville campus.[1] (Verified Compl. ¶¶ 1, 25-28, 35-36). Tree of Life operates as a non-profit religious corporation under the laws of the State of Ohio, with a principal place of business at 935 Northridge Road, Columbus, Ohio. (Verified Compl. ¶ 8).

Tree of Life was founded in 1978, when members of the Linden Church of Christ, Beechwold Church of Christ, and Minerva Park Church of Christ collectively established a school in north Columbus.[2] Members from these three churches serve on the school board governing Tree of Life. The school was initially known as Linden Christian School and was later renamed Tree of Life. (Verified Compl. ¶¶ 10-12).

The primary purpose of Tree of Life is to assist parents and the Church in educating and nurturing young lives in Christ. Their mission statement reads: "In partnership with the family and the church, the mission of Tree of Life Christian Schools is to glorify God by educating students in His truth and discipling

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[1] Since filing the Verified Complaint, Plaintiff has closed the Westerville location. (Marrah Depo. at 75).

[2] The following churches have also sponsored or contributed to Tree of Life, including providing facilities space, financial support, and school board members: Northeast Church of Christ, Indianola Church of Christ, Westerville Christian Church, North Park Church of Christ, Discover Christian Church, Pickerington Christian Church, Hilliard Church of Christ, and Worthington Christian Church.

them in Christ. 'A cord of three strands is not easily torn apart.' (Ecclesiates 4:12)." (Verified Compl. ¶¶ 16-17). Tree of Life's vision statement states: "As students are led to spiritual, intellectual, social and physical maturity, they become disciples of Jesus Christ, walking in wisdom, obeying His word and serving in His Kingdom." (Verified Compl. ¶ 18). Tree of Life describes their philosophy of education as "quintessentially and undeniably Christian," and believes this philosophy "puts the Bible at the center and asks the student to evaluate all he/she studies through the lens of God's Word." (Verified Compl. ¶ 19). Tree of Life requires all parents who enroll their children to certify that they agree with the mission, philosophy, and vision. Further, all faculty and staff must also sign a statement of faith, and must be active members of a local, "Bible-believing congregation." (Verified Compl. ¶¶ 21- 22).

Tree of Life has limited space in its current buildings for new students. The Indianola and Dublin campuses are located within existing church buildings of sponsoring churches of Tree of Life. However, there are no long-term leases with these churches, and the schools occupy space in the church facilities as at-will tenants. Further, the facilities are located in buildings that are old and in need of substantial upkeep and/or remodeling. The lack of long-term space and scattered campuses has hampered the unity of Tree of Life. (Verified Compl. ¶¶ 29-34, 37-38).

As a result of Tree of Life's growth and success, it began searching in 2006 for property that would allow for expansion of its ministry. For over two years, Tree of Life reviewed more than twenty sites and facilities

within Franklin County, and finally found a building and property located at 5000 Arlington Centre Boulevard in Upper Arlington, Ohio (hereinafter "the property"). The property contains an office building that is approximately 254,000 square feet and is centrally located to serve all of Tree of Life's current constituents. The property's size would allow for consolidation of preschool through twelfth grade at one location and to accommodate even more students. Further, the consolidation would allow Tree of Life to minister across all grade levels, reduce staff and student transportation costs, and provide updated facilities. Tree of Life ultimately purchased the property on August 11, 2010. (Verified Compl. ¶¶ 39-50).

B. The City of Upper Arlington

Defendant, the City of Upper Arlington, Ohio, ("the City" or "Upper Arlington"), is a public body authorized under the laws of the State of Ohio, and acting under the color of state law. (Verified Compl. ¶ 9). Upper Arlington is a prosperous and highly regarded suburban community, with a notable history of careful development and land use dating back to the 1910s, when brothers King and Ben Thompson first began to develop the primarily residential community with curved streets and plentiful trees. As a now landlocked, nearly fully developed community, the City commissioned a development plan ("the Master Plan") in 2001 to provide guidance for its land use.

According to the Master Plan, in order for the City to maintain its existing level of facilities and services, and in order to provide for future capital needs, it is

critical for the City to enhance its revenues. The revenue generated per acre from commercial use far exceeds the revenue provided by residential use. In order to maximize revenues, the City was directed in the Master Plan to create opportunities for office development that emphasize high-paying jobs. Because Upper Arlington is landlocked and primarily residential, only 4.7% of its useable land area is zoned "Commercial," and only 1.1% is in office use. Therefore, full use of existing office space, as well as the development of additional office space, is critical for the City's financial stability. The City's opportunities to expand are limited; therefore, it must maximize its few opportunities for commercial use, or it cannot maintain its level of services for its residents. (Affidavit of Chad Gibson, Senior Planning Officer for Upper Arlington, ¶¶ 3-4).

All land and development in Upper Arlington is regulated by the Upper Arlington Unified Development Ordinance ("the UDO"), which employs "non-cumulative" or "exclusive" zoning. Article 5 of the UDO sets forth the regulations applicable to the use and development of land in Upper Arlington and establishes the zoning districts, including residential, commercial, planned, and miscellaneous.

The largest office building in Upper Arlington is located at 5000 Arlington Centre Boulevard (the "commercial office building"), in the ORC Office and Research District. The commercial office building was previously occupied by AOL/Time Warner, and it generated substantial income tax and property tax revenues for the City. In 2001, it accounted for 29% of the City's income tax revenues. However, operations at the commercial office building declined over the

course of recent years. Time Warner ceased operations at this location in 2009. Requiring commercial use of the commercial office building is consistent with the language and purposes of the ORC Office and Research District, as well as the Master Plan. (Affidavit of Catherine Armstrong, Finance Director for Upper Arlington ¶¶ 4-7).

The purpose of the "ORC Office and Research District" is set forth in Section 5.03(A)(6) of the UDO as follows:

> [T]o allow offices and research facilities that will contribute to the City's physical pattern of planned, healthy, safe, and attractive neighborhoods. The ORC district should also provide job opportunities and services to residents and contribute to the City's economic stability. Permitted uses generally include, but are not limited to business and professional offices, research and development, book and periodical publishing, insurance carriers, corporate data centers, survey research firms, and outpatient surgery centers.

A complete list of permitted uses appears in Table 5-C of the UDO. Schools of any type are not permitted in the ORC Office and Research District. (Gibson Aff. ¶¶ 5-7).

Section 5.01(B) of the UDO governs the rules of application. Section 5.01(B)(2) entitled "Permitted Uses" provides:

> Only a use designated as a permitted use shall be allowed as a matter of right in a zoning district and any use not so designated shall be prohibited except, when in character with the zoning district, such other additional uses may be added to the permitted uses of the zoning district by an amendment to this UDO (Section 4.04).

Section 5.01(B)(3) entitled "Conditional Uses" states:

> A use designated as a conditional use shall be allowed in a zoning district when such conditional use, its location, extent and method of development will not substantially alter the character of the vicinity or unduly interfere with the use of adjacent lots in the manner prescribed for the zoning district. To this end BZAP [Board of Zoning and Planning] shall, in addition to the development standards for the zoning district, set forth such additional requirements as will, in its judgment, render the conditional use compatible with the existing and future use of adjacent lots and the vicinity. Additional standards for conditional uses are listed in Section 6.10.

Rezoning is governed by Section 4.04 of the UDO titled "UDO and Official Zoning Map Amendments" which specifically provides:

B. Amendment Process: Amendments may be initiated in one of the following ways:

1. By the filing of an application to BZAP by the owner(s) of property within the area proposed to be affected or changed by said amendment;

2. By the adoption of a motion by BZAP; or

3. By the adoption of a motion by City Council and referral to BZAP.

All text and map amendments shall follow the same procedure. City Council initiated text or map amendments shall be referred to BZAP for recommendation prior to Council consideration.

C. Standards for Approval: The following criteria shall be followed in approving zoning map amendments to the UDO:

1. That the zoning district classification and use of the land will not materially endanger the public health or safety;

2. That the proposed zoning district classification and use of the land is reasonably necessary for the public health or general welfare, such as by enhancing the successful operation of the surrounding area in its basic community function or by providing an

> essential service to the community or region;
>
> 3. That the proposed zoning district classification and use of the land will not substantially injure the value of the abutting property;
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> 4. That the proposed zoning district classification and use of the land will be in harmony with the scale, bulk, coverage, density, and character of the area the neighborhood in which it is located;
>
> 5. That the proposed zoning district classification and use of the land will generally conform with the Master Plan and other official plans of the City;
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> 6. That the proposed zoning district classification and use of the land are appropriately located with respect to transportation facilities, utilities, fire and police protection, waste disposal, and similar characteristics; and
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> 7. That the proposed zoning district classification and use of the land will not cause undo [sic] traffic congestion or create a traffic hazard.

C. Tree of Life's Conditional Use Permit Application

In early 2009, Upper Arlington officials became aware that Tree of Life was considering purchasing

the commercial office building for use as a school. On March 16, 2009, Matthew Shad, Deputy City Manager for Economic Development in Upper Arlington, met with Don Roberts of CB Richard Ellis, the listing agent, and advised him that schools were not a permitted use for that building. (Shad Aff. ¶¶ 4-7). On October 1, 2009, Tree of Life contracted to purchase the commercial office building, contingent upon zoning to allow a school. Upon learning of the buyer, on November 11, 2009, the Upper Arlington Economic Development Director advised the Tree of Life school superintendent directly that schools were not a permitted use.

On December 21, 2009, Tree of Life filed an application with Upper Arlington for a Conditional Use Permit requesting to "use the property for a place of worship, church and residential, to the extent that residential includes a private school." (Verified Compl. Ex. A). In a letter dated December 28, 2009, Mr. Gibson responded to the application by stating, among other things, that "a private school is neither a permitted use nor a conditional use in the ORC, Office and Research District (*see* UDO Table 5-C Article 5.01). Therefore, this application will not be scheduled for BZAP review, even if a traffic study is submitted. The applicant should submit a rezoning application if they wish to pursue a private school at this location." (Verified Compl. Ex. B).

On January 5, 2010, Tree of Life appealed Mr. Gibson's determination to the Board of Zoning and Planning ("BZAP"). (Verified Compl. Ex. C). On March 1, 2010, the BZAP held a public hearing on the issue, and subsequently issued a Board Order upholding Mr. Gibson's determination "that the

conditional use application proposing a private school in an ORC District was inappropriate and would not be scheduled for BZAP review." (Verified Compl. Ex. D). On April 2, 2010, Tree of Life appealed the BZAP decision to the Upper Arlington City Council ("City Council"). (Verified Compl. Ex. E). On April 26, 2010, the City Council held a public hearing on the appeal and ultimately voted to uphold the decision of the BZAP. (Verified Compl. Ex. F). The City Council concluded that "a private school is neither a permitted or conditional use in the Office and Research District and that rezoning is required if Appellant plans to pursue a private school at this location." (*Id*. at 4).

Mr. Gibson's initial letter dated December 28, 2009, determined that the Tree of Life school was not a residential use that could be considered as a conditional use in the ORC Office and Research District; however, there was no determination as to whether Tree of Life was a "Place of Worship" or a "Church." On January 5, 2010, counsel for Tree of Life wrote to Mr. Gibson asking for clarification as to "whether these uses, which are contained in the application, are, or are not, Conditional Uses in the ORC zoning district in the Upper Arlington UDO." (Verified Comp. Ex. C at 6). On February 26, 2010, Mr. Gibson addressed these issues by confirming the hearing scheduled by the BZAP on March 1, 2010, to consider the conditional use application for "a private school with ancillary uses." Mr. Gibson further stated: "At this time, no conditional use application has been submitted for a church at this site." (Verified Compl. Ex. G).

On March 3, 2010, Tree of Life appealed this determination to the BZAP. (Verified Compl. Ex. H).

The BZAP held a public hearing on June 7, 2010, and upheld Mr. Gibson's determination. The BZAP stated that "for purposes of the UDO, the proposed primary use of the property as a private school does not constitute a 'place of worship, church' as that term is used in Table 5-C of Article 5 of the UDO, and is therefore not a conditional use in the ORC District." (Verified Compl. Ex. I). On June 18, 2010, Tree of Life appealed the BZAP decision to the City Council. (Verified Compl. Ex. J). On August 16, 2010, the City Council held a public hearing and issued findings affirming the prior decisions that "for purposes of the UDO, the proposed primary use of the property as a private school does not constitute a 'place of worship, church' as that term is used in Table 5-C of Article 5 of the UDO, and is therefore not a conditional use in the ORC District." (Verified Compl. Ex. K).

Despite Tree of Life's unsuccessful appeals with the BZAP and the City Council, it continued with the purchase of the commercial office building. The closing on the commercial office building occurred on August 11, 2010.

Tree of Life appealed the final decision of the Upper Arlington City Council to the Environmental Division of the Franklin County Municipal Court, but ultimately withdrew that appeal.

D. Procedural History

Plaintiff initiated this case on January 5, 2011, with the filing of a Verified Complaint, alleging violations of its rights to free speech, free exercise of religion, peaceable assembly, equal protection, due process, and the establishment clause under the First and Fourteenth Amendments to the United States

Constitution and Article I, Section 7 of the Ohio Constitution, as well as a violation of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").

Plaintiff filed a Motion for Preliminary Injunction on January 28, 2011, seeking to enjoin Defendant, the City of Upper Arlington, from enforcing Article 5.01, Table 5-C of the UDO prohibiting Plaintiff from operating a religious school in the ORC Office and Research District. Plaintiff sought injunctive relief on two of its claims: violation of the RLUIPA and violation of equal protection. On April 27, 2011, this Court denied Plaintiff's Motion for Preliminary Injunction (Doc. 23). Despite finding that Plaintiff demonstrated a potential likelihood of success on the merits of its RLUIPA claim, the Court found that the balance of harms did not strongly justify the issuance of a preliminary injunction.

Following discovery in this case, the parties filed cross-motions for summary judgment. On August 16, 2012, the Court issued an Opinion and Order granting Defendant's motion finding that the case was not ripe for review because Tree of Life had not petitioned the City to rezone the property at issue. Plaintiff appealed this decision to the United States Court of Appeals for the Sixth Circuit. While the appeal was pending, on December 21, 2012, Tree of Life submitted an application to the City seeking to amend the City's UDO to allow private religious schools as a permitted use in the ORC Office and Research District. On March 11, 2013, the Upper Arlington City Council denied the application. The Council reasoned that if the application were approved, private religious schools would have been

permitted, but not non-religious schools–creating a facial First Amendment problem. (*See* City Council Minutes, Doc. 81-7, Page ID# 2463).

Tree of Life moved to supplement the record on appeal with the denial of the rezoning and the Sixth Circuit granted that request and remanded the case to this Court "to determine in the first instance whether the claims are ripe." *Tree of Life Christian Schools v. City of Upper Arlington*, 536 F. App'x 580 (6th Cir. 2013).

Following remand, on October 17, 2013, Tree of Life submitted a second application to the City to rezone its property. This time, Tree of Life sought to rezone only its 15.81 acre parcel from ORC Office and Research District to residential. Upper Arlington's Senior Planning Officer, Chad Gibson, submitted a staff report to City Council on November 25, 2013, stating:

> Staff believes that the proposed rezoning is in direct opposition to numerous core master plan goals and objectives. The proposed zoning change would eliminate nearly 16 acres of extremely limited ORC zoned ground, which will reduce the amount of office and research space within the City. The Master Plan clearly indicates that the Henderson Road corridor has the greatest opportunity for intense office use, and approving such a rezoning would be contrary to the City's long-term financial interest. The majority of land use categories within Upper Arlington currently permits

> schools, public or private, religious or secular. The applicant has failed to establish the necessity of changing the zoning of an established office park from commercial to residential given the potential detrimental impacts to the City.
>
> A K-12 school has inherent characteristics which can be intrusive and destructive to an office park. Traffic, including school bus circulation, loading and unloading, can be challenging for an area to accommodate. A large number of young drivers and parents arriving and departing at similar (peak) times can tax the roadways and related infrastructure, reducing the level of service for signalized intersections. After school activities, such as band and theater productions can also bring large number of parents and students to an area, often necessitating overflow parking demands. Outdoor events, such as band practice, can create noise impacts for office workers who are attempting to do business and/or serve clients. Furthermore, after reviewing the application, revised traffic study, and other materials, BZAP unanimously recommended against the proposed zoning map amendment.

(*See* November 25, 2013 Staff Report to Upper Arlington City Council, Doc. # 81-9).

Additionally, City Council heard from the Upper Arlington City Attorney who spoke to the seven points of analysis required for rezoning applications by Article 4.04(c) of the UDO. The focus of the analysis was that rezoning to eliminate commercially zoned property would be contrary to the master plan. Based on the staff report and the comments by the Upper Arlington City Attorney made during the December 9, 2013 City Council meeting, the Council denied Tree of Life's rezoning request. (*See* Minutes of the December 9, 2013 Upper Arlington City Council meeting, Doc. 81-11, Page ID# 2578-80).

The parties have agreed that this case is now ripe for consideration on the merits and have filed cross-motions for summary judgment.

II. STANDARD OF REVIEW

The standard governing summary judgment is set forth in Rule 56 of the Federal Rules of Civil Procedure, which provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *See Muncie Power Prods., Inc. v. United*

Techs. Auto., Inc., 328 F.3d 870, 873 (6th Cir. 2003) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)); *see also Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

When reviewing a summary judgment motion, the Court must view all the facts, evidence and any inferences that may permissibly be drawn from the facts, in favor of the nonmoving party. *Matsushita*, 475 U.S. at 587. The Court will ultimately determine whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Liberty Lobby*, 477 U.S. at 251-53. Moreover, the purpose of the procedure is not to resolve factual issues, but to determine if there are genuine issues of fact to be tried. *Lashlee v. Sumner*, 570 F.2d 107, 111 (6th Cir. 1978). The Court's duty is to determine only whether sufficient evidence has been presented to make the issue of fact a proper question for the jury; it does not weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. *Liberty Lobby*, 477 U.S. at 249; *Weaver v. Shadoan*, 340 F.3d 398, 405 (6th Cir. 2003).

In responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (quoting *Liberty Lobby*, 477 U.S. at 257). The existence of a mere scintilla of evidence in support of the opposing party's position is insufficient; there must be evidence on which the jury could reasonably find for the opposing

party. *Liberty Lobby*, 477 U.S. at 252. The nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Phillip Morris Companies, Inc.*, 8 F.3d 335, 340 (6th Cir. 1993). The Court may, however, enter summary judgment if it concludes that a fair-minded jury could not return a verdict in favor of the nonmoving party based on the presented evidence. *Liberty Lobby*, 477 U.S. at 251-52; *see also Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994).

Moreover, "[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street*, 886 F.2d at 1479-80. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001).

III. DISCUSSION

Plaintiff, Tree of Life, initiated this case against Defendant, the City of Upper Arlington, asserting claims for violation of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"); violation of the right to free exercise of religion; violation of the Due Process Clause of the Fourteenth Amendment; violation of the Equal Protection Clause; violation of the Free Speech Clause; violation of the right to peaceable assembly under the First Amendment; violation of the Establishment Clause;

and violation of Article I, Section 7 of the Ohio Constitution.[3]

The parties have filed cross-motions for summary judgment. Plaintiff seeks summary judgment on its RLUIPA claim, asserting that the City's UDO as applied to Tree of Life violates RLUIPA's equal terms provision. Plaintiff does not address any of its other claims, but rather states in a footnote "Tree of Life continues to assert that the City's UDO, as applied and on its face violates RLUIPA's substantial burden provision and the First and Fourteenth Amendments to the United States Constitution. Tree of Life incorporates herein fully and relies upon its earlier briefing on these points." (Pl.'s Mot. for Summ. J. at 20). All of Plaintiff's claims were fully briefed by both parties in the previous motions. The case was dismissed on ripeness grounds and no decision was ever rendered on the merits. Therefore, those motions and arguments are still pending before the Court and will be considered at this time. The Court will address each of Plaintiff's claims in turn.

A. RLUIPA Claim

This Court previously concluded in its April 27, 2011 Opinion and Order that Plaintiff demonstrated a likelihood of success on the merits on its RLUIPA claim. However, after the conclusion of discovery in this case and further development of the arguments of the parties, the Court is compelled to find that Plaintiff's RLUIPA claim lacks merit. Specifically, the

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[3] This Court previously held that Upper Arlington's UDO does not violate the Equal Protection Clause. (*See* April 27, 2011 Opinion and Order, Doc. 23).

Court previously applied the analysis used in prior RLUIPA cases in which courts had to search for proper comparators to churches, looking at community centers, hotels, private clubs, lodges, bars and nightclubs, daycare centers, hospitals, and charitable organizational offices. However, Defendant asserts, and the Court now agrees, that the proper comparator for a religious school is a non-religious or secular school, as it constitutes an "apples to apples" comparison. Given the existence of an "apples to apples" comparator, it is unnecessary and improper to identify an alternate comparator.

Plaintiff Tree of Life argues that Upper Arlington's UDO violates RLUIPA's "equal terms" provision, which is set forth in Section (b)(1) as follows: "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(b)(1).[4] "The equal-terms provision is violated whenever religious land uses are treated worse than comparable nonreligious ones, whether or not the discrimination imposes a substantial burden on the religious uses." *Digrugilliers v. City of Indianapolis*, 506 F.3d 612, 616 (7th Cir. 2007) (citing *Vision Church v. Vill. of Long Grove*, 468 F.3d 975,

[4] Plaintiff in its Verified Complaint alleges that Defendant's UDO also imposes a substantial burden on Plaintiff's religious exercise, which would be a separate violation under RLUIPA. 42 U.S.C. § 2000cc(a)(1). However, in the extensive briefing before the Court, Plaintiff has only developed arguments in support a RLUIPA Equal Terms violation. Therefore, any other allegations that Defendant violated other provisions of RLUIPA are deemed abandoned.

1002-03 (7th Cir. 2006)). While this provision of RLUIPA "has the feel of an equal protection law, it lacks the similarly situated requirement usually found in equal protection analysis." *Midrash Shephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1229 (11th Cir. 2004). RLUIPA does not require a city to give religious assemblies and institutions more rights than other users of land in the same zones have. *River of Life Kingdom Ministries v. Village of Hazel Crest, Illinois*, 611 F.3d 367, 371 (7th Cir. 2010) (citing *Digrugilliers*, 506 F.3d at 615). Further, "RLUIPA's Equal Terms provision requires equal treatment, not special treatment." *Primera Inglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1313 (11th Cir. 2006).

RLUIPA explicitly places the burden on the plaintiff to initially establish a *prima facie* case supporting its claim. 42 U.S.C. § 2000cc-2(b). For an "equal terms" violation, the plaintiff's *prima facie* case is comprised of four elements: "(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 Inglesia*, 450 F.3d at 1307. The statute does not define the meaning of "equal terms" and the Sixth Circuit has not yet spoken as to the definition. Those courts that have defined the term are not in agreement as to its meaning. *See Roman Catholic Bishop of Springfield v. City of Springfield*, 760 F. Supp. 2d 172, 188 (D. Mass. 2011) (comparing cases). The disagreement among the Circuits "centers on how broadly to construe the phrase 'nonreligious assembly or institution'" and what is a similarly situated

comparator. *Id.* at 188. The Eleventh Circuit requires a plaintiff to demonstrate unequal treatment as compared to any secular institution or assembly. *See, e.g., Midrash*, 366 F.3d at 1230-31. The Third Circuit has held that "a regulation will violate the [e]qual [t]erms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similar situated *as to the regulatory purpose*." *Lighthouse Inst. for Evangelism, Inc. v. City of Long Beach*, 510 F.3d 253, 266 (3d Cir. 2007) (emphasis in original). The Seventh Circuit applied a modified version of the Third Circuit's test, concluding that the focus should be on secular assemblies or institutions similarly situated as to the "accepted zoning criteria" rather than the regulatory purpose. *River of Life*, 611 F.3d at 371.[5]

Since the issuance of the preliminary injunction order, two additional circuit courts have addressed the equal terms provision of RLUIPA: *Elijah Group v. City of Leon Valley*, 643 F.3d 419 (5th Cir. 2011) and *Centro Familiar Cristiano Buenas Nevas v. City of Yuma*, 651 F.3d 1163 (9th Cir. 2011). The Fifth Circuit held that a zoning ordinance violated RLUIPA's equal terms provision because "it prohibits the Church from even applying for a SUP [Special Use Permits] when, a nonreligious private club may apply for a SUP." *Elijah Group,* 643 F.3d at 424. The court held that the equal terms provision of RLUIPA "must

[5] The Sixth Circuit had not yet adopted a test for evaluating a RLUIPA equal terms claim. The Court analyzed the different tests set forth by the Third, Seventh, and Eleventh Circuits in detail in its previous Opinion and Order. (*See* Doc. 23). The Court does not find it necessary to repeat the analysis with respect to the tests of each of the aforementioned circuits.

be measured by the ordinance itself and the criteria by which it treats institutions differently." *Id*. The Fifth Circuit explicitly stated that it was not adopting any particular test adopted by another circuit, but its test appears to be similar to that used by the Third, Seventh, and Second Circuits who view the equal terms provision in light of the zoning criteria or purpose of the zoning ordinance.[6]

The Ninth Circuit also construed the equal terms provision, adopting the Third Circuit's approach along with the Seventh Circuit's refinement of the test. *Centro Familiar*, 651 F.3d at 1172-73. The Ninth Circuit held that the "city may be able to justify some distinctions drawn with respect to churches, if it can demonstrate that the less-than-equal-terms are on account of a legitimate regulatory purpose, not the fact that the institution is religious in nature." *Id*. The court realized that "our analysis is about the same as the Third Circuit's" but also recognized that the Seventh Circuit's refinement of this test was appropriate. The court ultimately stated the test to be used as follows:

> The city violates the equal terms provision only when a church is treated on less than equal terms with a secular comparator, similarly situated with respect to an accepted zoning criteria. The burden is not on the church to show a similarly situated secular assembly,

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[6] See *Lighthouse Institute*, 510 F.3d at 265; *River of Life*, 611 F.3d at 371; *Third Church of Christ Scientist v. City of New York*, 626 F.3d 667, 669 (2nd Cir. 2010).

> but on the city to show that the treatment received by the church should not be deemed unequal, where it appears to be unequal on the face of the ordinance. *Id*. at 1173.[7]

Plaintiff Tree of Life asserts both a facial challenge and an as-applied equal terms challenge to Upper Arlington's UDO. This Court has previously found that Upper Arlington's UDO is facially neutral. The August 16, 2012 Opinion and Order specifically states:

> Plaintiff fails to explain how the UDO is unconstitutional on its face. There is no evidence that Upper Arlington's UDO allows other non-secular uses that are not permitted in the ORC Office and Research District to not seek rezoning. Upper Arlington has been consistent from the time it became aware that Plaintiff intended to purchase the commercial building that schools, both secular or non-secular, are not permitted in the ORC, Office and Research District.

(Doc. 70 at 20). This remains true. Plaintiff has not provided any additional evidence to support a facial challenge to the UDO. Upper Arlington treats both religious schools and secular schools the same. In fact,

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[7] The Ninth Circuit noted that its test departed from that utilized by the Third Circuit in its burden shifting. The Third Circuit placed the burden on the church while the Ninth Circuit placed the burden on the government, once a *prima face* case is established. *Centro Familiar*, 651 F.3d at 1173.

both secular and non-secular schools are permitted in over 95% of the City of Upper Arlington that is zoned residential.

With respect to Plaintiff's as-applied equal terms RLUIPA claim, there is no dispute between the parties that Plaintiff Tree of Life is a religious assembly or institution[8] and that it has been subjected to a land use regulation, in this case the City of Upper Arlington's UDO, zoning law. The analysis therefore turns on whether Upper Arlington's UDO treats Plaintiff, a religious school, on less than equal terms, with a nonreligious assembly or institution.

Both Plaintiff and Defendant assert that their respective positions will prevail no matter what test this Court, and ultimately the Sixth Circuit, chooses to apply to the facts of this case. Whichever test this Court decides to follow — which it need not decide now — Plaintiff is required to identify a similar secular comparator that received more favorable treatment. The Court finds the tests set forth by the Third and Seventh Circuits to be the most reasonable and pragmatic; therefore, the Court will analyze the facts of this case under these respective tests

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[8] Many courts analyzing RLUIPA claims have found facilities used for religious education to fall under RLUIPA's protection. *See Living Water Church of God v. Charter Twp. of Meridian*, 384 F. Supp. 2d 1123, 1129-30 (W.D. Mich. 2005) ("Plaintiff's use of the proposed facility for a religious oriented school and for other ministries of the church constitutes religious exercise"); *see also Castle Hills First Baptist Church v. City of Castle Hills*, 2004 U.S. Dist. LEXIS 4669 (W.D. Tex. Mar. 17, 2004); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1213 (C.D. Cal. 2002).

regarding regulatory purpose and accepted zoning criteria. Then, the Court will determine based on that analysis whether there are secular assemblies that are treated more favorably in light of the stated zoning criteria or purposes.

Under the Third Circuit's "Regulatory Purpose" approach, "a regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated as to their regulatory purpose." *Lighthouse*, 510 F.3d at 266. In *Lighthouse*, a church bought a property in a commercial district that had been re-developed to strengthen retail trade and city revenues. Churches were not a permitted use in the district and the application to use the property as a church was denied. The denial was upheld by the court finding that allowing a church would be inconsistent with the purposes of the sector. The regulatory purpose approach allows cities or local governments to justify unequal treatment by pointing to its objectives in enacting the zoning regulations and proving that the secular assemblies treated more favorably do not damage those objectives.

The City of Upper Arlington has informed Plaintiff through the various zoning applications that a school is not a permitted or conditional use in the ORC Office and Research District. The purpose of the "ORC Office and Research District" is set forth in Section 5.03(A)(6) of the UDO as follows:

> [T]o allow offices and research facilities that will contribute to the City's physical pattern of planned, healthy, safe, and

> attractive neighborhoods. The ORC district should also provide job opportunities and services to residents and contribute to the City's economic stability. Permitted uses generally include, but are not limited to business and professional offices, research and development, book and periodical publishing, insurance carriers, corporate data centers, survey research firms, and outpatient surgery centers.

Other permitted uses include: banks, barber shops and beauty parlors, daycare centers[9], coffee shops, hotels/motels, and hospitals. The City argues that Plaintiff's proposed use of the building in the ORC Office and Research District as a school is not consistent with these regulatory purposes. Specifically, the City asserts that the "uses permitted in the district are narrowly tailored to comport with office use, research use, and supporting commercial activities. These uses are also consistent with the criteria articulated in the Upper Arlington Master Plan, including the importance of generating tax revenue." (Def.'s Mot. at 13). Further, the City asserts that the fact that all schools are forbidden in this district is consistent with these criteria, and "the fact that the district does not distinguish between religious and non-religious schools means that

[9] The City of Upper Arlington has removed daycare centers as a permitted use in the ORC Office and Research District. The Court does not find it necessary to address the relevance of this removal to Plaintiff's RLUIPA claim because it is not a proper comparator under the facts of this case.

similar religious and non-religious assemblies are being treated the same." (*Id.*). Finally, the City argues that "putting a school there would be at odds with the existing physical pattern of planning, which provides for schools in Residential Districts, not Commercial Districts." (*Id.*).

There is no question that the City of Upper Arlington has carefully set forth its regulatory purpose of the ORC Office and Research District in the City's Master Plan and in the UDO, and those purposes serve a compelling state interest. Moreover, it is not disputed that Upper Arlington has very little area designated as commercial, and to rezone the 15.81 acres in question as residential and allow for a school would be contrary to the purpose of the district. The City treats all schools the same by excluding all schools from the ORC Office and Research District. All schools, however, are permitted in the City's residential districts, which make up 95.3% of all the land in the City of Upper Arlington. The City has presented strong reasons for its decision. Schools are not offices or research facilities, nor are they ancillary uses to those, such as coffee shops and daycares. Based on the evidence presented, allowing a school, religious or not, within the ORC Office and Research District would be inconsistent with the purposes of the ORC Office and Research District.

Even under the Seventh Circuit's test, which substitutes "accepted zoning criteria" for the Third Circuit's regulatory purpose approach, Plaintiff cannot establish a violation under the Equal Terms provision of RLUIPA. In *River of Life*, the Seventh Circuit recognized that generating municipal revenue can be promoted by setting aside some land for

commercial use only. The village of Hazel Crest created "a commercial district that excludes churches along with community centers, meeting halls, and libraries because these secular assemblies, like churches, do not generate significant taxable revenue or offer shopping opportunities. Similar assemblies are being treated the same." *River of Life*, 611 F.3d at 373. Again, the City has set forth accepted zoning criteria in the ORC Office and Research District and the permitted uses are consistent with the conventional criteria articulated in the Upper Arlington comprehensive master plan, including the importance of generating tax revenue.[10] Further, the uses permitted in the ORC Office and Research District are narrowly tailored to comport with office use, research use, and supporting commercial activities.

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[10] Patricia E. Salkin, American Law of Zoning § 9:15 (5th ed. 2010), explains with specific reference to commercial districts: "All commercial uses are not created equal. Some require pedestrian traffic; others create hazards for pedestrian traffic. Some commercial uses cause pedestrian traffic during the daylight hours; others operate at night and are quiet in the daytime. The list of characteristics could be extended, but this small sample suggests that residential uses in commercial neighborhoods will injure, as well as be injured by, the adjacent commercial uses. And it suggests further that some commercial uses will be incompatible with others . . . . The most common drafting answer to the problems sketched above is the 'exclusive' zoning ordinance . . . . Districts are established for named uses, or groups of uses, and all others are excluded. The chief virtue of such ordinances is that they create districts for commerce and industry, and exclude from such districts residential and other uses which are capable of interfering with the planned use of land."

Plaintiff urges the court that there "is no need, however, for the religious institution to show that there exists a secular comparator that performs the same functions." *Lighthouse Institute*, 510 F.3d at 266. A plaintiff bringing an as-applied equal-terms challenge must present evidence that a nonreligious comparator received unequal treatment under the challenged regulation. *See Primera Iglesia*, 450 F.3d at 1311. For example, "[i]f a church and a community center, though different in many respects, do not differ with respect to any accepted zoning criterion, then an ordinance that allows one and forbids the other denies equality and violates the equal-terms provision." *River of Life*, 611 F.3d at 371. In another formulation, the Seventh Circuit explained that an equal-terms claim exists "whenever religious land uses are treated worse than comparable nonreligious ones." *Digrugilliers v. Consolidated City of Indianapolis*, 506 F.3d 612, 616 (7th Cir. 2007). If a plaintiff does not offer a suitable comparator, however, there can be no cognizable evidence of less than equal treatment, and the plaintiff cannot meet its initial burden of proof. *Primera Iglesia*, 450 F.3d at 1311 (citing 42 U.S.C. § 2000cc-2(b)).

Here, the Court's search for an appropriate comparator to a religious school begins and ends with a non-religious school. Unlike the other comparators that Plaintiff wants the Court to use for its analysis, there is no practical difference, for the purpose of land use regulation, between a religious and non-religious school. The City of Upper Arlington identifies at least two schools that are currently operating in the residential zoning district: St. Andrews Catholic schools and the private secular school, Wellington.

The City has never done anything to attempt to exclude these schools from operating, nor are religious schools treated less favorably than secular schools. All schools are excluded from the ORC Office and Research District.

At least two other district courts have only looked to secular schools as a comparator when evaluating an Equal Terms RLUIPA claim brought by a religious school. In *Hillcrest Christian Schoo*l *v. City of Los Angeles*, the court, in analyzing the school's Equal Terms RLUIPA claim, looked to whether plaintiff was treated on less than equal terms with non-religious schools and ultimately found that there was "no discernible disparity between the treatment of Hillcrest and any other non-religious school." No.: 05-cv-8788, 2007 U.S. Dist. LEXIS 95925, *19 (C.D. Cal. 2007). In *Irshad Learning Ctr. v. County of Dupage*, the court held that plaintiff's proposed use would have a greater impact on the surrounding neighborhood than the use approved for a comparator, the Balkwill School. 937 F. Supp. 2d 910 (N.D. Ill. 2013). Based on the differences, the court held that "Plaintiff has not established that the Balkwill School would have been treated any differently had it sought a Conditional Use for the use proposed by ILC." *Id.* at 936.

As set forth above, RLUIPA requires "equal treatment, not special treatment." *See Primera Iglesia*, 450 F.3d at 1313. To interpret RLUIPA to require Upper Arlington to allow Plaintiff to operate a religious school in the ORC Office and Research District, would effectively require Upper Arlington to treat Plaintiff more favorably than secular schools, which are prohibited from operating in that district. Stated differently, while RLUIPA operates as a shield

to protect religious assemblies or institutions from unequal treatment, Plaintiff attempts to use the equal terms provision as a sword to receive preferential treatment. Upper Arlington's UDO treats secular and non-secular schools alike, and it treats all schools differently than Plaintiff's proposed comparators, such as daycares, hospitals, and charitable organizations offices. *See Racine Charter One, Inc. v. Racine Unified School Dist.*, 424 F.3d 677, 680 (7th Cir. 2005) ("it is clear that similarly situated individuals must be very similar indeed."). Regardless of which test is applied, even including those tests set forth by other circuits, Upper Arlington's UDO does not violate the Equal Terms provision of RLUIPA.

B. 14th Amendment Equal Protection Clause Claim

This Court has previously concluded that Plaintiff cannot establish an Equal Protection Clause claim because there is no similarly situated comparator that received different treatment. Section 1 of the Fourteenth Amendment provides, in pertinent part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. Amend. XIV, § 1. To establish a violation of the Equal Protection Clause, it must first be shown that the defendant's actions result in similarly-situated individuals receiving disparate treatment. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985); *Gillard v. Norris*, 857 F.2d 1095, 1100 (6th Cir. 1988). If it is shown that similarly-situated persons receive disparate treatment, and if that disparate treatment invades a "fundamental right" such as speech or religious freedom, then the strict

scrutiny standard governs and the defendant's actions will be sustained only where they are narrowly tailored to serve a compelling government interest. *See Reno v. Flores*, 507 U.S. 292, 302 (1993); *37712, Inc. v. Ohio Dept. of Liquor Control*, 113 F.3d 614, 621 (6th Cir. 1997). It is well-established that, "absent a fundamental right or a suspect class, to demonstrate a viable equal protection claim in the land use context, a plaintiff must demonstrate governmental action wholly impossible to relate to legitimate governmental objectives." *Forseth v. Village of Sussex*, 199 F.3d 363, 370-71 (7th Cir. 2001); *see also City of Cleburne*, 473 U.S. at 440 (unless a statute classifies by race, alienage, or national origin or impinges on fundamental constitutional rights, "the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest").

This Court previously concluded that there are no schools, religious or non-religious, permitted in the ORC Office and Research district. Further, allowing a school to operate in the largest office building in the City presents a threat to the financial stability of the City. Nothing in the record has changed to support Plaintiff's Equal Protection claim. Plaintiff still argues the Court should apply the higher level of scrutiny. Plaintiff still maintains that the City of Upper Arlington has no rational basis for prohibiting Tree of Life's Christian school when other similar uses, such as daycare centers, are permitted uses in the same zone.

The Court finds that Plaintiff has failed to establish that it is treated differently from other

similarly-situated institutions, and further that it cannot provide that this alleged disparate treatment invaded its fundamental rights to justify the application of strict scrutiny. A zoning ordinance imposing "restrictions in respect of the use and occupation of private lands in urban communities" such as the "segregation of residential, business, and industrial buildings" satisfies the rational basis test as "a valid exercise of authority." *Village of Euclid v. Amber Realty Company*, 272 U.S. 365, 386-87, 394, 397 (1926).

This Court previously held and still maintains that the City of Upper Arlington's UDO passes rational basis review. The City has a reasonable interest in imposing restrictions on the use of land in its city limits. *See Village of Euclid*, 272 U.S. at 386-87. The Court therefore concludes that the City of Upper Arlington's UDO does not violate the Equal Protection Clause.

C. Free Exercise of Religion under the First Amendment

The general rule under the Free Exercise Clause is that a neutral law of general applicability may burden religious exercise. *See Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990). If a law is not neutral or generally applicable, then government cannot justify placing a substantial burden on religious exercise. *Id.* at 878. In addition, any law which permits individualized, discretionary exemptions is not neutral or generally applicable. *Id.* Several courts have found that zoning laws requiring permits involve individualized assessments. *See Fortress Bible Church v. Feiner*, 734 F. Supp. 2d 409,

498-99 (S.D.N.Y. 2010); *Lighthouse Inst.*, 510 F.3d at 276-77 (holding that zoning law was not system of individualized assessments). Plaintiff argues that the UDO is not neutral and not generally applicable because it requires an application and hearing before the BZAP and the City Council. Additionally, Plaintiff asserts that the UDO treated Plaintiff's school on less than equal terms with secular assemblies or institutions such as daycares, hospitals, and charitable office uses, and, accordingly is not neutral.

Defendant argues that it did not violate the free exercise clause because they applied no coercion in adjudicating Plaintiff's attempt to seek zoning as a church. Defendant argues, and the Court agrees, that any burden imposed on Plaintiff was self-inflicted. Plaintiff was fully aware of the zoning restrictions when it purchased the building. Plaintiff was specifically informed by Upper Arlington City Council that "a private school is neither a permitted or a conditional use in the Office and Research District and that rezoning is required if Appellant plans to pursue a private school at this location." Despite this clear instruction, Plaintiff initially failed to seek rezoning and instead sought a conditional use permit. Even after seeking rezoning, Plaintiff still cannot demonstrate how Upper Arlington's UDO is not neutral. Defendant argues, and the Court agrees, that Tree of Life was treated just as any other private school would have been treated, irrespective of religion. Accordingly, Defendant is entitled to summary judgment on Plaintiff's Free Exercise claim.

D. Establishment Clause of the First Amendment

Plaintiff Tree of Life argues that the City of Upper Arlington's UDO violates the Establishment Clause because it does not define the terms "church" or "place of worship" and because its normal procedures for determining whether a use falls within those terms excessively entangles it with religion. Plaintiff asserts that the City wrongfully determined that Tree of Life was not a place of worship. Plaintiff argues that it was subjected to an "intrusive religious inquiry during its appeal regarding whether it met the definition of place of worship in the UDO." (Pl.'s MSJ at 15).

Plaintiff relies on *Colorado Christian University v. Weaver*, in support of its argument that the process utilized by Defendant was improper. In *Colorado Christian*, the Colorado law at issue required the state to determine whether an institution was "pervasively sectarian" to be eligible for state scholarship programs. 534 F.3d 1245 (10th Cir. 2008). The court held that the determination whether an institution was pervasively sectarian was an "intrusive religious inquiry," that required the state to "troll through a person's or institution's religious beliefs" in violation of the Establishment Clause. *Id.* at 1261. Based on this analysis, Plaintiff argues that Upper Arlington's procedures and ultimate outcome was unconstitutional.

Defendant, however, argues that Plaintiff's reliance on *Colorado Christian* is misplaced. Defendant asserts, and the Court agrees, that no such inquiry was conducted by the City of Upper Arlington that delves into the consideration of religious practices. The City merely evaluated the purpose that Tree of Life proposed for the building, a K through 12 school and determined that it was not a place of

worship, but a school. Accordingly, Defendant is entitled to summary judgment on Plaintiff's Establishment Clause claim.

E. Unconstitutionally Vague under the Fourteenth Amendment

Plaintiff argues that the City of Upper Arlington's UDO is unconstitutionally vague and repeats many of the same arguments it advanced in support of its claim that the UDO violates the Establishment Clause. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The Supreme Court noted that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to [government officials] for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108-09. Plaintiff relies on *State v. Cameron*, in which a court found that a zoning ordinance that did not define the phrase "churches and similar places of worship" was unconstitutionally vague when it was applied to prohibit a pastor from using his home once a week for religious service for his congregation. 498 A.2d 1217, 1220 (1985). The court held that "it cannot, however, be determined with sufficient certainty what kinds of religious practices were intended to be governed by the ordinance." *Id.* at 1225. The court continued:

> The ordinance does not give fair warning or notice to enable a person of average intelligence and experience to know

> what activities could turn his or her home into a church. Further, the ordinance does not foreclose unguided discretion in its application; it provides no sufficient assurance that its broad and undefined terms could be fairly, consistently, and uniformly enforced.

Id.

Plaintiff argues that this case is like *Cameron* in that there is nothing in the UDO or elsewhere that defines "place of worship" or gives fair notice of what a "place of worship" is. Further, Plaintiff asserts that there is nothing to prevent the City of Upper Arlington from applying this term on an *ad hoc* and subjective basis with the dangers of arbitrary and discriminatory application. *See Grayned*, 408 U.S. at 109. Plaintiff therefore concludes that the UDO is unconstitutionally vague on its face and as applied.

Plaintiff, however, must establish that the UDO is unconstitutionally vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). Defendant correctly notes that the UDO's use of words like "churches", "places of worship", and "residences" does not require a separate and precise definition of those terms. The City of Upper Arlington has chosen to rely on the commonly held definitions of such terms. Senior Planning Officer Gibson testified, for instance, that if there is uncertainty concerning a term contained in the UDO, it behooves one to consult a dictionary or the

American Planning Association's Glossary. (Gibson Depo. at 67). This Court agrees that the UDO is not unconstitutionally vague on its face.

The cases relied upon by Plaintiff concerned what uses or activities were permitted in the zoning code. However, in this case, there is no question under the City of Upper Arlington's UDO what a "church" or "place of worship" is or whether such conditional uses are permitted in the ORC Office and Research District. Anyone reading the UDO would have seen that "school" was not one of the permissible zoned uses of the ORC Office and Research District. Anyone reading the UDO would have promptly realized that if one wished to use ORC Office and Research District zoned property for a school, a rezoning decision by the City would be necessary. Indeed, not coincidentally, Tree of Life sought just such a decision on multiple occasions. The UDO, in short, is not unclear or vague – Tree of Life simply wishes it were because they do not like what is says.

Further, as applied to Plaintiff, the UDO is not unconstitutional. As discussed above, Plaintiff plans to use the property in question as a school, not as a church or place of worship, as these terms are commonly defined. Plaintiff was instructed to seek rezoning, and did in fact. The rezoning application was denied for valid reasons. Any school attempting to relocate to the ORC Office and Research District, regardless of religion, would have been instructed to go through the same process. Accordingly, Defendant is entitled to summary judgment on Plaintiff's vagueness claim.

F. Free Speech Claim under the First Amendment

Plaintiff asserts that the City of Upper Arlington's UDO violates the Free Speech Clause of the First Amendment because it is an invalid prior restraint on speech. Plaintiff also asserts that for all the same reasons asserted in this section, that the UDO violates the Peaceable Assembly Clause. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577-78 (1980) (holding that the right of peaceable assembly is a right cognate to free speech and is equally fundamental because people assemble to exercise their right to free speech).

Courts have held that when zoning laws seek to determine whether a religious exercise can occur, they trigger a free speech analysis. *See Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 468-69 (8th Cir. 1991) (holding that a zoning ordinance that placed "determinative weight on the fact that the proposed use is a church" to decide whether it was allowed in the zoning district triggered a free speech analysis); *see also Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 980-81 (N.D. Ill. 2003) (holding that zoning codes that restrict churches implicate the free speech doctrine).

In the case at bar, Plaintiff argues that the City's UDO restricts the location of a religious use, therefore implicating the Free Speech Clause. Plaintiff's assertions that the UDO is an invalid prior restraint are the same as those stated in support of the argument that the City's UDO is unconstitutionally vague.

Defendant argues that Plaintiff's free speech claim fails because the City did not exclude churches from the ORC Office and Research District. The City excluded private schools, some of which are secular and do not engage in religious speech. The City does not single out religious schools. It prohibits all schools and therefore Plaintiff's free speech argument fails. Additionally, the City's UDO does not grant overly broad discretion to officials to determine whether or not to allow the speech and do not contain adequate standards to guide the officials' decision. Defendant argues, and the Court agrees, that the standards for determining whether or not to permit a school in the ORC Office and Research District are clear and objective. Therefore, for the same reasons as set forth with respect to Plaintiff's unconstitutionally vague claim, Plaintiff's free speech claim also fails. No prior restraint has been exercised on Plaintiff. Accordingly, Defendant is entitled to summary judgment on Plaintiff's free speech claim.

G. State Law Claims

Plaintiff has also asserted state law claims under Article I, Section 7 of the Ohio Constitution. However, Plaintiff only asserts federal subject matter as the basis for this Court's jurisdiction. Having granted summary judgment to the Defendant on the claims under which Plaintiff asserted federal subject matter jurisdiction, the Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state law claims.

It is well settled that a District Court may decline to exercise supplemental jurisdiction over state-law claims once it has dismissed all claims over which it

possessed original jurisdiction. *Saglioccolo v. Eagle Ins. Co.*, 112 F.3d 226, 233 (6th Cir. 1997). Indeed, the Sixth Circuit has recognized that if all federal claims are dismissed before trial, remaining state claims generally should be dismissed. *Id.*; *Taylor v. First of Am. Bank-Wayne*, 973 F.2d 1284, 1287 (6th Cir. 1992). Therefore, pursuant to 28 U.S.C. §1367(c)(3) and (d), the Court will dismiss Plaintiff's state law claims against Defendant without prejudice.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment. Final judgment shall be entered in favor of Defendant as to all of the federal claims. The state law claims are dismissed without prejudice.

The Clerk shall remove Documents 79 and 82 from the Court's pending motions list.

The Clerk shall remove this case from the Court's pending cases list.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 13a0817n.06

No. 12-4089, 12-4111

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TREE OF LIFE CHRISTIAN SCHOOLS, Plaintiff-Appellant / Cross-Appellee, v. CITY OF UPPER ARLINGTON, Defendants-Appellee / Cross-Appellant.	)	**FILED** Sep 06, 2013 DEBORAH S. HUNT, Clerk ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO OPINION

Before: ROGERS and DONALD, Circuit Judges; ANDERSON, District Judge*.

Bernice B. Donald, Circuit Judge. Tree of Life Christian Schools ("Tree of Life" or "the School") purchased property in the landlocked suburb of Upper

* The Honorable S. Thomas Anderson, United States District Judge for the Western District of Tennessee, sitting by designation.

Arlington (or "the City"), intending to open a private Christian school that would consolidate its existing less-than-ideal campuses. The property is located in the City's Office and Research or "ORC" zoning district, in which neither churches nor schools are allowed as of right.[1] City of Upper Arlington, Unified Development Ordinance ("UDO"), Pt. 11, § 5.03(A)(6) and Table 5-C.

After Tree of Life unsuccessfully sought a conditional use permit and unsuccessfully appealed to both the Board of Zoning and Planning ("BZAP") and the City Council, it filed a complaint in the district court alleging religious-based discrimination. Specifically, it filed four claims under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"): facial and as-applied "equal terms" claims alleging that the City's land use ordinance violates 42 U.S.C. § 2000cc(b)(l) by treating the School on less than equal terms with nonreligious assemblies or institutions, and facial and as-applied "substantial burden" claims alleging that the ordinance violates 42 U.S.C. § 2000cc(a)(l) by imposing a substantial burden on its religious exercise without a compelling government interest. Tree of Life also brought six constitutional claims alleging violations of the rights

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[1] Upper Arlington uses what is known as "non-cumulative" zoning, in which only building use categories that are designated as permissive uses are allowed as of right, and all other uses are either expressly listed as "conditional uses," requiring a special permit, or are prohibited entirely. *See* UDO, Pt. 11, §§ 4.05(F), 5.0l(B)(2); *see also* Land Use Planning and Development Regulation Law § 4.3 (3d ed. 2012). Churches or places of worship are listed as conditional uses in the ORC District. UDO, Pt. 11, Table 5-C.

to free exercise, due process, equal protection, free speech, peaceable assembly; and a violation of the Establishment Clause; as well as a claim under the Ohio Constitution.

The district court granted summary judgment to the City on all claims on grounds that the claims were not ripe because Tree of Life did not seek a zoning amendment. Tree of Life appeals this order arguing that the claims are all ripe because the zoning ordinance was finally applied to it when BZAP and the City Council made a final determination that a private Christian School is a non-permitted use under the ordinance. The City responds that the claims are not ripe because the results of an attempted zoning amendment are uncertain because it is a legislative process. Tree of Life also argues that insofar as its RLUIPA equal terms claim can be characterized as a facial claim, such challenges are not subject to the normal requirements of ripeness doctrine.[2]

In *Miles Christi Religious Order v. Township of Northville,* we held that a claim challenging a zoning ordinance is not ripe until the "relevant administrative agency [has] resolve[d] the

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[2] The Appellant spent much effort during oral arguments arguing that the very nature of a RLUIPA equal terms claim makes it a facial claim, but simultaneously arguing that the error alleged occurred in an as-applied fashion when Tree of Life itself was denied a permit. The Appellant eventually asked us to reverse "even if" we construe this to be an as-applied claim. As the complaint itself brought both kinds of claims, we decline to construe them as one or the other. Insofar as Tree of Life alleges a facial claim, however, we have doubts as to its validity because the face of the statute appears to be neutral as to non-Church religious uses. We leave this issue to the district court.

appropriate application of the zoning ordinance to the property in dispute" or when the "claimant '[has] obtain[ed] a final decision regarding the application of the zoning ordinance[s] . . . to its property.'" 629 F.3d 533, 537 (6th Cir. 2010) (quoting *Williamson Cnty. Reg.l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 186 (1985)). There, the claim at issue was not ripe because the plaintiff did not seek a variance from the zoning board, and thus the zoning board had not reached a final decision regarding the property. *Id.* at 538. We decline to consider whether the holding in *Miles Christi* covers situations where the plaintiff did not seek a zoning amendment because new information has come to light.

Tree of Life has filed a motion to supplement the record to include minutes from recent City Council proceedings in Upper Arlington. While this case was pending, Tree of Life indeed sought a zoning amendment, which the City Council voted to deny. Based on this change of circumstances, the present arguments before this panel are no longer sufficient. We remand to the district court to determine in the first instance whether the claims are ripe.

Tree of Life also argues the district court ruled on the merits of the RLUIPA equal terms claim and asks us to consider the merits as well. The district court order granting summary judgment to the City on ripeness grounds included language suggesting that the City's new ordinance removing daycare centers as permitted uses in the ORC District might undermine the plaintiff's RLUIPA equal terms claim because the UDO applies equally to "any

other [use] not permitted." This language is dicta, and it does not include an analysis of whether Tree of Life is treated "on less than equal terms with a nonreligious assembly or institution," 42 U.S.C. § 2000cc(b)(1), or of any other claim on the merits. We do not construe this language as a separate holding. If on remand, the district court determines that this case is ripe, we leave it to the district court to rule on the merits of each claim in the first instance.

Finally, the City "cross-appeals," asking the court to reverse the district court's denial of the City's summary judgment motion on the merits, but arguing that we do not have jurisdiction under the final judgment rule to consider this cross-appeal or parts of the primary appeal. The City fundamentally misunderstands the final judgment rule. "The [final judgment] rule is that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at *any stage of the litigation* may be ventilated." *Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 712 (1996)(internal quotations omitted) (emphasis added). Nevertheless, we dismiss the cross-appeal because we generally have "no appellate jurisdiction when the appellant does not seek a change in the relief ordered by the judgment appealed from" because we do not issue advisory opinions. *Wheeler v. City of Lansing,* 660 F.3d 931, 939-40 (6th Cir. 2011). These issues are best left to the district court.

For the reasons explained above, as to Tree of Life's appeal, we GRANT the motion to supplement the record and REVERSE and REMAND to the

district court on the issue of ripeness in light of new information. We DISMISS the City's cross-appeal.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Tree of Life Christian Schools,

Plaintiff,

-v-

Case No.: 2:11-cv-009
JUDGE SMITH
Magistrate Judge Deavers

The City of Upper Arlington,

Defendant.

OPINION AND ORDER

This matter is before the Court on Defendant the City of Upper Arlington's Motion for Summary Judgment (Doc. 36), Plaintiff Tree of Life Christian Schools' Motion for Summary Judgment (Doc. 64), and Defendant's Second Motion for Summary Judgment (Doc. 65). Responses and replies have been filed and these motions are now ripe for review. For the reasons that follow, the Court **GRANTS** Defendant's First Motion for Summary Judgment; **DENIES** Defendant's Second Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

I. BACKGROUND

A. Tree of Life Christian Schools

Plaintiff Tree of Life Christian Schools ("Plaintiff" or "Tree of Life") is a private Christian school located in the Columbus, Ohio, metropolitan area serving approximately 660 students, and employing approximately 150 people. Tree of Life is currently scattered across four campuses in different locations of the metropolitan area, including the Northridge campus, Indianola campus, Dublin campus, and Westerville campus.[1] (Verified Compl. ¶¶ 1, 25-28, 35-36). Tree of Life operates as a non-profit religious corporation under the laws of the State of Ohio. Tree of Life's principal place of business is located at 935 Northridge Road, Columbus, Ohio. (Verified Compl. ¶ 8).

Tree of Life was founded in 1978, when members of the Linden Church of Christ, Beechwold Church of Christ, and Minerva Park Church of Christ collectively established a school in north Columbus.[2] Members from these three churches serve on the school board governing Tree of Life. The school was initially known

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[1] Since the filing of the Verified Complaint, Plaintiff has closed the Westerville location. (Marrah Depo. at 75).

[2] The following churches have also sponsored or contributed to Tree of Life, including providing facilities space, financial support, and school board members: Northeast Church of Christ, Indianola Church of Christ, Westerville Christian Church, North Park Church of Christ, Discover Christian Church, Pickerington Christian Church, Hilliard Church of Christ, and Worthington Christian Church.

as Linden Christian School and was later renamed Tree of Life. (Verified Compl. ¶¶ 10-12).

The primary purpose of Tree of Life is to assist parents and the Church in educating and nurturing young lives in Christ. Their mission statement reads: "In partnership with the family and the church, the mission of Tree of Life Christian Schools is to glorify God by educating students in His truth and discipling them in Christ. 'A cord of three strands is not easily torn apart.' (Ecclesiates 4:12)." (Verified Compl. ¶¶ 16-17). Tree of Life's vision statement states: "As students are led to spiritual, intellectual, social and physical maturity, they become disciples of Jesus Christ, walking in wisdom, obeying His word and serving in His Kingdom." (Verified Compl. ¶ 18). Tree of Life describes their philosophy of education as "quintessentially and undeniably Christian," and believes this philosophy "puts the Bible at the center and asks the student to evaluate all he/she studies through the lens of God's Word." (Verified Compl. ¶ 19). Tree of Life requires all parents who enroll their children to certify that they agree with the mission, philosophy, and vision. Further, all faculty and staff must also sign a statement of faith, and must be active members of a local, "Bible-believing congregation." (Verified Compl. ¶¶ 21- 22).

Tree of Life has limited space in its current buildings for new students. The Indianola and Dublin campuses are located within existing church buildings of sponsoring churches of Tree of Life. However, there are no long-term leases with these churches, and the schools occupy space in the church facilities as at-will tenants. Further, the facilities are located in buildings that are old and in need of substantial upkeep and/or

remodeling. The lack of long-term space and scattered campuses has hampered the unity of Tree of Life's ministry. (Verified Compl. ¶¶ 29-34, 37-38).

In 2006, Tree of Life began searching for property that would allow for expansion of its ministry. For over two years, Tree of Life reviewed more than twenty sites and facilities within Franklin County, and finally found a building and property located at 5000 Arlington Centre Boulevard in Upper Arlington, Ohio (hereinafter "the property"). The property contains an office building that is approximately 254,000 square feet and is centrally located to serve all of Tree of Life's current constituents. The property's size would allow for consolidation of preschool through twelfth grade at one location and to accommodate even more students. Further, the consolidation would allow Tree of Life to minister across all grade levels, reduce staff and student transportation costs, and provide updated facilities. Tree of Life ultimately purchased the property on August 11, 2010. (Verified Compl. ¶¶ 39-50).

B. The City of Upper Arlington

Defendant, the City of Upper Arlington, Ohio, ("the City" or "Upper Arlington"), is a public body authorized under the laws of the State of Ohio, and operating within the course and scope of its authority and under the color of state law. (Verified Compl. ¶ 9).

In 2001, the City of Upper Arlington commissioned a development plan ("the Master Plan") to provide guidance for its land use. According to the Master Plan, in order for the City to maintain its existing level of facilities and services, and in order to provide for

future capital needs, it is critical for the City to enhance its revenues. The revenue generated per acre from commercial use far exceeds the revenue provided by residential use. In order to maximize revenues, the City was directed in the Master Plan to create opportunities for office development that emphasize high-paying jobs. Upper Arlington is landlocked and primarily residential. Only 4.7% of its useable land area is zoned "Commercial," and only 1.1% is in office use. Therefore, full use of existing office space, as well as the development of additional office space, is critical for the City's financial stability. The City's opportunities to expand are limited; therefore, it must maximize its few opportunities for commercial use, or it cannot maintain its level of services for its residents. (Affidavit of Chad Gibson, Senior Planning Officer for Upper Arlington, ¶¶ 3-4).

All land and development in Upper Arlington is regulated by the Upper Arlington Unified Development Ordinance ("the UDO"), which employs "non- cumulative" or "exclusive" zoning. Article 5 of the UDO sets forth the regulations applicable to the use and development of land in Upper Arlington and establishes the zoning districts, including residential, commercial, planned, and miscellaneous.

The largest office building in Upper Arlington is located at 5000 Arlington Centre Boulevard (the "commercial office building"), in the ORC Office and Research District. The commercial office building was previously occupied by AOL/Time Warner, and it generated substantial income tax and property tax revenues for the City. In 2001, it accounted for 29% of the City's income tax revenues. However, operations at the commercial office building declined over the

course of recent years. Time Warner ceased operations at this location in 2009. Requiring commercial use of the commercial office building is consistent with the language and purposes of the ORC Office and Research District, as well as the Master Plan. (Affidavit of Catherine Armstrong, Finance Director for Upper Arlington ¶¶ 4-7).

The purpose of the "ORC Office and Research District" is set forth in Section 5.03(A)(6) of the UDO as follows:

> [T]o allow offices and research facilities that will contribute to the City's physical pattern of planned, healthy, safe, and attractive neighborhoods. The ORC district should also provide job opportunities and services to residents and contribute to the City's economic stability. Permitted uses generally include, but are not limited to business and professional offices, research and development, book and periodical publishing, insurance carriers, corporate data centers, survey research firms, and outpatient surgery centers.

A complete list of permitted uses appears in Table 5- C of the UDO. Schools of any type are not permitted in the ORC Office and Research District. (Gibson Aff. ¶¶ 5-7).

Section 5.01(B) of the UDO governs the rules of application. Section 5.01(B)(2) entitled "Permitted Uses" provides:

> Only a use designated as a permitted use shall be allowed as a matter of right in a zoning district and any use not so designated shall be prohibited except, when in character with the zoning district, such other additional uses may be added to the permitted uses of the zoning district by an amendment to this UDO (Section 4.04).

Section 5.01(B)(3) entitled "Conditional Uses" states:

> A use designated as a conditional use shall be allowed in a zoning district when such conditional use, its location, extent and method of development will not substantially alter the character of the vicinity or unduly interfere with the use of adjacent lots in the manner prescribed for the zoning district. To this end BZAP [Board of Zoning and Planning] shall, in addition to the development standards for the zoning district, set forth such additional requirements as will, in its judgment, render the conditional use compatible with the existing and future use of adjacent lots and the vicinity. Additional standards for conditional uses are listed in Section 6.10.

Plaintiff was advised that if it desired to operate a school in the commercial office building, it would need to apply for rezoning. Such rezoning is governed by Section 4.04 of the UDO titled "UDO and Official Zoning Map Amendments" which specifically provides:

B. Amendment Process: Amendments may be initiated in one of the following ways:

1. By the filing of an application to BZAP by the owner(s) of property within the area proposed to be affected or changed by said amendment;

2. By the adoption of a motion by BZAP; or

3. By the adoption of a motion by City Council and referral to BZAP.

All text and map amendments shall follow the same procedure. City Council initiated text or map amendments shall be referred to BZAP for recommendation prior to Council consideration.

C. Standards for Approval: The following criteria shall be followed in approving zoning map amendments to the UDO:

1. That the zoning district classification and use of the land will not materially endanger the public health or safety;

2. That the proposed zoning district classification and use of the land is reasonably necessary for the public health or general welfare, such as by enhancing the successful operation of the surrounding area in its basic community function or by providing an essential service to the community or region;

3. That the proposed zoning district classification and use of the land will not

> substantially injure the value of the abutting property;
>
> 4. That the proposed zoning district classification and use of the land will be in harmony with the scale, bulk, coverage, density, and character of the area the neighborhood in which it is located;
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> 5. That the proposed zoning district classification and use of the land will generally conform with the Master Plan and other official plans of the City;
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> 6. That the proposed zoning district classification and use of the land are appropriately located with respect to transportation facilities, utilities, fire and police protection, waste disposal, and similar characteristics; and
>
> 7. That the proposed zoning district classification and use of the land will not cause undo [sic] traffic congestion or create a traffic hazard.

C. Tree of Life's First Appeal

In early 2009, Upper Arlington officials became aware that Tree of Life was considering purchasing the commercial office building for use as a school. On March 16, 2009, Matthew Shad, Deputy City Manager for Economic Development in Upper Arlington, met with Don Roberts of CB Richard Ellis, the listing agent, and advised him that schools were not a permitted use for that building. (Shad Aff. ¶¶ 4- 7). On October 1, 2009, Tree of Life contracted

to purchase the commercial office building, contingent upon zoning to allow a school. Upon learning of the buyer, on November 11, 2009, the Upper Arlington Economic Development Director advised the Tree of Life school superintendent directly that schools were not a permitted use.

On December 21, 2009, Tree of Life filed an application with Upper Arlington for a Conditional Use Permit requesting to "use the property for a place of worship, church and residential, to the extent that residential includes a private school." (Verified Compl. Ex. A). In a letter dated December 28, 2009, Mr. Gibson responded to the application by stating, among other things, that "a private school is neither a permitted use nor a conditional use in the ORC, Office and Research District (*see* UDO Table 5-C Article 5.01). Therefore, this application will not be scheduled for BZAP review, even if a traffic study is submitted. The applicant should submit a rezoning application if they wish to pursue a private school at this location." (Verified Compl. Ex. B)

On January 5, 2010, Tree of Life appealed Mr. Gibson's determination to the Board of Zoning and Planning ("BZAP"). (Verified Compl. Ex. C). On March 1, 2010, the BZAP held a public hearing on the issue, and subsequently issued a Board Order upholding Mr. Gibson's determination "that the conditional use application proposing a private school in an ORC District was inappropriate and would not be scheduled for BZAP review." (Verified Compl. Ex. D). On April 2, 2010, Tree of Life appealed the BZAP decision to the Upper Arlington City Council ("City Council"). (Verified Compl. Ex. E). On April 26, 2010, the City Council held a public hearing on the appeal and

ultimately voted to uphold the decision of the BZAP. (Verified Compl. Ex. F). The City Council concluded that "a private school is neither a permitted or conditional use in the Office and Research District and that rezoning is required if Appellant plans to pursue a private school at this location." (*Id*. at 4).

Despite being advised in three separate rulings that rezoning is required to operate a school in the commercial office building, Plaintiff has never initiated the rezoning process.

D. Tree of Life's Second Appeal

Mr. Gibson's initial letter dated December 28, 2009, determined that the Tree of Life school was not a residential use that could be considered as a conditional use in the ORC District; however, there was no determination as to whether Tree of Life was a "Place of Worship" or a "Church." On January 5, 2010, counsel for Tree of Life wrote to Mr. Gibson asking for clarification as to "whether these uses, which are contained in the application, are, or are not, Conditional Uses in the ORC zoning district in the Upper Arlington UDO." (Verified Comp. Ex. C at 6). On February 26, 2010, Mr. Gibson addressed these issues by confirming the hearing scheduled by the BZAP on March 1, 2010, to consider the conditional use application for "a private school with ancillary uses." Mr. Gibson further stated: "At this time, no conditional use application has been submitted for a church at this site." (Verified Compl. Ex. G).

On March 3, 2010, Tree of Life appealed this determination to the BZAP. (Verified Compl. Ex. H). The BZAP held a public hearing on June 7, 2010, and upheld Mr. Gibson's determination. The BZAP stated

that "for purposes of the UDO, the proposed primary use of the property as a private school does not constitute a 'place of worship, church' as that term is used in Table 5-C of Article 5 of the UDO, and is therefore not a conditional use in the ORC District." (Verified Compl. Ex. I). On June 18, 2010, Tree of Life appealed the BZAP decision to the City Council. (Verified Compl. Ex. J). On August 16, 2010, the City Council held a public hearing and issued findings affirming the prior decisions that "for purposes of the UDO, the proposed primary use of the property as a private school does not constitute a 'place of worship, church' as that term is used in Table 5-C of Article 5 of the UDO, and is therefore not a conditional use in the ORC District." (Verified Compl. Ex. K).

Despite Tree of Life's unsuccessful appeals with the BZAP and the City Council, it continued with the purchase of the commercial office building. The closing on the commercial office building occurred on August 11, 2010.

Tree of Life appealed the final decision of the Upper Arlington City Council to the Environmental Division of the Franklin County Municipal Court, but ultimately withdrew that appeal. Tree of Life then initiated this lawsuit against Defendant Upper Arlington alleging violations of its rights to free speech, free exercise of religion, peaceable assembly, equal protection, due process, and the establishment clause under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 7 of the Ohio Constitution, as well as a violation of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").

Plaintiff initiated this case on January 5, 2011, with the filing of a Verified Complaint and ultimately filed a Motion for Preliminary Injunction on January 28, 2011, seeking to enjoin Defendant, the City of Upper Arlington, from enforcing Article 5.01, Table 5-C of the UDO prohibiting Plaintiff from operating a religious school in the ORC Office and Research zoning district. Plaintiff sought injunctive relief on two of its claims: violation of the RLUIPA and violation of equal protection. On April 27, 2011, this Court denied Plaintiff's Motion for Preliminary Injunction (Doc. 23). Despite finding that Plaintiff demonstrated a potential likelihood of success on the merits of its RLUIPA claim, the Court found that the balance of harms did not strongly justify the issuance of a preliminary injunction.

II. STANDARD OF REVIEW

The standard governing summary judgment is set forth in Rule 56 of the Federal Rules of Civil Procedure, which provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *See Muncie Power Prods., Inc. v. United Techs. Auto., Inc.,*

328 F.3d 870, 873 (6th Cir. 2003) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)); *see also Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 588 (1986).

When reviewing a summary judgment motion, the Court must view all the facts, evidence and any inferences that may permissibly be drawn from the facts, in favor of the nonmoving party. *Matsushita*, 475 U.S. at 587. The Court will ultimately determine whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Liberty Lobby*, 477 U.S. at 251-53. Moreover, the purpose of the procedure is not to resolve factual issues, but to determine if there are genuine issues of fact to be tried. *Lashlee v. Sumner*, 570 F.2d 107, 111 (6th Cir. 1978). The Court's duty is to determine only whether sufficient evidence has been presented to make the issue of fact a proper question for the jury; it does not weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. *Liberty Lobby*, 477 U.S. at 249; *Weaver v. Shadoan*, 340 F.3d 398, 405 (6th Cir. 2003).

In responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (quoting *Liberty Lobby*, 477 U.S. at 257). The existence of a mere scintilla of evidence in support of the opposing party's position is insufficient; there must be evidence on which the jury could reasonably find for the opposing

party. *Liberty Lobby*, 477 U.S. at 252. The nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Phillip Morris Companies, Inc.*, 8 F.3d 335, 340 (6th Cir. 1993). The Court may, however, enter summary judgment if it concludes that a fair-minded jury could not return a verdict in favor of the nonmoving party based on the presented evidence. *Liberty Lobby*, 477 U.S. at 251-52; *see also Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994).

Moreover, "[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street*, 886 F.2d at 1479-80. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001).

III. DISCUSSION

Plaintiff Tree of Life initiated this case against Defendant the City of Upper Arlington asserting claims for violation of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"); violation of the right to free exercise of religion; violation of the due process clause of the Fourteenth Amendment; violation of the equal protection clause; violation of the free speech clause; violation of the right to peaceable assembly under the First Amendment; violation of the Establishment Clause; and violation of Article I, Section 7 of the Ohio Constitution.

Defendant filed an initial motion for summary judgment asserting that Plaintiff failed to exhaust its locally available remedies and therefore the matter is not ripe for decision under RLUIPA. Defendant then filed a second motion for summary judgment seeking judgment on all of Plaintiff's claims. Plaintiff has also moved for summary judgment on its claims under RLUIPA, the free exercise clause, the establishment clause, the free speech clause, and the equal protection clause. The Court will first address Defendant's argument regarding ripeness because it involves a basic question of jurisdiction that goes to the very heart of the case and controversy requirement of Article III.[3] Then, if the case is ripe, the Court will turn to each of Plaintiff's individual claims.

A. Ripeness

Defendant Upper Arlington argues that this matter is not ripe for review by this Court because local officials were never afforded the opportunity to address the merits of Plaintiff's requested change in use of its property. Despite instructing Plaintiff that the only process under the UDO by which a non-permitted use can be allowed in an ORC, Office and Research District is a rezoning, Plaintiff did not pursue this remedy. Instead, Plaintiff chose to pursue a conditional use permit, a remedy not available to it

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[3] The Court notes that Defendant failed to raise this issue sooner, such as in response to the motion for preliminary injunction. Despite this failure, ripeness cannot be waived and therefore will be considerd by the Court. *See DLX, Inc. v. Kentucky*, 381 F.3d 511, 534 (6th Cir. 2004) (citing *Florida Ass'n of Rehab. Facilities, Inc. v. Florida Dep't of Health and Rehab Serv.*, 225 F.3d 1208, 1227 (11th Cir. 2000)).

under the UDO, and the subsequent appeals associated with seeking the permit. The UDO clearly sets forth the permitted, prohibited and conditional uses for each of the commercial districts in Table 5-C, Commercial Uses. Since schools were not a permitted or conditional use, the only process available under the UDO to operate a school in the ORC, Office and Research District is to seek rezoning.

The ripeness doctrine is grounded in Article III limitations on judicial power and practical considerations of judicial economies. *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). Its purpose is "to prevent the courts through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Id.* at 807. Courts generally consider three factors to determine if a claim is ripe for review: 1) "the likelihood that the harm alleged by [the] plaintiffs will ever come to pass"; 2) "whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims"; and 3) "the hardship to the parties if judicial relief is denied at [this] stage" in the proceedings. *Adult Video Ass'n v. U.S. Dep't of Justice*, 71 F.3d 563, 568 (6th Cir. 1995). In the land-use context, the first requirement of ripeness requires "finality, an insistence that the relevant administrative agency resolve the appropriate application of the zoning ordinance to the property in dispute." *Miles Christi Religious Order v. Twp. of Northville*, 629 F.3d 533, 537 (6th Cir. 2010) (citing *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985)). In *Williamson*, the United States Supreme Court held that a regulatory taking claim "is not ripe until the government entity charged with

implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.*

In cases involving First Amendment claims, "the ripeness doctrine is somewhat relaxed." *Dougherty v. Town of North Hempstead*, 282 F.3d 83, 90 (2d Cir. 2002). "It is [also] true that the existence of a constitutional claim, particularly a First Amendment claim, affects the hardship component of the ripeness inquiry" by raising the potential that the plaintiff will be harmed if the court were to stay its hand. *Miles Christi*, 629 F.3d at 540.

Defendant Upper Arlington argues that Plaintiff cannot satisfy the ripeness doctrine because Defendant was never given the opportunity to apply the prescribed rezoning standards to Plaintiff's proposed use of its facility, there are no records of or any arguments regarding the merits of a rezoning application, and there is no way to determine if the harm alleged by Plaintiff will ever come to pass.

Defendant relies on a recent decision of the Sixth Circuit that considered the ripeness issue in a case involving a RLUIPA claim. In *Miles Christi*, 629 F.3d 533, the plaintiff was a religious order that conducted services in a residential neighborhood. Neighbors complained to the defendant township about parking congestion during service times. The township contacted the plaintiff and informed it that it needed to seek a variance for additional parking and submit a site plan detailing the intended expansion of parking spaces. The plaintiff, however, ignored the instruction and was issued a ticket by the township for violation of the zoning ordinance. The plaintiff

appeared in state court on the ticket, and a record of the state court proceedings was developed, including depositions of members of the plaintiff's religious order and township officials about the events that led to the ticket being issued. However, before a final decision was rendered in state court, the plaintiff filed an action in federal court based on RLUIPA.

The Sixth Circuit held that plaintiff Miles Christi had not made sufficient efforts to resolve its dispute with the township and affirmed the district court's dismissal of the plaintiff's RLUIPA claims on ripeness grounds. The Sixth Circuit reasoned: "Finality requires the input of the zoning board on these unresolved questions." 629 F.3d at 538.

Defendant Upper Arlington asserts that Plaintiff Tree of Life ignored pleas from local zoning officials to use the appropriate process to accomplish its purposes. Upper Arlington's UDO does not allow private schools of any type in the ORC, Office and Research District where the building they purchased is located. Despite being told on several occasions that the only path for a private school to function in this district would be rezoning, Plaintiff, like the plaintiff in *Miles Christi*, chose not to seek rezoning and filed a RLUIPA claim in federal court before any decision on the merits of its planned use could be rendered by the City of Upper Arlington.

Plaintiff Tree of Life argues that the City's argument misses the point and that a rezoning application is irrelevant to the determination of its' legal claims. Plaintiff asserts that Upper Arlington's UDO is unconstitutional both on its face and as applied to Tree of Life because it was applied to

prohibit Tree of Life's school while allowing other uses such as daycares and hospitals. Tree of Life also alleges that the harm has occurred and is continuing to occur, and that going through the rezoning process would only exacerbate this harm. Tree of Life maintains that this case is ripe because the UDO was applied to its' property and a final decision was rendered by the City Council. According to Tree of Life, neither the facial challenge, nor the as-applied challenge to the decisions applying the UDO to Tree of Life would be made more final than they already are if Tree of Life were to apply for rezoning of the property.

However, Plaintiff fails to acknowledge that Upper Arlington advised it from the very beginning that to operate a private school at its location, it would have to apply for rezoning in accordance with the UDO. Plaintiff is correct that this case differs somewhat from *Miles Christi* in that Plaintiff pursued two separate appeals of the UDO, first seeking a conditional use as a school, and second as a church or place of worship.

There is no question that Plaintiff's primary purpose for its building is use as a school, therefore the conditional use application was futile. In no situation under the UDO would a school be considered a conditional use. Plaintiff's Articles of Incorporation filed with the Ohio Secretary of State describe its purpose as follows:

> To establish, maintain and operate a Christian School to teach, train, instruct and educate children on preschool, elementary and secondary levels of education. The Bible, acknowledged as

> the written Word of God, shall be the basic reference for all teaching. All courses of instruction on all grade levels shall be related to the Scriptures as the standard of all science, humanities and religion. Admission shall be open to all whose parents or guardians desire them to be taught the facts and precepts of the Bible.

(*See* Marrah Depo. Ex. 1A).

Similarly, the Tree of Life website states its purpose as: "The primary purpose of the school was (and remains to this day) to assist parents and the Church in educating and nurturing young lives in Christ." (Marrah Depo. Ex. 1E). Plaintiff Tree of Life, through its superintendent, has freely admitted that it intends to use the building in question as a school. He described plans for the property as follows: "So building 4, 6, and 7 will on the first floor house preschool through 3rd grade." (Marrah Depo. at 149). He also testified that: "the 4th through 8th grade will go on the second floor." (Marrah Depo. at 149). In addition, he stated that the "third floor would be [grades] 9 through 12." (Marrah Depo. at 150). Further, "Building 2 is an arts campus. . . [c]hoir, band, digital arts, drawing arts, et cetera." (Marrah Depo. at 153).

Additionally, Ms. Lezlee Knowles, former superintendent and current assistant superintendent of Tree of Life Christian Schools, described that Tree of Life must abide by curriculum standards to participate in the Educational Choice Program and receive money from the state of Ohio. (Knowles Depo.

at 8-17). In order to receive these funds, Tree of Life must maintain its status as a chartered nonpublic school with the state board of education. *See* Ohio Rev. Code § 3310.02. In order to remain a chartered nonpublic school, Plaintiff must follow strict curriculum standards for the teaching of mathematics, language arts, physical education, fine arts, science, social studies, health and history. *See* Ohio Rev. Code § 3301.16. Students at the elementary level are taught the Bible about one half hour per day and attend chapel one hour every other week. (Knowles Depo. at 12).

The Court will consider whether this case is ripe based on the analysis applied by the Sixth Circuit in *Miles Christi*: whether a dispute is "fit for a court decision in the sense that it arises in a concrete factual context and involves a dispute that is likely to come to pass." *Miles Christi*, 629 F.3d at 615. Plaintiff claims there is a sufficiently developed record to enable this Court to fairly adjudicate the merits of the claim. Defendant argues, and the Court agrees, that there has been no record established regarding a proposed rezoning. Zoning application hearings in Upper Arlington require in-depth review of the impact a proposed rezoning would have on the surrounding community. The UDO provision on rezoning requires analysis of the following elements:

> 1. That the zoning district classification and use of the land will not materially endanger the public health or safety;
>
> 2. That the proposed zoning district classification and use of the land is reasonably necessary for the public

health or general welfare, such as by enhancing the successful operation of the surrounding area in its basic community function or by providing an essential service to the community or region;

3. That the proposed zoning district classification and use of the land will not substantially injure the value of the abutting property;

4. That the proposed zoning district classification and use of the land will be in harmony with the scale, bulk, coverage, density, and character of the area the neighborhood in which it is located;

5. That the proposed zoning district classification and use of the land will generally conform with the Master Plan and other official plans of the City;

6. That the proposed zoning district classification and use of the land are appropriately located with respect to transportation facilities, utilities, fire and police protection, waste disposal, and similar characteristics; and

7. That the proposed zoning district classification and use of the land will not cause undo [sic] traffic congestion or create a traffic hazard.

Section 4.04(C) of the UDO

Because Plaintiff chose to pursue a conditional use permit, rather than a rezoning as instructed, none of this review or analysis took place. Further, there is no dispute that schools are not permitted in the ORC, Office and Research District.

Turning next to whether or not a dispute is likely to come to pass, Defendant argues it cannot be decided at this stage in the proceedings. Tree of Life's Superintendent Dr. Todd Marrah admitted that he did not know what the outcome would have been had Tree of Life pursued a rezoning application as instructed:

> Q. And admittedly you've never filed anything, you've never even started the process of rezoning, correct?
>
> A. Correct.
>
> Q. Never tried so you don't know what city council would have done had they been presented with a rezoning package; is that correct?
>
> A. I have an idea.
>
> Q. I'm just asking you for a yes or no.
>
> A. But I don't know.
>
> Q. Do you know what they would have done?
>
> A. No.
>
> Q. You didn't talk with the individual members and find out what their vote would be?
>
> A. No.

(Marrah Depo at 265).

Defendant argues, and the Court agrees, that in accordance with *Miles Christi*, the Court should not interject itself into a local governmental process until the dispute is fully defined. Essentially, the only dispute resolved by the Upper Arlington BZAP and Upper Arlington City Council is whether or not Plaintiff intended to use the property as a church or a school. As previously discussed, there is no question that Plaintiff intends to use the property as a school. And a school is not a permitted use in the ORC, Office and Research District.

The Court acknowledges Plaintiff's concerns that Defendant has expressed that the property should only be used for commercial purposes. Defendant Upper Arlington has made it clear that it relies on the tax revenue from this building. However, the Court cannot state with certainty that a rezoning attempt would be futile. There is no record whatsoever of Upper Arlington's application of its zoning code in Plaintiff's case. Quite possibly, Upper Arlington may welcome the rezoning and determine that any tax revenue generated at that location is better than the property sitting empty for close to three years. Therefore, at this time, a sufficient record has not been established to determine whether Upper Arlington's UDO places a substantial burden on Plaintiff's free exercise of religion or whether Plaintiff has been treated on equal terms with similarly situated entities.

Plaintiff argues that Upper Arlington's UDO is unconstitutional on its face and as applied to Plaintiff. Plaintiff asserts that the very existence of the UDO harms Tree of Life. Plaintiff references an example in support, that the UDO treats Tree of Life on less than equal terms with other secular assemblies or

institutions that are permitted uses in the ORC Office and Research District, such as hospitals or hotels. Requiring Tree of Life to apply for rezoning for its property while other similar permitted uses do not have to apply for rezoning approval harms Tree of Life, and that harm continues until this Court determines the constitutionality of the UDO. Plaintiff concludes that a rezoning application will have no bearing on Tree of Life's claims that the zoning code is unconstitutional on its face.

Aside from this example, Plaintiff fails to explain how the UDO is unconstitutional on its face. There is no evidence that Upper Arlington's UDO allows other non-secular uses that are not permitted in the ORC Office and Research District to not seek rezoning. Upper Arlington has been consistent from the time it became aware that Plaintiff intended to purchase the commercial building that schools, both secular or non-secular, are not permitted in the ORC, Office and Research District.

This Court previously addressed Plaintiff's argument with respect to its RLUIPA claim that a daycare center could move in to the Plaintiff's building and operate as a matter of right, without having to first seek zoning permission for its use of the property, because it is a recognized permitted commercial use in the ORC, Office and Research District. Based on Plaintiff's arguments that there are daycare centers that are licensed to operate with a capacity of 1,000 children, as well as case law that addressed the comparison between churches and child daycare centers, and concluded that allowing daycare centers and not churches could be a violation of RLUIPA, the Court found that Plaintiff will most likely be able to

demonstrate that it is treated differently than a similar, secular assembly. *See, e.g.*, *Chabad of Nova, Inc. v. City of Cooper City*, 533 F. Supp. 2d 1220, 1223 (S.D. Fl. 2008).

Since the Court's ruling on Plaintiff's Motion for a Preliminary Injunction, Defendant, the City of Upper Arlington, has amended its UDO, and daycare centers are no longer a permitted use in the ORC, Office and Research District. (*See* Doc. 55-8). The City ultimately decided that if it was "required to choose between not permitting daycares in the ORC District or permitting daycares and schools in the ORC District, then Council believes that not permitting daycares in the ORC District is more consistent with the fundamental purpose of the ORC District;" and further, that "not permitting daycares in the ORC District is in accordance with the City's comprehensive plan." (*Id*.).

Therefore, despite Plaintiff's arguments to the contrary, after careful examination of the UDO, it applies equally to any other purpose that is not permitted under the UDO. Even the fact that churches or places of worship are permitted, while schools, Christian or otherwise are not, does not indicate that the UDO is unconstitutional. There is no question that the burden on the community of a pre-kindergarten through twelfth grade school is significantly greater than that of a church. A church with weekly or even bi-weekly services does not compare to the level of activity involved with a school in transporting, supervising, teaching and recreating over 600 kids five days a week. The decision to allow churches but not schools under the UDO is quite rational and by no means suggests any type of discrimination. If an organization desires to operate

in the ORC, Office and Research District and is not permitted under the UDO, then it must apply for rezoning with no exception. It is well-known that primary use determines zoning, and there can be no permitted or conditional ancillary use to a prohibited primary use. *State ex rel. Scadden v. Willhite*, 2002 Ohio 1352 (Ohio Ct. App. 10th Dist. 2002). Therefore, the UDO is not unconstitutional on its face or as applied to Plaintiff.

Finally, Plaintiff asserts that it "has already demonstrated above how it has been harmed in this case by the City's actions and by the unconstitutional UDO, and how that harm is continuing in the future absent intervention by this Court." (Pl.'s Memo. in Opp. at 15). However, as this Court acknowledged in its April 27, 2011 Opinion and Order, "one who purchases property to use as a school knowing that the use as a school is not permitted does not suffer irreparable harm." (Opinion and Order at 29). Further, Plaintiff continues to operate its school and accommodate both its existing students and applicants. Plaintiff's Verified Complaint states that the current Tree of Life Christian Schools facilities are old and in need of substantial upkeep and repair and/or remodeling. (Ver. Compl. at 32). Yet, Dr. Marrah testified that the current facilities are safe and up to code. (Marrah Depo. at 102-03). Additionally, Plaintiff's enrollment statistics show that very few student applications were rejected from 2007 through 2010, therefore space does not appear to be an issue. (Marrah Depo. Ex. 1F). Finally, when asked if on "August 11th of 2010 when you closed on this property you did so with the full knowledge that you had the data center lease and the pledges that would

completely cover your expenses, that you were at little or no risk for the purchase price of the property and keeping up the property indefinitely, correct?" And he responded, "Correct." (Marrah Depo. at 238-39).

In conclusion, neither the Upper Arlington BZAP, nor the Upper Arlington City Council were given the opportunity to apply the clearly outlined criteria set forth in Section 4 of the UDO to Plaintiff's proposed use of the commercial office building as a school. The Court agrees that Defendant should be afforded the opportunity to develop a record and take a definitive position on this issue. Accordingly, this case is not ripe for review.

IV. CONCLUSION

In summary, the Court finds that this case is not ripe for review. Although this Court is sympathetic to Plaintiff's situation, Plaintiff did purchase the property fully aware that the building was not zoned for use as a school. Even if the Court had found that this case was ripe, the Court believes that the circumstances have changed, primarily the removal of daycare centers from the ORC Office and Research District, that no longer justify a finding in Plaintiff's favor.

For the foregoing reasons, the Court **GRANTS** Defendant's First Motion for Summary Judgment; **DENIES** Defendant's Second Motion for Summary Judgment, and **DENIES** Plaintiff's Motion for Summary Judgment.

The Clerk shall remove Documents 36, 64, and 65 from the Court's pending motions list.

The Clerk shall remove this case from the Court's pending cases list.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

TREE OF LIFE CHRISTIAN SCHOOLS,

Plaintiff,

-v-

THE CITY OF UPPER ARLINGTON,

Defendant.

Case No.: 2:11-cv-009
JUDGE SMITH
Magistrate Judge Deavers

OPINION AND ORDER

This matter is before the Court on Plaintiff Tree of Life Christian Schools' Motion for a Preliminary Injunction (Doc. 12). Plaintiff initiated this case on January 5, 2011, with the filing of a Verified Complaint. Plaintiff filed a Motion for Preliminary Injunction on January 28, 2011, seeking to enjoin Defendant, the City of Upper Arlington, from enforcing Article 5.01, Table 5-C of the Upper Arlington Unified Development Ordinance prohibiting Plaintiff from operating a religious school in the ORC zoning district. On February 14, 2011, Defendant filed a Response in Opposition (Doc. 16). On February 18, 2011, Plaintiff filed its Reply (Doc. 21), as well as supplemental information on February 25, 2011 (Doc. 22). This matter is now ripe for review. For the reasons that follow, the Court **DENIES** Plaintiff's Motion for a Preliminary Injunction.

I. BACKGROUND

A. Tree of Life Christian Schools

Plaintiff Tree of Life Christian Schools ("Plaintiff" or "Tree of Life") is a private Christian school located in the Columbus, Ohio, metropolitan area serving approximately 660 students, and employing approximately 150 people. Tree of Life is currently scattered across four campuses in different locations of the metropolitan area, including the Northridge campus, Indianola campus, Dublin campus, and Westerville campus. (Verified Compl. ¶¶ 1, 25-28, and 35-36). Tree of Life operates as a non-profit religious corporation under the laws of the State of Ohio. Tree of Life's principal place of business is located at 935 Northridge Road, Columbus, Ohio. (Verified Compl. ¶ 8).

Tree of Life was founded in 1978 when members from the Linden Church of Christ, Beechwold Church of Christ, and Minerva Park Church of Christ collectively established a school in north Columbus.[1] Members from these three churches serve on the school board governing Tree of Life. The school was initially known as Linden Christian School and was later renamed Tree of Life. (Verified Compl. ¶¶ 10-12).

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[1] The following churches have also sponsored or contributed to Tree of Life, including providing facilities space, financial support, and school board members: Northeast Church of Christ, Indianola Church of Christ, Westerville Christian Church, North Park Church of Christ, Discover Christian Church, Pickerington Christian Church, Hilliard Church of Christ, and Worthington Christian Church.

The primary purpose of Tree of Life is to assist parents and the Church in educating and nurturing young lives in Christ. Their mission statement reads: "In partnership with the family and the church, the mission of Tree of Life Christian Schools is to glorify God by educating students in His truth and discipling them in Christ. 'A cord of three strands is not easily torn apart.' (Ecclesiates 4:12)." (Verified Compl. ¶¶ 16-17). Tree of Life's vision statement states: "As students are led to spiritual, intellectual, social and physical maturity, they become disciples of Jesus Christ, walking in wisdom, obeying His word and serving in His Kingdom." (Verified Compl. ¶ 18). Tree of Life describes their philosophy of education as "quintessentially and undeniably Christian," and believes this philosophy "puts the Bible at the enter and asks the student to evaluate all he/she studies through the lens of God's Word." (Verified Compl. ¶ 19). Tree of Life requires all parents who enroll their children to certify that they agree with the mission, philosophy, and vision. Further, all faculty and staff must also sign a statement of faith, and must be active members of a local, "Bible-believing congregation." (Verified Compl. ¶¶ 21- 22).

Tree of Life has limited space in its current buildings for new students and has had to turn away potential students. The Indianola, Dublin, and Westerville campuses are all located within existing church buildings of sponsoring churches of Tree of Life. However, there are no long term leases with these churches and the schools occupy space in the church facilities as at-will tenants. Further, the facilities are located in buildings that are old and in need of substantial upkeep and/or remodeling. The

lack of long-term space and scattered campuses has hampered the unity of Tree of Life's ministry. (Verified Comp. ¶¶ 29-34, 37-38).

In 2006, Tree of Life began searching for property that would allow for expansion of its ministry. For over two years, Tree of Life reviewed more than twenty sites and facilities within Franklin County, and finally found a building and property located at 5000 Arlington Centre Boulevard in Upper Arlington, Ohio (hereinafter "the property"). The property contains an office building that is approximately 254,000 square feet and is centrally located to serve all of Tree of Life's current constituents. The property's size would allow for consolidation of pre-school through twelfth grade at one location and to accommodate even more students. Further, the consolidation would allow Tree of Life to minister across all grade levels, reduce staff and student transportation costs, and provide updated facilities. Tree of Life ultimately purchased the property on August 11, 2010. (Verified Compl. ¶¶ 39-50).

B. The City of Upper Arlington

Defendant, the City of Upper Arlington, Ohio, (the "City" or "Upper Arlington"), is a public body authorized under the laws of the State of Ohio, and operating within the course and scope of its authority and under the color of state law. (Verified Compl. ¶ 9).

In 2001, the City of Upper Arlington commissioned a development plan (the "Master Plan") to provide guidance for its land use. According to the Master Plan, in order for the City to maintain its existing level of facilities and services, and in order to provide for future capital needs, the City has a critical need to

enhance its revenues. The revenue generated per acre from commercial use by far exceeds the revenue provided by residential use. In order to maximize revenues, the City was directed in the Master Plan to create opportunities for office development that emphasize high-paying jobs. Upper Arlington is landlocked and primarily residential. Only 4.7% of its useable land area is zoned "Commercial," and only 1.1% is in office use. Therefore, full use of existing office space, as well as the development of additional office space, is critical for the financial stability of the City. The City's opportunities to expand are limited; therefore, it must maximize its few opportunities for commercial use, or it cannot maintain its level of services for its residents. (Affidavit of Chad Gibson, Senior Planning Officer for Upper Arlington, ¶¶ 3-4).

All land and development in Upper Arlington is regulated by the Upper Arlington Unified Development Ordinance (the "UDO"), which employs "non-cumulative" or "exclusive" zoning. Article 5 of the UDO sets forth the regulations applicable to the use and development of land in Upper Arlington and establishes the zoning districts including, residential, commercial, planned, and miscellaneous.

The largest office building in Upper Arlington is located at 5000 Arlington Centre Boulevard, in the ORC Office and Research District (the "commercial office building"). The commercial office building was previously occupied by AOL/Time Warner, and it generated substantial income tax and property tax revenues for the City. In 2001, it accounted for 29% of the City's income tax revenues. However, operations at the commercial office building declined over the course of recent years. Time Warner ceased

operations at this location in 2009. Requiring commercial use of the commercial office building is consistent with the language and purposes of the ORC Office and Research District, as well as the Master Plan. (Affidavit of Catherine Armstrong, Finance Director for Upper Arlington ¶¶ 4-7).

The purpose of the "ORC Office and Research District" is set forth in Section 5.03(A)(6) of the UDO as follows:

> [T]o allow offices and research facilities that will contribute to the City's physical pattern of planned, healthy, safe, and attractive neighborhoods. The ORC district should also provide job opportunities and services to residents and contribute to the City's economic stability. Permitted uses generally include, but are not limited to business and professional offices, research and development, book and periodical publishing, insurance carriers, corporate data centers, survey research firms, and outpatient surgery centers.

A complete list of permitted uses appears in Table 5-C of the UDO. Schools of any type are not permitted in the District. (Gibson Aff. ¶¶ 5-7).

Section 5.01(B) of the UDO governs the rules of application. Section 5.01(B)(2) entitled "Permitted Uses" provides:

> Only a use designated as a permitted use shall be allowed as a matter of right in a zoning district and any use not so

> designated shall be prohibited except, when in character with the zoning district, such other additional uses may be added to the permitted uses of the zoning district by an amendment to this UDO (Section 4.04).

Section 5.01(B)(3) entitled "Conditional Uses" states:

> A use designated as a conditional use shall be allowed in a zoning district when such conditional use, its location, extent and method of development will not substantially alter the character of the vicinity or unduly interfere with the use of adjacent lots in the manner prescribed for the zoning district. To this end BZAP shall, in addition to the development standards for the zoning district, set forth such additional requirements as will, in its judgment, render the conditional use compatible with the existing and future use of adjacent lots and the vicinity. Additional standards for conditional uses are listed in Section 6.10.

C. Tree of Life's First Appeal

In early 2009, Upper Arlington officials became aware that Tree of Life was considering purchasing the commercial office building for use as a school. On March 16, 2009, Matthew Shad, Deputy City Manager for Economic Development in Upper Arlington, met with Don Roberts of CB Richard Ellis, the listing agent, and advised him that schools were not a permitted use for that building. (Shad Aff. ¶¶ 4-

7). On October 1, 2009, Tree of Life contracted to purchase the commercial office building, contingent upon zoning to allow a school. Upon learning of the buyer, on November 11, 2009, the Upper Arlington Economic Development Director advised the Tree of Life school superintendent directly that schools were not a permitted use.

On December 21, 2009, Tree of Life filed an application with Upper Arlington for a Conditional Use Permit requesting to "use the property for a place of worship, church and residential, to the extent that residential includes a private school." (Verified Compl. Ex. A). In a letter dated December 28, 2009, Mr. Gibson responded to the application by stating, among other things, that "a private school is neither a permitted use nor a conditional use in the ORC, Office and Research District (see UDO Table 5-C Article 5.01). Therefore, this application will not be scheduled for BZAP review, even if a traffic study is submitted. The applicant should submit a rezoning application if they wish to pursue a private school at this location." (Verified Compl. Ex. B).

On January 5, 2010, Tree of Life appealed Mr. Gibson's determination to the Board of Zoning and Planning ("BZAP"). (Verified Compl. Ex. C). On March 1, 2010, the BZAP held a public hearing on the issue, and subsequently issued a Board Order upholding Mr. Gibson's determination "that the conditional use application proposing a private school in an ORC District was inappropriate and would not be scheduled for BZAP review." (Verified Compl. Ex. D). On April 2, 2010, Tree of Life appealed the BZAP decision to the Upper Arlington City Council. (Verified Compl. Ex. E). On April 26, 2010, the Upper Arlington City Council

held a public hearing on the appeal and ultimately voted to uphold the decision of the BZAP. (Verified Compl. Ex. F). The City Council concluded that "a private school is neither a permitted or conditional use in the Office and Research District and that rezoning is required if Appellant plans to pursue a private school at this location." (*Id*. at 4).

D. Tree of Life's Second Appeal

Mr. Gibson's initial letter dated December 28, 2009, determined that Tree of Life was not a residential use that could be considered as a conditional use in the ORC District; however, there was no determination as to whether Tree of Life was a "Place of Worship" or a "Church." On January 5, 2010, counsel for Tree of Life wrote to Mr. Gibson asking for clarification as to "whether these uses, which are contained in the application, are, or are not, Conditional Uses in the ORC zoning district in the Upper Arlington UDO." (Verified Comp. Ex. C at 6). On February 26, 2010, Mr. Gibson addressed these issues confirming the hearing scheduled by the BZAP on March 1, 2010, to consider the conditional use application for "a private school with ancillary uses." Mr. Gibson further stated that "At this time, no conditional use application has been submitted for a church at this site." (Verified Compl. Ex. G).

On March 3, 2010, Tree of Life appealed this determination to the BZAP. (Verified Compl. Ex. H). The BZAP held a public hearing on June 7, 2010, and upheld Mr. Gibson's determination. The BZAP stated that "for purposes of the UDO, the proposed primary use of the property as a private school does not constitute a 'place of worship, church' as that term is

used in Table 5-C of Article 5 of the UDO, and is therefore not a conditional use in the ORC District." (Verified Compl. Ex. I). On June 18, 2010, Tree of Life appealed the BZAP decision to the Upper Arlington City Council. (Verified Compl. Ex. J). On August 16, 2010, the City Council held a public hearing and issued findings affirming the prior decisions that "for purposes of the UDO, the proposed primary use of the property as a private school does not constitute a 'place of worship, church' as that term is used in Table 5-C of Article 5 of the UDO, and is therefore not a conditional use in the ORC District." (Verified Compl. Ex. K).

Despite Tree of Life's unsuccessful appeals with the BZAP and City Council, it continued with the purchase of the commercial office building. The closing on the building took place on August 11, 2010.

Tree of Life appealed the final decision of the Upper Arlington City Council to the Environmental Division of the Franklin County Municipal Court, but ultimately withdrew that appeal. Tree of Life then initiated this lawsuit against Defendant Upper Arlington alleging violations of its rights to free speech, free exercise of religion, peaceable assembly, equal protection, due process, and the establishment clause under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 7 of the Ohio Constitution, as well as a violation of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").

Plaintiff now seeks injunctive relief on two of its claims: violation of the RLUIPA and violation of equal protection.

II. STANDARD OF REVIEW

The Court must consider four factors in determining whether to issue a preliminary injunction and/or permanent injunction:

> (1) whether the movant has a strong or substantial likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the relief requested; (3) whether issuance of the injunction will cause substantial harm to others; and (4) whether the public interest will be served by issuance of the injunction.

Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati, 363 F.3d 427, 432 (6th Cir. 2004). These four factors are "to be balanced, not prerequisites that must be met." *Hamad v. Woodcrest Condominium Assoc.*, 328 F.3d 224, 230 (6th Cir. 2003); *see also Capobianco, D.C. v. Summers*, 377 F.3d 559, 561 (6th Cir. 2004). Notwithstanding this balancing approach, the likelihood of success and irreparable harm factors predominate the preliminary injunction inquiry. Thus, "[a]lthough no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal." *Gonzales v. National Bd. of Med. Examiners*, 225 F.3d 620, 625 (6th Cir. 2000).

The decision to issue a preliminary injunction lies within the sound discretion of the district court. *See Golden v. Kelsey-Hayes*, 73 F.3d 648, 653 (6th Cir. 1996). As noted by the Supreme Court and Sixth Circuit, "[t]he purpose of a preliminary injunction is merely to preserve the status quo until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451

U.S. 390, 395 (1981); *Certified Restoration Dry Cleaning Network, L.L.C., v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007). The issuance of a preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban Co. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002).

III. DISCUSSION

Plaintiff Tree of Life initiated this case against Defendant Upper Arlington asserting claims for violation of its civil rights under 42 U.S.C. § 1983. To recover under 42 U.S.C. § 1983, a plaintiff must satisfy two elements: "1) the deprivation of a right secured by the Constitution or laws of the United States and 2) the deprivation was caused by a person acting under color of state law." *Ellison v. Garbarino*, 48 F.3d 192, 194 (6th Cir. 1995). In the instant case, when Defendant the City of Upper Arlington denied Plaintiff Tree of Life's conditional use application to use its property located at 5000 Arlington Centre Boulevard, the City was acting under color of state law. Plaintiff Tree of Life has asserted a number of claims against Defendant, but only seeks a preliminary injunction on the claims for violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and violation of the Equal Protection Clause of the United States Constitution. Thus, the Court will consider each of Plaintiff's claims in turn to determine whether Plaintiff has been deprived of a constitutional right or the right guaranteed by RLUIPA; and whether a preliminary injunction should be entered in this case.

A. Likelihood of Success on the Merits

1. RLUIPA Claim

Plaintiff Tree of Life argues that Upper Arlington's UDO violates RLUIPA's "equal terms" provision, which is set forth in Section (b)(1) as follows: "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(b)(1). "The equal-terms provision is violated whenever religious land uses are treated worse than comparable nonreligious ones, whether or not the discrimination imposes a substantial burden on the religious uses." *Digrugilliers v. City of Indianapolis*, 506 F.3d 612, 616 (7th Cir. 2007) (citing *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 1002-03 (7th Cir. 2006)). While this provision of RLUIPA "has the feel of an equal protection law, it lacks the similarly situated requirement usually found in equal protection analysis." *Midrash Shephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1229 (11th Cir. 2004). RLUIPA does not require a city to give religious assemblies and institutions more rights than other users of land in the same zones have. *River of Life Kingdom Ministries v. Village of Hazel Crest, Illinois*, 611 F.3d 367, 371 (7th Cir. 2010)(citing *Digrugilliers*, 506 F.3d at 615). Further, "RLUIPA's Equal Terms provision requires equal treatment, not special treatment." *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1313 (11th Cir. 2006).

There is no dispute between the parties that Plaintiff Tree of Life is a religious assembly or

institution[2] and that it has been subjected to a land use regulation, in this case the City of Upper Arlington's UDO, zoning law. The dispute arises when discussing which test to apply when evaluating whether the religious assembly has been treated less than equally to a nonreligious assembly or institution. The Sixth Circuit has not adopted a test for evaluating claims brought under RLUIPA's Equal Terms provision. The Third, Seventh, and Eleventh Circuits have each considered this issue and have each articulated different tests for evaluating RLUIPA Equal Terms claims. Given the disagreement among the circuits, the Court will consider each test proposed by the three circuits. However, there is some question as to whether there is any real practical difference between the tests.

Plaintiff asserts that the Eleventh Circuit's articulation of the elements required for an equal terms violation is "the clearest and best-stated." (Pl.'s Mot. at 4). The Eleventh Circuit in *Midrash Sephardi*, 366 F.3d at 1230-31, and followed in *Prima Iglesia*, 450 F.3d at 1308-10, and *Konikov v. Orange County*, 410 F.3d 1317, 1324-29 (11th Cir. 2005) (per curiam), requires the following four elements for an Equal

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[2] Many courts analyzing RLUIPA claims have found facilities used for religious education to fall under RLUIPA's protection. *See Living Water Church of God v. Charter Twp. of Meridian*, 384 F. Supp. 2d 1123, 1129-30 (W.D. Mich. 2005) ("Plaintiff's use of the proposed facility for a religious oriented school and for other ministries of the church constitutes religious exercise"); *see also Castle Hills First Baptist Church v. City of Castle Hills*, 2004 U.S. Dist. LEXIS 4669 (W.D. Tex. Mar. 17, 2004); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1213 (C.D. Cal. 2002).

Terms violations: "(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 non religious assembly or institution." *Primera Iglesia*, 450 F.3d at 1307. The Eleventh Circuit reads the language of the equal-terms provision literally: a zoning ordinance that permits any "assembly," as defined by dictionaries, to locate in a district, must also permit a church to locate there. In *Midrash*, the court held that where private clubs are allowed, churches must be as well. 366 F.3d at 1232.

Defendant relies on the Seventh Circuit's conclusion that "this approach would give religious land uses favored treatment--imagine a zoning ordinance that permits private clubs but not meeting halls used by political advocacy groups. The court indicated, however, that a seemingly unequal treatment of religious uses that nevertheless is consistent with the "strict scrutiny" standard for determining the propriety of a regulation affecting religion would not violate the equal-terms provision." *See River of Life*, 611 F.3d at 369, citing *Midrash Sephardi*, 366 F.3d at 1232.

An alternative test was adopted by the Third Circuit in *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 266 (3d Cir. 2007), which ruled that "a regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose*." (Emphasis in original). Under this test, the court must (1) identify the goals of the challenged zoning ordinance; and (2) identify the

secular assemblies that are comparable to the plaintiff's religious assembly, having the same relation to those goals. In the *Lighthouse* case, the zoning ordinance permitted meeting halls in the district in which the church wanted to locate and there was no way to distinguish between meeting halls and churches on the basis of the purpose of the ordinance. The Third Circuit therefore ordered summary judgment in favor of the church with respect to its challenge to the ordinance (though not its challenge to a newer redevelopment plan), saying that "Long Branch [the defendant] has failed to create a genuine issue of material fact as to whether the Ordinance treated religious assemblies or institutions on less than equal terms with non-religious assemblies or institutions that caused equivalent harm to its governmental objectives." *Lighthouse*, 510 F.3d at 272-73. Therefore, under this analysis, if the reasons for excluding a type of secular assembly, such as effect on traffic, are applicable to a religious assembly, the ordinance is deemed neutral and therefore not in violation of the equal terms provision. But if a secular assembly is allowed and the religious assembly banned even though the two assemblies don't differ in any way material to the regulatory purpose behind the ordinance, then there is a violation of the equal terms provision.

Several Seventh Circuit cases had been cited by the previous circuit courts, but an actual test was not pronounced by the Seventh Circuit until it addressed the issue en banc in *River of Life Kingdom Ministries v. Village of Hazel Crest, Illinois*, 611 F.3d 367 (7th Cir. 2010). In this case, the Seventh Circuit concludes that neither the Third or Eleventh

> Circuit approaches are satisfactory. The court stated, "We are troubled by the Eleventh Circuit's rule that mere 'differential treatment' between a church and some other 'company of persons collected together in one place . . . usually for some common purpose' (the court's preferred dictionary definition of 'assembly') violates the equal-terms provision." *Id.* at 370, citing *Midrash*, *supra*, 366 F.3d at 1230-31. Applying this definition of assembly, encompasses almost all secular land uses, such as factories, nightclubs, zoos, parks, malls, soup kitchens, and bowling alleys, as visitors to each of these institutions have a common purpose in visiting. However, most of these uses have different effects on the municipality and its residents from a church. The land use that led the Eleventh Circuit in *Midrash* to find a violation of the equal terms provision was, however, a private club, and it is not obvious that it has different effects on a municipality or its residents from those of a church. Thus, the Seventh Circuit concluded that "our quarrel is not with the result in *Midrash* but with the Eleventh Circuit's test." *Id.* at 370.

Further criticisms of the Eleventh Circuit's test include that it gives religious land uses preference, and that "equality, except when used of mathematical or scientific relations, signifies not equivalence or identity but proper relation to relevant concerns." *Id.* at 371. The Court finds many of the Seventh Circuit's conclusions persuasive. In evaluating this equal terms claim, the Court must also consider the Supreme Court's holding in *Employment Division v. Smith*, 494 U.S. 872, 878-80 (1990), that the clause of the First Amendment that guarantees the free

exercise of religion does not excuse churches from having to comply with nondiscriminatory regulations, such as the prohibition of drugs believed to be dangerous, even if the regulation interferes with church rituals or observances: "we have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878-79. If they were excused, this might be deemed favoritism to religion and thus violate the establishment clause.

The Seventh Circuit also illustrates that the Third Circuit's test focused on the zoning authorities regulatory purpose "invites speculation concerning the reason behind exclusion of churches; invites self-serving testimony by zoning officials and hired expert witnesses; facilitates zoning classifications thinly disguised as neutral but actually systematically unfavorable to churches (as by favoring public reading rooms over other forms of nonprofit assembly); and makes the meaning of 'equal terms' in a federal statute depend on the intentions of local government officials." *River of Life*, 611 F.3d at 371, citing *Midrash*, 366 F.3d at 1231.

Despite the problems with the Third Circuit's test, the Seventh Circuit used this test as a basis for its own, suggesting a "shift of focus from regulatory purpose to accepted zoning criteria." *River of Life*, 611 F.3d at 371. "'Purpose' is subjective and manipulable, so asking about 'regulatory purpose' might result in giving local officials a free hand in answering the question 'equal with respect to what?' 'Regulatory criteria' are objective--and it is federal judges who will apply the criteria to resolve the issue." *Id.*

In *River of Life*, a church that was operating in a cramped, dirty warehouse wanted to relocate to a building located in the Village of Hazel, in the village's commercial district. The district was in an older part of the town and in decline, but the village hoped it would be revitalized. The zoning in that district had been amended to exclude non-commercial uses, including churches, community centers, and schools. The Seventh Circuit ultimately decided,

> [W[e can't be certain, or even confident, that a particular zoning decision was actually motivated by a land-use concern that is neutral from the standpoint of religion. But if religious and secular land uses that are treated the same (such as the noncommercial religious and secular land uses in the zoning district that River of Life wants to have its church in) from the standpoint of an accepted zoning criterion, such as "commercial district," or "residential district," or "industrial district," that is enough to rebut an equal-terms claim and thus, in this case, to show that River of Life is unlikely to prevail in a full litigation.

River of Life, 611 F.3d at 373.

Plaintiff Tree of Life argues that the three tests discussed above are "functionally similar," relying on the Second Circuit's conclusion that "We have yet to decide the precise outlines of what it takes to be a valid comparator under RLUIPA's equal-terms provision, but three of our sister circuits have done so and have come to essentially the same result." *Third*

Church of Christ Scientist v. City of New York, 626 F.3d 667, 671 (2d Cir. 2010), (Pl.'s Reply at 5). The Second Circuit reasoned "RLUIPA, however, is less concerned with whether formal differences may be found between religious and non-religious institutions—they almost always can—than with whether, in practical terms, secular and religious institutions are treated equally." *Id.*, citing 42 U.S.C. §§ 2000cc (requiring that a municipality may not "impose or implement a land use regulation" in a discriminatory manner); *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty*, 450 F.3d 1295, 1308 (11th Cir. 2006) (noting that "a truly neutral statute that is selectively enforced against religious, as opposed to nonreligious[,] assemblies or institutions" violates RLUIPA's equal-terms provision). The Court continued "no court has held that the secular comparator's use need be identical to the religious entity's." *Id.,* citing *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 264 (holding that a secular institution need not engage in precisely "the same combination of uses" as the church to be a valid comparator).

Plaintiff argues that regardless of the test applied, Tree of Life is treated on less than equal terms with secular assemblies or institutions, such as child day care centers, and there is no practical difference between a child day care center and a Christian school in relation to any objective or compelling criteria the City of Upper Arlington can identify. Plaintiff asserts that, regardless of the test applied, this Court must compare apples to apples, and in doing so, Plaintiff is being treated on less than equal terms with secular assemblies.

Defendant argues that Upper Arlington's UDO, like the Village of Hazel Crest, is predicated upon conventional zoning criteria. Defendant asserts that "the uses permitted in the District are narrowly tailored to comport with office use, research use, and supporting commercial activities" and are "consistent with the conventional criteria articulated in the Upper Arlington comprehensive development plan, including the importance of generating tax revenue." (Def.'s Response at 9). Defendant further argues that there is no child day care center in the District, and even if there were, Plaintiff's comparison of its planned school, serving grades K through 12, is different than a day care center. (Def.'s Response at 15). Finally, Defendant argues that "the fact that the District does not distinguish between religious and non-religious schools means that similar religious and non-religious assemblies are being treated the same." (Def.'s Response at 9).

The City of Upper Arlington has concluded that under its UDO, Plaintiff's Christian school is not a permitted or conditional use in the ORC Zoning District. Upper Arlington's UDO, Table 5-C, specifically lists the permitted commercial uses within the ORC District. Schools of any type are not permitted in the District. Some permitted uses include: banks, barber shops and beauty parlors, business and professional offices, child day care centers, coffee shops, corporate data centers, electronic and text information retrieval services, hotels/motels, hospitals, insurance carriers, outpatient surgery centers, periodicals and book publishing, research and development in information technologies, and survey research firms.

Under the Eleventh Circuit approach, the Court must consider whether a zoning ordinance that permits any "assembly," as defined by dictionaries, to locate in a district, must also permit a church to locate there. In *Midrash*, the court found a violation because, on its face, secular assemblies were expressly allowed, but religious ones expressly were not, and the zoning ordinance was not narrowly tailored to achieve the city's stated objective of "retail synergy." 366 F.3d at 1232. Plaintiff asserts that the definition of a "Child Day-Care Center" is virtually identical to the activities it plans to conduct in its Christian school. Article 2-8 of the UDO defines the term "Child Day-Care" as:

> [A]dministering to the needs of infants, toddlers, preschool children and school children outside of school hours by persons other than their parents or guardians, custodians or relatives by blood, marriage, or adoption, for any part of the 24 hour day in a place or residence other than the child's own home.

Plaintiff further states that "there is no difference in terms of the impact on zoning objectives or purposes for the ORC zoning district between a child day-care center and a Christian school." (Pl.'s Mot. at 6). Further, the use of the property as a Christian school or a child day-care center would "have virtually identical impacts on the land in terms of character and intensity of use." (*Id.*). A child day-care could move in to the Plaintiff's building and operate as a matter of right without having to first seek zoning permission for its use of the property because it is a recognized permitted commercial use in the ORC zoning district. Plaintiff has submitted information regarding child

day-care centers across the county that are larger and would have a more intensive use of the property than Plaintiff Tree of Life would have using the property for a Christian school. There is evidence of some child day-care centers that are licensed to operate at a capacity of close to 1,000 children. (Pl.'s Mot. at 6; Pl.'s Notice of Add'l Evidence, Doc. 22).

Defendant the City argues that "child day care centers are functionally very different from the school proposed, particularly in light of the purposes of the ORC Office and Research District." (Def.'s Response at 17). However, the City fails to expand any further on this argument.

Other courts have addressed the comparison between churches and child day-care centers. In *Chabad of Nova, Inc. v. City of Cooper City*, 533 F. Supp. 2d 1220, 1223 (S.D. Fl. 2008), the court concluded that "day care centers, [and other uses], all undoubtedly meet the definition of assemblies [under RLUIPA]," and ultimately found a violation of RLUIPA's equal terms provision when the city allowed secular assemblies, but prohibited religious uses. Similarly in *Digrugilliers,* the court stated, "Some of the institutions permitted by the Indianapolis ordinance in C-1 districts . . . such as day-care centers, nursing homes. . . might well be thought institutions that are "like" churches so far as anything connected with the interests protected by zoning is concerned." 506 F.3d at 617. Plaintiff asserts that if day care centers are like churches, then they are even more like Christian schools. Based on Plaintiff's arguments and the similarities between a Christian school and a child day care center, Plaintiff will most likely be able to

demonstrate that it is treated differently than a similar, secular assembly.

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. The City states that the purpose of the "ORC Office and Research District" is set forth in Section 5.03(A)(6) of the UDO as follows:

> [T]o allow offices and research facilities that will contribute to the City's physical pattern of planned, healthy, safe, and attractive neighborhoods. The ORC district should also provide job opportunities and services to residents and contribute to the City's economic stability. Permitted uses generally include, but are not limited to business and professional offices, research and development, book and periodical publishing, insurance carriers, corporate data centers, survey research firms, and outpatient surgery centers.

The City argues that Plaintiff's proposed use of the building in the ORC district as a school is not consistent with these regulatory purposes. Specifically, the City asserts that the school "is not a commercial use," "does not generate tax revenue," "is not an office or research of similar commercial facility," nor does it "provide supportive services for an office or research facility." (Def.'s Response at 11). Finally, the City argues that "putting a school there would be at odds with the existing physical pattern of planning,

which provides for schools in Residential Districts, not Commercial Districts." (*Id.*).

These purposes of the ORC district appear to serve a compelling state interest; however, Plaintiff argues and the Court agrees, that this is undercut slightly by allowing child day care centers and hospitals in the ORC zoning district. The ORC zoning district is primarily established to generate tax revenue; however, both permitted uses for a child day care center and hospital can be exempt from property taxes. Plaintiff has provided evidence that Columbus Early Learning Centers, which provides day care services to children and has four locations in Franklin County, are exempt from property taxes. Further, the Jewish Community Center is a nonprofit entity located in Franklin County that is exempt from property taxes. Finally, hospitals can also be exempt from property taxes. Plaintiff provides two examples, Riverside Hospital and Doctor's Hospital, which are both exempt from property taxes.

In *International Church of the Foursquare Gospel v. City of San Leandro*, 2011 U.S. App.LEXIS 2909 (9th Cir. 2011), the court rejected the city's argument that its interest in revenue generation was sufficient to justify unequal treatment of a religious assembly. The court stated:

> In *Grace Church*, 555 F.Supp.2d 1126 (S.D. Cal. 2008), the district court concluded that "preservation of industrial lands for industrial uses does not by itself constitute a 'compelling interest' for purposes of RLUIPA. 42 U.S.C. § 2000cc(a)(1)."

> *Grace Church*, 555 F. Supp.2d at 1140. This is because "[c]ompelling state interests are 'interests of the highest order.'" *Id.* (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)). Similarly, the district court in *Cottonwood Christian Center* held that revenue generation is not a compelling state interest sufficient to justify denying a religious institution a CUP when such denial imposes a substantial burden. *Cottonwood Christian Ctr.*, 218 F. Supp.2d at 1228. The court there reasoned that if "revenue generation were a compelling state interest, municipalities could exclude all religious institutions from their cities." *Id.* This is so because religious and educational institutions are tax exempt and the land would always generate more revenue if put to a commercial or industrial use. *See id.*

Foursquare Gospel, 2011 U.S. App. LEXIS at *31-33.

Therefore, under a strict scrutiny standard, the City of Upper Arlington will face difficulty in establishing that excluding a Christian school, but allowing day care centers and hospitals, serves a compelling government interest, when all of the aforementioned uses may be exempt from property taxes. However, as discussed above, the Eleventh Circuit test has been criticized for being overly broad.

Turning to the Third Circuit's "Regulatory Purpose" approach, "a regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated as to their regulatory purpose." *Lighthouse*, 510 F.3d at 266. In *Lighthouse*, a church bought a property in a commercial district that had been re-developed to strengthen retail trade and city revenues. Churches were not a permitted use in the district and the application to use the property as a church was denied. The denial was upheld by the court finding that allowing a church would be inconsistent with the purposes of the sector.

There is no question that the City of Upper Arlington has carefully set forth its regulatory purpose of this district in the City's Master Plan and in the UDO. It does appear that a school, religious or not, would be inconsistent with the purposes set forth by the City. This point is emphasized by the City's existing physical pattern of planning, which provides for schools in residential districts, not in commercial districts. The regulatory purpose approach allows cities or local governments to justify unequal treatment by pointing to its objectives in enacting the zoning regulations and proving that the secular assemblies treated more favorably do not damage those objectives. However, even under this test, the City faces the problem raised by Plaintiff Tree of Life that other secular nonprofit uses are permitted as of right in the district, namely day care centers and hospitals.

The Court now turns to the third and final test, the Seventh Circuit's test, which substitutes "accepted

zoning criteria" for the Third Circuit's regulatory purpose approach. As discussed in detail above, this appears to be the most reasonable approach in evaluating a claim under the equal terms provision of RLUIPA; however, practically, it may not have any impact on Plaintiff's likelihood of success on the merits. In *River of Life*, the Seventh Circuit recognized that generating municipal revenue can be promoted by setting aside some land for commercial use only. The village of Hazel Crest created "a commercial district that excludes churches along with community centers, meeting halls, and libraries because these secular assemblies, like churches, do not generate significant taxable revenue or offer shopping opportunities. Similar assemblies are being treated the same." *River of Life*, 611 F.3d at 373. Applying this approach appears to be more favorable to the City of Upper Arlington. The City has set forth accepted zoning criteria in the ORC zoning district and the permitted uses are consistent with the conventional criteria articulated in the Upper Arlington comprehensive development plan, including the importance of generating tax revenue.[3] When including day care

[3] Patricia E. Salkin, American Law of Zoning § 9:15 (5th ed. 2010), explains with specific reference to commercial districts: "All commercial uses are not created equal. Some require pedestrian traffic; others create hazards for pedestrian traffic. Some commercial uses cause pedestrian traffic during the daylight hours; others operate at night and are quiet in the daytime. The list of characteristics could be extended, but this small sample suggests that residential uses in commercial neighborhoods will injure, as well as be injured by, the adjacent commercial uses. And it suggests further that some commercial uses will be incompatible with others . . . . The most common

centers and hospitals as permitted uses in the ORC zoning district, the City most likely did not consider that such uses could be exempt from property taxes. Nonetheless, Plaintiff Tree of Life has submitted evidence that these permitted uses can be exempt, undercutting the City of Upper Arlington's plan and purpose for the ORC zoning district.

Based on the aforementioned analysis, it appears that Plaintiff Tree of Life has demonstrated a sufficient likelihood of success on the merits on the RLUIPA claim for purposes of a preliminary injunction. However, because the likelihood of success is not overwhelming, the balance of the other factors must strongly favor the Plaintiff's position in order to succeed on a preliminary injunction motion. Plaintiff has also sought a preliminary injunction based on its equal protection clause claim which the Court will evaluate next.

2.Equal Protection Clause Claim

The Equal Protection Clause, Section 1 of the Fourteenth Amendment provides, in pertinent part: "No State shall make or enforce any law which shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. Amend. XIV, § 1. To establish a violation of the Equal Protection Clause, it must first be shown that the defendant's actions

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drafting answer to the problems sketched above is the 'exclusive' zoning ordinance . . . . Districts are established for named uses, or groups of uses, and all others are excluded. The chief virtue of such ordinances is that they create districts for commerce and industry, and exclude from such districts residential and other uses which are capable of interfering with the planned use of land."

result in similarly-situated individuals receiving disparate treatment. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985); *Gillard v. Norris*, 857 F.2d 1095, 1100 (6th Cir. 1988). If it is shown that similarly-situated persons receive disparate treatment, and if that disparate treatment invades a "fundamental right" such as speech or religious freedom, then the strict scrutiny standard governs and the defendant's actions will be sustained only where they are narrowly tailored to serve a compelling government interest. *See Reno v. Flores*, 507 U.S. 292, 302 (1993); *37712, Inc. v. Ohio Dept. of Liquor Control*, 113 F.3d 614, 621 (6th Cir. 1997). It is well-established that, "absent a fundamental right or a suspect class, to demonstrate a viable equal protection claim in the land use context, a plaintiff must demonstrate governmental action wholly impossible to relate to legitimate governmental objectives." *Forseth v. Village of Sussex*, 199 F.3d 363, 370-71 (7th Cir. 2001); *see also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (unless a statute classifies by race, alienage, or national origin or impinges on fundamental constitutional rights, "the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest").

Plaintiff argues that Upper Arlington's zoning code treats Christian schools differently than non-religious assemblies and institutions. Plaintiff Tree of Life asserts that Defendant has no compelling interest in treating Christian schools and other places of worship less favorably than nonreligious assemblies and institutions. Plaintiff continues that even if Defendant

did have such an interest, the UDO is not narrowly tailored to further it because it permits secular assemblies and institutions that have the same effect on property as Christian schools. (Pl.'s Mot. at 10-11).

Defendant Upper Arlington argues that Plaintiff cannot establish an Equal Protection clause violation because there is no similarly situated comparator that has received different treatment. And even if there were such a comparator, Upper Arlington's ORC district is both narrowly tailored to further a compelling governmental interest and is rationally related to a legitimate government interest, e.g. deriving revenue from the small area reserved for the largest office building in the City. (Def.'s Response at 15).

Defendant's arguments are persuasive. There are no schools, religious or non-religious, permitted in the ORC zoning district. Further, allowing a school to operate in the largest office building in the City presents a threat to the financial stability of the City. However, as set forth in detail in the RLUIPA analysis, there is a likelihood that Plaintiff can establish that the City of Upper Arlington's zoning code treats religious and non-religious schools differently than non-religious assemblies and institutions, e.g. day care centers and hospitals.

Even if Plaintiff Tree of Life can prove that it is treated differently from other similarly-situated institutions, Plaintiff must still show that this disparate treatment invaded its fundamental rights before strict scrutiny applies. 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 standard. *Regan v. Taxpayers with Representation*, 461 U.S. 540, 646-47 (1983). Thus, an equal protection claim that challenges a governmental action not found to violate the Free Exercise Clause gives rise only to rational basis review, not strict scrutiny. *Id.*; *see also Johnson v. Robinson*, 415 U.S. 361, 375 (1974) (explaining that once a law is found to be valid with respect to the free exercise right, there is "no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test" in addressing an equal protection claim). In general, a zoning ordinance imposing "restrictions in respect of the use and occupation of private lands in urban communities" such as the "segregation of residential, business, and industrial buildings" satisfies the rational basis test as "a valid exercise of authority." *Village of Euclid v. Amber Realty Company*, 272 U.S. 365, 386-87, 394, 397 (1926).

There is some question here as to whether the classifications are based on a fundamental right. The City's zoning code does not treat religious and non-religious schools differently. But, the City's zoning code does have the effect of treating two similarly situated institutions, a school and a day care center, differently, however, this is not based on religion. The Supreme Court has held that where a challenged governmental action does not violate the Free Exercise Clause, this conclusion also answers the question of whether the challenged action impermissibly infringes upon a fundamental right to religion. *See Locke v. Davey*, 540 U.S. 712, 720 (2004).

This issue was addressed by the Seventh Circuit in *Civil Liberties for Urban Believers, Christ Center,*

Christian Covenant Outreach Church, et al. v. City of Chicago, 342 F.3d 752 (7th Cir. 2003), upholding Chicago's zoning code. The Seventh Circuit held that "any burdens on religious exercise imposed by the CZO are both incidental and insubstantial." Further, the court held that "the fundamental rights theory of heightened equal protection scrutiny applies only to laws that effect 'grave interference with important religious tenets or . . . affirmatively compel congregants to perform acts undeniably at odds with fundamental tenets of their religious beliefs.'" *Id.* at 766, citing *Griffin High School v. Illinois High School Assoc.*, 822 F.2d 671, 674 (7th Cir. 1987). Therefore, even though the city's zoning code may present obstacles to a church's ability to locate on a specific plot of land, it "in no way regulate[s] the right, let alone interfere[s] with the ability, of an individual to adhere to the central tenets of his religious beliefs." *Id.* The Seventh Circuit further stated, "As the district court adroitly noted, the CZO's limitations on church location are "not the regulation of belief, any more than regulating the location of the Chicago Tribune building is the regulation of the newspaper's First Amendment-protected product." *Civil Liberties for Urban Believers v. City of Chicago*, 157 F. Supp. 2d 903, 908. The Seventh Circuit concluded that "To the extent that the CZO treats churches any differently from nonreligious assembly uses, it does not disfavor churches. More importantly, any such difference is rationally related to Chicago's legitimate interest in regulating land use within its city limits. The CZO thus complies with the requirements of the Equal Protection Clause." *Id.*

The Court finds that the City of Upper Arlington's UDO passes rational basis review. The City has a reasonable interest in imposing restrictions on the use of land in its city limits. *See Village of Euclid*, 272 U.S. at 386-87. The Court therefore concludes that the City of Upper Arlington's UDO does not violate the Equal Protection Clause.

B. Irreparable harm

After examining a plaintiff's likelihood of success on the merits of their claims, a court must balance those conclusions and findings with other factors, including the possibility that denial of a preliminary injunction will cause irreparable harm to the plaintiff.

Plaintiff Tree of Life argues that its remedy at law is inadequate if preliminary relief is not granted. Plaintiff asserts that "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (Pl.'s Mot. at 11, citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Plaintiff argues that "The fact that [its] 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." (*Id*. at 12, citing *Rocky Mountain Christian Church v. Board of County Com'rs of Boulder County*, 612 F. Sup.2d 1157, 1160 (D. Colo. 2009)). Plaintiff states that its damages are much more than money, "it is losing worship and ministry opportunities because its meeting space is inadequate," and that "these opportunities cannot be replaced." (Pl.'s Mot. at 12). Plaintiff Tree of Life's Superintendent Todd Marrah states that Tree of Life has had to turn away students for lack of space and

anticipates having to do so again this year for the same reason. (Marrah Decl. ¶ 7). Tree of Life seeks immediate relief to begin renovation and remodeling of the building to house its preschool through fifth grades for the 2011-2012 school year. Superintendent Marrah further states, "If Tree of Life is not able to use the building at all for the 2011-2012 school year and has to therefore turn away students because of a lack of space, we will miss the ability to teach those children and minister to them according to our Christian beliefs. The opportunities to minister to additional children for the 2011-2012 school year cannot be replaced and will never happen again." (*Id*. at ¶ 8).

Defendant, the City of Upper Arlington, however, argues that Plaintiff is able to carry out school activities and will not suffer irreparable harm. Plaintiff is currently operating in four locations and will continue to do so. Further, Plaintiff has claimed that it is financially secure in the commercial office building regardless of whether the commercial office building is used as a school. Plaintiff is currently leasing a portion of its building to a commercial data center and it pays property taxes to the City on that portion of the building and the employees who work in the data center pay income taxes as well. The lease with the data center is for a 10 year term with options to renew for an additional ten years. (Marrah Decl. at ¶ 9).

Plaintiff counters Defendant's argument by raising the fact that the tax revenue the City was receiving on the building was steadily declining since 2005, and Tree of Life's use of the building would reverse the trend and would add more employees to

the building than have been there for the last few years. (Pl.'s Reply at 15). Additionally, Plaintiff asserts that it only plans to renovate approximately 16% of the building to use it for the 2011-12 school year and as such, it "does not dramatically alter the status quo." (Pl.'s Reply at 16).

The Court is sympathetic to Plaintiff Tree of Life's situation. However, as Defendant correctly points out, "One who purchases property to use as a school knowing that the use as a school is not permitted does not suffer irreparable harm." (Def.'s Response at 17). Granting a preliminary injunction in this case would essentially provide Plaintiff with complete relief upon the merits as it would begin renovations and plan to open its school for the 2011-12 school year. Accordingly, granting a preliminary injunction would alter the status quo.

The court in *Foursquare Gospel* bought an industrial property and requested the city rezone the property for use as a church. The city conducted a study and revised its zoning ordinance to increase the potential for religious assembly use in certain industrial zones, but the application for the plaintiff's particular property was denied. In denying the plaintiff's motion for a preliminary injunction, the court held that "granting the motion would essentially provide ICFG with complete relief on the merits . . . , as the purpose of ICFG's lawsuit is to obtain an order compelling the City to allow the Church to use the Catalina property for religious assembly purposes. In other words, ICFG would achieve what it wants without any trial on the merits." *International Church of the Foursquare Gospel*, 2007 U.S. Dist. LEXIS at *33-34. The Court further

rejected the church's claims of irreparable harm, stating that "the record is clear that the Planning Staff advised the Church that any zoning amendment process would take a long time, and made no guarantees that the Church's application would be granted. ICFG was aware when it bought the property that it was zoned industrial." *Id.*

The case at bar goes even further than the facts in *Foursquare Gospel*. The plaintiff in that case was aware of the zoning of the property, but hoped it would be changed following the study by the city. In this case, not only was Plaintiff Tree of Life aware that the property it purchased was not zoned for schools, but Plaintiff participated in two different appeals seeking permission to establish a school at this location and was aware the appeals were denied before it purchased the property. This, combined with the fact that granting the preliminary injunction will essentially provide Plaintiff with complete relief upon the merits, weighs in favor of the City of Upper Arlington.

Further, Plaintiff has failed to establish the importance of the specific property at issue in this case to its mission. Plaintiff purchased this property on August 11, 2010, despite unsuccessfully attempting to obtain a conditional use permit. Plaintiff describes that it purchased the property because it could consolidate its current school into one, centrally located building. In *River of Life*, the Court recognized that the Church's decision to buy the property at issue in that case was based primarily on price and location, "factors that do not fall within the protective ambit of the First Amendment." The court also stated that "the Church offered no evidence of tangible reasons for

irreparable harm, for example that it would be unable to sell the property in the current market or that it would be unable to find another suitable location in Hazel Crest but outside of the TIF District." *River of Life*, 2008 U.S. Dist. LEXIS at *40. In the case at bar, Plaintiff Tree of Life has not suggested it is unable to sell the property, in fact, Plaintiff is making money on the building. Tree of Life even asserts that its decision to purchase the building was a business decision. (Pl.'s Reply at 16). Accordingly, the Court finds that Plaintiff will not suffer irreparable harm if a preliminary injunction is not ordered in this case.

C. Harm to others

As set forth above, the result of weighing the potential for irreparable harm in this case is close, but ultimately, the harm to the City of Upper Arlington and the residents outweighs the harm to Plaintiff Tree of Life. Plaintiff was well aware that it would lose out on the opportunity to establish the school and add new members when it purchased the building, having already lost two appeals on the zoning issue. Had Plaintiff purchased another property in August of 2010 that was zoned for schools, it would have not suffered any harm. Nonetheless, Plaintiff did purchase the property and as the analysis shows, Plaintiff's potential success on its RLUIPA claim is not overwhelming and the granting of a preliminary injunction would essentially be finding in Plaintiff's favor without the opportunity for discovery and/or a trial on the merits. Further, the City of Upper Arlington and its residents have a strong interest in having the commercial office building be used for commercial purposes as it is critical to the financial stability of the City. Accordingly, the harm to others

factor weighs in favor of denying a preliminary injunction in this case.

D. Public interest

Both Plaintiff's goal of expanding its school and the City's goal for economic development can be found to be in the public interest. However, the Court finds that the public interest is best served by maintaining the status quo, and denying Plaintiff Tree of Life's motion for a preliminary injunction. If injunctive relief were granted in this case, it would essentially give Tree of Life complete relief without the City having the opportunity to conduct discovery or present evidence at trial. The Court agrees that the status quo would be dramatically altered because once the school is operational, it would make meaningful judicial determination of this case later virtually impossible.

In summary, the Court finds that Plaintiff has demonstrated a potential likelihood of success on the merits of its RLUIPA claim, but when there is only a slight chance of success on the merits, the balance of harms needs to favor Plaintiff's position strongly. *See River of Life*, 2008 U.S. Dist. LEXIS at *45 (applying the "sliding scale" approach). And after considering the balance of harms, they do not strongly favor Plaintiff. Accordingly, after examining the four preliminary injunction factors together, the Court concludes that the issuance of a preliminary injunction is not warranted in this instance.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** Plaintiff's Motion for Preliminary Injunction.

The Clerk shall remove Document 12 from the Court's pending motions list.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

TREE OF LIFE CHRISTAN SCHOOLS,	:	CASE No. 2:11-cv-0009
Plaintiff,	:	
v.	:	JUDGE SMITH
CITY OF UPPER ARLINGTON, OHIO	:	MAGISTRATE JUDGE
Defendant.	:	DEAVERS

AFFIDAVIT OF CATHERINE ARMSTRONG

State of Ohio :
County of Franklin : ss

Now comes Catherine Armstrong, competent to testify, and deposes and says of her own personal knowledge, as follows:

1. My name is Catherine Armstrong. I am the Finance Director for the City of Upper Arlington. As part of my job duties, I am familiar with the tax revenues generated in connection with various properties and employers located within the City of Upper Arlington. I am making this Affidavit for use in the above-captioned lawsuit as part of my official duties.

2. This affidavit relates to tax revenue generated in connection with the real property known as 5000 Arlington Centre Boulevard (the "Property"). The Property includes the largest office building in Upper Arlington. Over the years, the Property was owned and/or occupied by CompuServe, then AOL, and then Time-Warner.

3. Tax revenues generated in connection with the Property have been of several varieties, including personal income tax on wages earned by employees working there, entity-level income tax on the net profits of the company(ies) located there, and property tax.

4. The following is a listing of the amount of property tax generated in connection with the Property in various years:

a. 2009 - $646,219
b. 2008 - $635,888
c. 2007 - $669,552
d. 2006 - $620,204
e. 2005 - $584,917

5. Income tax revenue generated in connection with the Property in years past was substantial. For example, in the year 2001 personal income tax revenue generated in connection with the Property accounted for 29% of all such income tax revenue generated for the City of Upper Arlington.

6. The following is a listing of the amount of personal and entity-level income tax, combined, generated in connection with the Property in various years:

a. 2009 - $20,269
b. 2008 - $61,037
c. 2007 - $125,776
d. 2006 - $674,012
e. 2005 - $1,216,732

7. As is described above, the Property has been and can be an important source of revenue for Upper Arlington. The decline in commercial activity there has resulted in a very significant loss of tax revenue for the City, but it is hoped that the Property can again generate substantial revenue for the City.

8. To the extent that tax-exempt entities own and/or use the Property for tax-exempt purposes, the City of Upper Arlington will be deprived of critical property and income tax revenue.

ATTEST:

Catherine Armstrong

Sworn to and subscribed in my presence this 11 day of February, 2011.

Notary Public

TRACY E. SULLIVAN
Notary Public - State of Florida
My Comm. Expires Sep 12, 2014
Commission # EE 25415

* * *

PART 11 UNIFIED DEVELOPMENT CODE
ARTICLE 5-15

(Per Ordinance No. 106-2009)[1]

Table 5-C: Commercial Uses

	Commercial District					
Use	**B-1**	**B-2**	**B-3**	**PB-3**	**O**	**ORC**
Adult Book Stores	Pr	Pr	P	Pr	Pr	Pr
Adult Motion Picture Theaters	Pr	Pr	P	Pr	Pr	Pr
Adult Only Entertainment Establishments	Pr	Pr	P	Pr	Pr	Pr
Amusement Arcades	Pr	Pr	P	Pr	Pr	Pr
Animal Boarding	Pr	P	Pr	P	Pr	Pr
Appliance, Plumbing & Heating Establishments	P	P	P	P	Pr	Pr
Automotive Service Establishments	Pr	P	P	Pr	Pr	Pr

[1] This is the Table of Commercial Uses that was in existence at the time the lawsuit in this matter was filed. The Table of Commercial Uses was amended by Ordinance No. 52-2011, which can be found at App. 271a.

	Commercial District					
Use	**B-1**	**B-2**	**B-3**	**PB-3**	**O**	**ORC**
Banks, Finance & Loan Offices	P	P	P	P	P	P
Barber Shops & Beauty Parlors	P	P	P	P	P	P
Big Box Retail	Pr	Pr	P	Pr	Pr	Pr
Bowling Alleys	Pr	P	P	P	Pr	Pr
Business & Professional Offices	P	P	P	P	P	P
Candy Stores	P	P	P	P	Pr	Pr
Carpenter Shops	Pr	P	P	Pr	Pr	Pr
Child Day Care Centers	P	P	P	P	C	P
Coffee Shops	P	P	P	P	P	P
Pool or Billiard Rooms	Pr	C	P	Pr	Pr	Pr
Corporate Data Centers	Pr	Pr	Pr	Pr	P	P
Dancing Studios	C	P	P	P	Pr	Pr
Department Stores	Pr	P	P	P	Pr	Pr
Drive Through Carry Outs	C	C	C	C	C	C
Drug Stores	P	P	P	P	Pr	Pr
Dry Cleaning Shops	P	P	P	P	Pr	Pr

	Commercial District					
Use	**B-1**	**B-2**	**B-3**	**PB-3**	**O**	**ORC**
Dry Goods & Apparel Stores	P	P	P	P	Pr	Pr
Electronic & Text Information Retrieval Services	Pr	Pr	Pr	P	P	P
Fast Food Restaurants	Pr	C	P	Pr	Pr	Pr
Funeral Homes	P	P	P	P	Pr	Pr
Furniture & Appliance Stores	P	P	P	P	Pr	Pr
Furniture Upholstering	P	P	P	P	Pr	Pr
Grocery & Supermarket	P	P	P	P	Pr	Pr
Hotels/Motels	Pr	Pr	P	Pr	C	P
Hospitals	Pr	Pr	P	C	C	P
Insurance Carriers	P	P	P	P	P	P
Interior Decorating Shops	P	P	P	P	Pr	Pr
Laundromats	P	P	P	P	Pr	Pr
Liquor Stores	P	P	P	P	Pr	Pr
Mail Order Houses	Pr	P	P	P	Pr	Pr
Massage Parlors	Pr	Pr	P	Pr	Pr	Pr
Meat & Fruit Market	P	P	P	P	Pr	Pr

	Commercial District					
Use	**B-1**	**B-2**	**B-3**	**PB-3**	**O**	**ORC**
Motor Vehicle Wash Facilities	Pr	Pr	P	Pr	Pr	Pr
Movie Theaters	Pr	C	P	Pr	Pr	Pr
Night Clubs	Pr	Pr	P	Pr	Pr	Pr
Outpatient Surgery Centers	Pr	Pr	Pr	Pr	C	P
Periodicals and Book Publishing	Pr	Pr	Pr	Pr	P	P
Pharmacies	P	P	P	P	Pr	Pr
Pharmacies with Drive-Through	Pr	Pr	P	P	Pr	Pr
Photographic Studios	P	P	P	P	Pr	Pr
Places of Worship, Churches	P	P	Pr	P	C	C
Printing	Pr	P	P	Pr	Pr	Pr
Publishing	Pr	P	P	Pr	Pr	Pr
Radio & TV Studios	Pr	P	P	Pr	Pr	Pr
Research & Development in Information Technologies	Pr	Pr	Pr	Pr	C	P
Research & Development in Medical Technologies	Pr	Pr	Pr	Pr	C	P

	Commercial District					
Use	**B-1**	**B-2**	**B-3**	**PB-3**	**O**	**ORC**
Residential	C	Pr	Pr	Pr	C	C
Restaurant & Accessory Cocktail Lounge	C	P	P	P	C	C
Restaurants	C	P	P	P	C	C
Restaurants with Entertainment or Dancing	Pr	P	P	P	Pr	Pr
Satellite Ground Stations	C	C	P	P	C	C
Shoe Repair & Tailor	P	P	P	P	C	C
Skating Rinks	Pr	P	P	Pr	Pr	Pr
Soda Fountains	P	P	P	Pr	Pr	Pr
Survey Research Finns	Pr	Pr	Pr	Pr	P	P
Tattoo parlor or Body-piercing studio	Pr	Pr	C	Pr	Pr	Pr
Variety Stores	P	P	P	P	Pr	Pr
P=Permitted Use, C=Conditional Use, Pr=Prohibited Use, A=Accessory Use						

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RECORD OF ORDNANCES
CITY OF UPPER ARLINGTON
STATE OF OHIO

ORDINANCE NO. 52-2011

TO AMEND ARTICLE 5 – ZONING DISTRICTS AND USE STANDARDS – TABLE 5-C – TO PROHIBIT DAY CARE CENTERS IN THE OFFICE RESEARCH DISTRICT (ORC), RELATIVE TO THE UNIFIED DEVELOPMENT CODE

WHEREAS, the property known as 5000 Arlington Centre Boulevard (the "Office Building") is the single largest office complex in the City of Upper Arlington; and

WHEREAS, the Office Building is located in the City's "ORC Office and Research District" zoning district ("ORC District"), described in Section 5.03(A)(6) of the Unified Development Ordinance, the City's zoning code; and

WHEREAS, the purpose of the ORC District is to allow offices and research facilities such as business and professional offices, research and development, book and periodical publishing, insurance carriers, corporate data centers, survey

research firms, and outpatient surgery centers; and,

WHEREAS, the City's Master Plan adopted by Council as its comprehensive plan for zoning ("comprehensive plan") "recommends shaping land use in a way that enhances revenues" including "implementing economic development strategies, undertaking appropriate redevelopment, and encouraging businesses that offer high paying professional jobs"; and

WHEREAS, the comprehensive plan recognizes that "commercial office use provides significantly more revenue to the City than any other land use" and that "increasing commercial office use is the best way to enhance revenues to the City so that services and facilities can be maintained and enhanced"; and

WHEREAS, under the Unified Development Ordinance, schools are neither a permitted nor conditional use in the ORC District; and

WHEREAS, the Office Building was acquired for use by Tree of Life Christian Schools, Inc. ("Tree of Life") as a

school, despite Tree of Life knowing that the City did not allow schools in the ORC District; and

WHEREAS, Tree of Life has sued the City of Upper Arlington in U.S. Dist. S.D. Ohio Case No. 2:11-cv-0009, alleging, among other things, religious discrimination and violations of the Religious Land Use Protection and Institutionalized Persons Act, 42 U.S.C. 2000cc, *et seq*. ("RLUIPA"); and,

WHEREAS, the City denies RLUIPA violations, denies religious discrimination, and contends that its zoning criteria for the ORC District are conventional and legitimate; and

WHEREAS, Tree of Life has argued in the District Court that because child day care centers are currently allowed in the ORC District, Tree of Life's school should also be allowed because it is a Christian school, and RLUIPA requires that secular and religious "assemblies" be treated equally; and,

WHEREAS, the City denies that child day care centers and schools are comparable "assemblies" for RLUIPA purposes

and denies that RLUIPA requires more favorable treatment be given to religious schools than secular schools; and

WHEREAS, if the City is required to choose between not permitting daycares in the ORC District or permitting daycares and schools in the ORC District, then Council believes that not permitting daycares in the ORC District is more consistent with the fundamental purpose of the ORC District; and

WHEREAS, not permitting daycares in the ORC District is in accordance with the City's comprehensive plan;

NOW, THEREFORE, BE IT ORDAINED by the Council of the City of Upper Arlington, Ohio:

SECTION 1. That Article 5 – Zoning Districts and Use Standards – Table 5-C is hereby amended in accordance with Exhibit A (attached hereto and incorporated herein by reference).

SECTION 2. That this ordinance shall take effect at the earliest date allowed by law.

PASSED: September 12, 2011

President of Council

ATTEST: City Clerk

I, Beverly Clevenger, City Clerk of Upper Arlington, Ohio, do hereby certify that the above is a true and correct copy.

City Clerk

CERTIFICATE OF POSTING

I, Beverly Clevenger, City Clerk of the City of Upper Arlington, Ohio, do hereby certify that publication of the foregoing was made by posting a true copy of Ordinance No. 52-2011 at the most public place in said corporation as determined by the Council, the Municipal Building, 3600 Tremont Road, for a period of ten (10) days commencing September 13, 2011.

City Clerk of the City of Upper Arlington

Sponsor: Mrs. Krauss
Date Introduced: July 11, 2011
Legal Add:
Newspaper:
Reading Date(s): July 11, 2011; August 22, 2011; September 12, 2011

Voting Aye: Unanimous
Voting Nay:
Abstain:
Absent:

Date of Passage: September 12, 2011

City Council Conference Session/Other Review:
July 5, 2011

Other: Thirty Day Clause;

PART 11 UNIFIED DEVELOPMENT CODE

ARTICLE 5-15 Exhibit

Table 5-C: Commercial Uses

Use	Commercial District					
	B-1	B-2	B-3	PB-3	O	ORC
Adult Book Stores	Pr	Pr	P	Pr	Pr	Pr
Adult Motion Picture Theaters	Pr	Pr	P	Pr	Pr	Pr
Adult Only Entertainment Establishments	Pr	Pr	P	Pr	Pr	Pr
Amusement Arcades	Pr	Pr	P	Pr	Pr	Pr
Animal Boarding	Pr	P	Pr	P	Pr	Pr
Appliance, Plumbing & Heating Establishments	P	P	P	P	Pr	Pr
Automotive Service Establishments	Pr	P	P	Pr	Pr	Pr
Banks, Finance & Loan Establishments	P	P	P	P	P	P
Barbers Shops & Beauty Parlors	P	P	P	P	P	P
Big Box Retail	Pr	Pr	P	Pr	Pr	Pr
Bowling Alleys	Pr	P	P	P	Pr	Pr

Use	Commercial District					
	B-1	B-2	B-3	PB-3	O	ORC
Business & Professional Offices	P	P	P	P	P	P
Candy Stores	P	P	P	P	Pr	Pr
Carpenter Shops	Pr	P	P	Pr	Pr	Pr
Child Day Care Centers	P	P	P	P	C	Pr
Coffee Shops	P	P	P	P	P	P
Pool or Billiard Rooms	Pr	C	P	Pr	Pr	Pr
Corporate Data Centers	Pr	Pr	Pr	Pr	P	P
Dancing Studios	C	P	P	P	Pr	Pr
Department Stores	Pr	P	P	P	Pr	Pr
Drive Through Carry Outs	C	C	C	C	C	C
Drug Stores	P	P	P	P	Pr	Pr
Dry Cleaning Shops	P	P	P	P	Pr	Pr
Dry Goods & Apparel Stores	P	P	P	P	Pr	Pr
Electronic & Text Information Retrieval Services	Pr	Pr	Pr	P	P	P
Fast Food Restaurants	Pr	C	P	Pr	Pr	Pr
Funeral Homes	P	P	P	P	Pr	Pr

Use	Commercial District					
	B-1	B-2	B-3	PB-3	O	ORC
Furniture & Appliance Stores	P	P	P	P	Pr	Pr
Furniture Upholstering	P	P	P	P	Pr	Pr
Grocery & Supermarket	P	P	P	P	Pr	Pr
Hotels/Motels	Pr	Pr	P	Pr	C	P
Hospitals	Pr	Pr	P	C	C	P
Insurance Carriers	P	P	P	P	P	P
Interior Decorating Shops	P	P	P	P	Pr	Pr
Laundromats	P	P	P	P	Pr	Pr
Liquor Stores	P	P	P	P	Pr	Pr
Mail Order Houses	Pr	P	P	P	Pr	Pr
Massage Parlors	Pr	Pr	P	Pr	Pr	Pr
Meat & Fruit Market	P	P	P	P	Pr	Pr
Motor Vehicle Wash Facilities	Pr	Pr	P	Pr	Pr	Pr
Movie Theaters	Pr	C	P	Pr	Pr	Pr
Night Clubs	Pr	Pr	P	Pr	Pr	Pr
Outpatient Surgery Centers	Pr	Pr	Pr	Pr	C	P
Periodicals and Book Publishing	Pr	Pr	Pr	Pr	P	P
Pharmacies	P	P	P	P	Pr	Pr

Use	Commercial District					
	B-1	B-2	B-3	PB-3	O	ORC
Pharmacies with Drive-Through	Pr	Pr	P	P	Pr	Pr
Photographic Studios	P	P	P	P	Pr	Pr
Places of Worship, Churches	P	P	Pr	P	C	C
Printing	Pr	P	P	Pr	Pr	Pr
Publishing	Pr	P	P	Pr	Pr	Pr
Radio & TV Studios	Pr	P	P	Pr	Pr	Pr
Research & Development in Information Technologies	Pr	Pr	Pr	Pr	C	P
Research & Development in Medical Technologies	Pr	Pr	Pr	Pr	C	P
Residential	C	Pr	Pr	Pr	C	C
Restaurant & Accessory Cocktail Lounge	C	P	P	P	C	C
Restaurants	C	P	P	P	C	C
Restaurants with Entertainment or Dancing	Pr	P	P	P	Pr	Pr
Satellite Ground Stations	C	C	P	P	C	C
Shoe Repair & Tailor	P	P	P	P	C	C

Use	Commercial District					
	B-1	B-2	B-3	PB-3	O	ORC
Skating Rinks	Pr	P	P	Pr	Pr	Pr
Soda Fountains	P	P	P	Pr	Pr	Pr
Survey Research Firms	Pr	Pr	Pr	Pr	P	P
Tattoo parlor or Body-piercing studio	Pr	Pr	C	Pr	Pr	Pr
Variety Stores	P	P	P	P	Pr	Pr
P = Permitted Use; C = Conditional Use; Pr = Prohibited Use; A = Accessory Use						

Article 5

Zoning Districts and Use Standards

Cross References
1. *Article 4: Development Procedures*
2. *Article 6: Development Standards*
3. *Master Plan*
4. *Official Zoning Map*

§ 5.01 General Provisions

A. Regulation of the Use and Development of Land and Structures: These regulations are established and adopted governing the use and physical development of land and/or structures.

B. Rules of Application: These regulations shall be interpreted and enforced according to the following rules:

1. Identification of Uses: Listed uses are to be defined by their customary name or identification, except where they are specially defined or limited in this Ordinance.

2. Permitted Uses: Only a use designated as a permitted use shall be allowed as a matter of right in a zoning district and any use not so designated shall be prohibited except, when in character with the zoning district, such

other additional uses may be added to the permitted uses of the zoning district by an amendment to this UDO (Section 4.04).

3. **Conditional Uses:** A use designated as a conditional use shall be allowed in a zoning district when such conditional use, its location, extent and method of development will not substantially alter the character of the vicinity or unduly interfere with the use of adjacent lots in the manner prescribed for the zoning district. To this end BZAP shall, in addition to the development standards for the zoning district, set forth such additional requirements as will, in its judgment, render the conditional use compatible with the existing and future use of adjacent lots and the vicinity. Additional standards for conditional uses are listed in Section 6.10.

4. **Accessory Uses:** A use designated as an accessory use shall be permitted in a zoning district when such use is subordinate in area, extent, and purpose to the principal use and is located on the same lot and in the same zoning district as the principal use.

5. **Development Standards:** The development standards shall be the minimum required for development in a zoning district unless otherwise stated. If the development standards are in conflict with the requirements of any other lawfully adopted rules, regulations or laws, the more restrictive or higher standard shall govern.

C. Districts: The City is divided into the following zoning districts, which shall be governed by all the use and area requirements of this Ordinance. The following lists each district along with its appropriate symbol:

Residential Districts

R-S	Residential Suburban District
R-1	One-Family Residence District
R-2	One-to-Four-Family Residence District
R-3	Multi-Family Residence District
RO-3	Multi-Family Residence and Office District
R-4	Multi-Family Residence District
RCD	Community Development District

Commercial Districts

B-1	Neighborhood Business District
B-2	Community Business District
B-3	Conditional Business District
O	Office District
ORC	Office and Research District

Planned Districts

PMU	Planned Mixed-Use District
PB-3	Planned Shopping Center District

Overlay Districts

Historic district

WCD	Wireless Communications District

(Amended 3/16/11 per Ordinance No. 96-2010)

§ 5.02 Residential Districts

A. **Purpose:** The following generally describes the purpose and general characteristics of each residential district:

1. **R-S Residential Suburban District:** The purpose of the R-S District is to allow single-family dwellings in low-density residential neighborhoods. This district is further subdivided into four subdistricts: R-Sa, R-Sb, R-Sc, and R-Sd, differing primarily in required lot area and yard space. Net densities range from 0.33 dwelling units per acre in the R-Sa District to 2 dwelling units per acre in the R-Sd District. Permitted uses generally include, but are not limited to, single-family residential, institutional, cultural, recreation, and day care.

2. **R-1 One-Family Residence District:** The purpose of the R-1 District is to allow single-

family dwellings in low- to medium-density residential neighborhoods. Two-family dwellings are a Conditional Use. The district is further subdivided into three subdistricts: R-la, R-1 b, and R-1 c, differing primarily in required lot area and yard space. Net densities range from 1.09 dwelling units per acre in the R-1 a District to 4.84 dwelling units per acre in the R-1 c District. Permitted uses generally include, but are not limited to, single-family residential, two-family residential, institutional, cultural, recreation, and day care. *(Per Ordinance No. 106-2009)*

3. **R-2 One-to-Four-Family Residence District:** The purpose of the R-2 District is to allow single-family dwellings and two- to four-family dwellings in medium-density residential neighborhoods. The district is further subdivided into two subdistricts: R-2a and R-2b, differing only in height regulations. Net densities range from 4.84 dwelling units per acre in the R-2a District to 14.52 dwelling units per acre in the R-2b District. Permitted uses generally include, but are not limited to, single-family and two- to four-family residential, institutional, cultural, recreation, and day care.

4. **R-3 Multi-Family Residence District:** The purpose of the R-3 District is to allow single-family dwellings and multi-family dwellings (up to six units in a building) in medium-density residential neighborhoods. The district is further subdivided into two subdistricts: R-3a and R-3b, differing

primarily in height regulations. Net densities range from 4.84 dwelling units per acre in the R-3a District to 14.52 dwelling units per acre in the R-3b District. Permitted uses generally include, but are not limited to two- to six-family residential, institutional, cultural, recreation, and day care.

5. **RO-3 Multi-Family Residence and Office District:** The purpose of the RO-3 District is to allow single-family dwellings and combined residential and office space in high-density residential neighborhoods. The district is further subdivided into two subdistricts: RO-3a and RO-3b, differing primarily in height regulations. Net densities range from 4.84 dwelling units per acre in the RO-3a District to 34.85 dwelling units per acre in the RO-3b District. Permitted uses generally include, but are not limited to two-to six-family residential, institutional, cultural, recreation, day care and a combination of residential and office uses.

6. **R-4 Multi-Family Residence District:** The purpose of the R-4 District is to allow single-family dwellings, multi-family dwellings (up to six units in a building) apartment hotels, adult care, and funeral homes in high-density residential neighborhoods. The district is further subdivided into two subdistricts: R-4a and R-4b, differing primarily in height regulations. Net densities range from 4.84 dwelling units per acre in the R-4a District to 14.52 dwelling units per acre in the R-4b District. Permitted uses generally include,

but are not limited to, single-family, and two- to six-family residential, institutional, cultural, recreation, day care, apartment hotels, adult day care, and funeral homes.

7 **RCD Community Development District:** The purpose of the RCD District is to allow residential uses in medium- to high-density residential complexes. The district is further subdivided into three subdistricts: RCD-2, RCD-3, and RCD-4 each with a specific set of requirements. Net densities range from 4.84 dwelling units per acre in the RCD-2 District to 34.85 dwelling units per acre in the RCD-4 District. Permitted uses generally include, but are not limited to, single-family, and two- to six-family residential, institutional, cultural, recreation, day care, apartment hotels, adult care facility retirement home, and funeral homes.

B. Permitted, Prohibited, Accessory, and Conditional Uses: Permitted, prohibited, accessory, and conditional uses for each of the residential use districts are listed in Table 5-A, Residential Uses and Table 5-B, Home Occupational Uses.

C. Performance Standards: Development standards for each of the residential districts are listed in Table 5-E, Residential Building Area, Density, and Setback Standards and Table 5-F, Residential Building Coverage and Height Standards.

§ 5.03 Commercial Districts

A. **Purpose:** The following generally describes the purpose and general characteristics of each commercial district:

1. **B-1 Neighborhood Business District:** The purpose of this district is to allow local retail business or service establishments that supply commodities or perform services needed on a daily basis primarily for residents of the immediate neighborhood. Permitted uses generally include, but are not limited to, personal services, professional offices, coffee shops, barber shops, laundromats, and child day care centers.

2. **B-2 Community Business District:** The purpose of this district is to allow retail business or service establishments that supply commodities or perform services needed on a daily basis primarily for residents of the community. Permitted uses generally include, but are not limited to, offices, restaurants, personal services, child day care centers, entertainment, supermarkets, and pharmacies.

3. **B-3 Conditional Business District:** The purpose of this district to allow retail, retail service, eating and drinking places, including drive-in carry out and other types of fast food restaurants, automotive service and entertainment and commercial recreation uses. Sexually-oriented businesses are also a permitted use in this district.

4. **O Office District:** The purpose of this district is to allow offices of varying types within the community. Permitted uses generally include, but are not limited to, professional offices and single occupancy office buildings.

5. **PB-3 Planned Shopping Center District:** The purpose of this district is to allow retail business or service establishments that supply commodities or perform services primarily for residents of the community on a day-to-day basis within an integrated shopping center design. Permitted uses generally include, but are not limited to, retail and personal services, offices, restaurants, child day care centers, department stores, groceries, and supermarkets. The PB3 is a planned district requiring development plan approval.

6. **ORC Office and Research District:** The purpose of this district is to allow offices and research facilities that will contribute to the City's physical pattern of planned, healthy, safe, and attractive neighborhoods. The ORC district should also provide job opportunities and services to residents and contribute to the City's economic stability. Permitted uses generally include, but are not limited to, business and professional offices, research and development, book and periodical publishing, insurance carriers, corporate data centers, survey research firms, and outpatient surgery centers.

B. Permitted, Prohibited and Conditional Uses: Permitted and conditional uses for each of the commercial districts are listed in Table 5-C, Commercial Uses and Table 5-D, Mixed Uses.

C. Development Standards: Development standards for each of the commercial districts are listed in Table 5-G, Commercial Development Standards.

§ 5.04 Planned Mixed-Use Districts

A. **Purpose: It** is the purpose and intent of Planned Use Districts to implement the goals, policies, and strategies of the Master Plan by allowing a mixture of residential, office, and commercial uses in a high quality urban environment. This type of development pattern was recommended in the Master Plan for seven specific areas of the City. Other areas of the City may be considered for Planned Mixed-Use designation if the development meets the guidelines established in Article 7.0. These seven areas, or Planned Mixed Use Districts as further described in Volume 2: Study Areas Report of the Master Plan, are the following:

1. **Kingsdale:** The area contains three sub-areas which are demonstrated in the Master Plan. The Kingsdale Core and Triangle area bounded by Northwest Boulevard, Tremont Road and Zollinger Road containing approximately 38 acres. The Kingsdale West area is generally bounded by Tremont Road, Fishinger Road, Ardleigh Road and Somerford Road. *(Per Ordinance No. 106-2009)*

2. **Henderson Road:** The area on both sides of Reed Road and south of Henderson Road containing approximately 50 acres.

3. **Tremont:** The area encompassing a seven-acre commercial center and an 18-acre multi-family site north of the center.

4. **Lane Avenue:** A predominantly commercial corridor that includes 33 acres on both sides of Lane Avenue from North Star Road to Northwest Boulevard.

5. **Northwest Boulevard:** The area along Northwest Boulevard from Zollinger Road to the Ridgeview Road area containing approximately 13 acres.

6. U.S. 33: The area along the U.S. 33 corridor and more specifically the area around both the Fishinger and Trabue Road intersections with U.S. Route 33.

7. **Mallway:** The area bounded generally by Arlington Avenue, Guilford Road, Coventry Road, and Waltham Road.

B. **Criteria:** In order to be eligible for approval under this section, a proposed development must meet all of the following criteria:

1 **Design criteria:** The property shall be situated within a study area as identified in Volume 2: Study Areas Report of the Master Plan. Each study area shall include:

a. Mixed use centers with vertical and horizontal integration of office, residential, and retail functions.

b. Prominently located civic spaces and uses that also serve as a gathering place for residents and visitors.
c. Increased floor area and higher intensity use of land to create vitality and enhance real property values.
d. Emphasis on office use within a mixed-use district.
e. Enhanced physical image to compliment the character of Upper Arlington's oldest residential neighborhoods.
f. Interconnected uses with pedestrian and vehicular links to adjacent neighborhoods.
g. Demonstrated consistency with the design guidelines outlined in Article 7.

2 Focus: The proposed development shall, in general, be consistent with the Master Plan recommendations for each study area, shall have a strong pedestrian orientation, and shall be of overall economic and aesthetic benefit to the community. The design of each development shall also adhere to the following recommended focus:

a. Kingsdale: Town center with a mix of uses including office, retail, residential, and civic.
b. Henderson Road: Regional office corridor with a supporting mix of uses.
c. Lane Avenue: Mixed-use corridor with office emphasis, improved streetscape, and gateway treatment.
d. Tremont*:* Neighborhood center with retail, office, and residential.

e. **Northwest Boulevard:** Mixed-use corridor with office and residential.
f. **U.S. 33:** Improved design character, especially at key intersections.
g. **Mallway:** Neighborhood center with retail, office and civic uses.

3. **Timing:** It is expected that individual development projects will only address one geographic portion of a Planned Mixed-Use District (PMUD). In those areas, the development should address the City's intent for a particular PMUD, but it may propose a portion of a PMUD that fits within the overall concept and the Study Area Plan.

C. Permitted and Conditional Uses: Permitted and conditional uses for the mixed-use districts are listed in Table 5-D, Mixed Uses.

D. Development Standards: Development standards for each of the Commercial Districts are listed in Table 5-G, Commercial Development Standards.

§ 5.05 Overlay Districts

A **Wireless Communication District:** The purpose of this Section is to protect the health, safety and welfare of the public while not unreasonably interfering with the development of the competitive wireless telecommunication market place through the establishment of requirements for the installation of wireless telecommunication facilities. The goals of this Ordinance are to:

1. Protect residential areas and land uses from potential adverse impacts of towers and antennas.
2. Minimize the total number of towers throughout the community.
3. Strongly encourage the joint use of new and existing tower sites as a primary option rather than construction of additional single use towers.
4. Encourage users of the towers and antennas to locate them, to the extent possible, in areas where the adverse impact on the community is minimal.
5. Ensure that users of towers and antennas configure them in a way that minimizes the adverse impact of the towers and antennas through careful design, landscape screening, and innovative camouflaging techniques.
6. Enhance the ability of the providers of telecommunications services to provide such services to the community quickly, effectively and efficiently.
7. Consider the public health and safety of communication towers.
8. Avoid potential damage to adjacent properties from tower failure through engineering and careful siting of tower structures.

B **Historic District:** The purpose of this Section is to preserve and protect the architectural character, history and significance of the buildings within the Upper Arlington Historic District through provisions designed to:

1. Establish guidelines and encourage sensible rehabilitation of buildings within the Historic District.
2. Ensure that the Historic District maintains its historic architectural character in Upper Arlington into the future.
3. Ensure that new additions and remodeling are compatible with the neighborhood.
4. Avoid potential damage to adjacent properties from the removal of an irreplaceable asset.
5. Provide a public procedure for a Historic Demolition. *(Amended 03/16/11 per Ordinance No. 96-2010)*

§ 5.06 Official Zoning Map

A. **Official Zoning Map Adopted:** All land in the municipality is placed into zoning districts as shown on the Official Zoning Map that is hereby adopted and declared to be part of the UDO.

   1. Final authority: The Official Zoning Map, as amended from time to time, shall complement appropriate legislation as the final authority for the current zoning district status of land under the jurisdiction of the UDO.

   2. Land Not Otherwise Designated: All land under the UDO and not designated or otherwise included within another zoning district map shall be included in the R-S, Suburban Residential District.

B. Identification of the Official Zoning District Map: The Official Zoning Map, with any amendments made thereon, shall be identified by

the signatures of the Mayor and all members of City Council under the following words:

Official Zoning District Map, Upper Arlington, Ohio.
Adopted by the City Council, Upper Arlington, Ohio.

_____ _____
Date President of Council

_____

_____

_____

_____

_____

C. Establishment of Zoning Districts: The names and symbols for zoning districts as shown on the Official Zoning Map are as follows:

Residential Districts

R-S	Residential Suburban District
R-1	One-Family Residence District
R-2	One-to-Four-Family Residence District
R-3	Multi-Family Residence District
RO-3	Multi-Family Residence and Office
R-4	Multi-Family Residence District

RCD	Community Development District

Commercial Districts

B-1	Neighborhood Business District
B-2	Community Business District
B-3	Conditional Business District
O	Office District
ORC	Office and Research District

Planned Districts

PMU	Planned Mixed-Use District
PB-3	Planned Shopping Center District

Miscellaneous Districts

WCD	Wireless Communications District
FP	Floodplain District

D. Legend and Use of Color or Patterns: There shall be provided on the Official Zoning Map a legend which shall list the name and symbol for each zoning district. In lieu of a symbol, a color or black and white pattern may be used on the Official Zoning Map to identify each zoning district as indicated in the legend.

E. Interpretation of Zoning District Boundaries: The boundaries of the zoning districts are shown upon the Official Zoning Map. The Official Zoning Map and all notations, references, and other information are a part of the UDO. A certified copy of the Official Zoning Map shall be kept on file with the City Clerk.

F. Rules for Determination: When uncertainty exists with respect to the boundaries of zoning districts as shown on the Official Zoning Map, the following rules shall apply:

1. **Along a Street or Other Right-of-Way:** Where zoning district boundary lines are indicated as approximately following a center line of a street or highway, alley, railroad easement, or other right-of-way, or a river, creek, or other watercourse, such centerline shall be the zoning district boundary.
2. **Along a Property Line:** Where zoning district boundary lines are indicated as approximately following a lot line, such lot line shall be the zoning district boundary.
3. **Parallel to Right-of-Way or Property Line:** Where zoning district boundary lines are indicated as approximately being parallel to a centerline or a property line, such zoning district boundary lines shall be parallel to a centerline or a property line and, in the absence of a specified dimension on the Official Zoning Map.
4. **Actual Conflict with Map:** When the actual street or lot layout existing on the ground is

in conflict with that shown on the Official Zoning Map, the party alleging that such conflict exists shall furnish an actual survey for interpretation by the Director of Development.

5. **Right of Way Vacation:** Whenever any street, alley or other public way is vacated by official action of Council, the zoning district adjoining each side of such street, alley or public way shall be automatically extended to the center of such vacation, and all area included in the vacation shall then and henceforth be subject to all appropriate regulations of the extended district or districts.

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PART 11 UNIFIED DEVELOPMENT CODE
ARTICLE 5-13

Table 5-A: Residential Uses

Article 1.	Use Residential District				
	R-S	R-1	R-2	R-3	RO-3
Adult Group Homes (six to 16 adults)	Pr	Pr	Pr	Pr	Pr
Adult Family Home (three to five adults)	P	P	P	P	P
Agricultural Uses	P[2]	Pr	Pr	Pr	Pr
Antenna and Antenna Towers	a	a	a	a	a
Apartment Hotels	Pr	Pr	Pr	Pr	Pr
Bed & Breakfast Homestay	C	C	C	C	C
Cemeteries	C	C	C	C	C
Clubs/Organizations	Pr	Pr	C	C	C
Country Club, Private	P	P	P	P	P
Day Care Facility	Pr	C	C	C	C
Decks	a	a	a	a	a
Dish-Type Antennas	a	a	a	a	a
Dish-Type Satellite Antennas	a	a	a	a	a
Dwelling, Four-Family	Pr	Pr	P	P	P

PART 11 UNIFIED DEVELOPMENT CODE
ARTICLE 5-13

Table 5-A: Residential Uses [cont'd]

Article 1.	Use Residential District			
	R-4	RCD2	RCD3	RCD4
Adult Group Homes (six to 16 adults)	Pr	P	P	P
Adult Family Home (three to five adults)	P	P	P	P
Agricultural Uses	Pr	Pr	Pr	Pr
Antenna and Antenna Towers	a	a	a	a
Apartment Hotels	P	Pr	Pr	P
Bed & Breakfast Homestay	C	C	C	C
Cemeteries	C	C	C	C
Clubs/Organizations	C	C	C	C
Country Club, Private	P	P	P	P
Day Care Facility	C	C	C	C
Decks	a	a	a	a
Dish-Type Antennas	a	a	a	a
Dish-Type Satellite Antennas	a	a	a	a
Dwelling, Four-Family	P	P	P	P

Article 1.	Use Residential District				
	R-S	R-1	R-2	R-3	RO-3
Dwelling, Single-Family	P	P	P	Pr	Pr
Dwelling, Three-Family	Pr	Pr	P	P	P
Dwelling, Two-Family	Pr	C	P	P	P
Elderly Housing	Pr	Pr	Pr	C	C
Essential Services	P	P	P	P	P
Funeral Homes	Pr	Pr	Pr	Pr	Pr
Home, Type A Day Care	P	Pr	Pr	P	P
Home, Type B Day Care	P	P	P	P	P
Home Occupations[1]					
Home Sales	a	a	a	a	a
Hospitals	C	Pr	Pr	Pr	C
Hot Tubs & Jacuzzis	a	a	a	a	a
Hotels and Motels	C	C	C	C	C
In-law Suite	C	C	C	C	C
Libraries	P	P	P	P	P

Article 1.	Use Residential District			
	R-4	RCD2	RCD3	RCD4
Dwelling, Single-Family	Pr	P	Pr	Pr
Dwelling, Three-Family	P	P	P	P
Dwelling, Two-Family	P	P	P	P
Elderly Housing	C	Pr	C	P
Essential Services	P	P	P	P
Funeral Homes	P	Pr	Pr	P
Home, Type A Day Care	P	P	P	P
Home, Type B Day Care	P	P	P	P
Home Occupations[1]				
Home Sales	a	a	a	a
Hospitals	Pr	C	C	C
Hot Tubs & Jacuzzis	a	a	a	a
Hotels and Motels	C	C	C	C
In-law Suite	C	C	C	C
Libraries	P	P	P	P

Article 1.	Use Residential District				
	R-S	R-1	R-2	R-3	RO-3
Open Sided Structure	a	a	a	a	a
Park	P	P	P	P	P
Parking of Motor Vehicles	a	a	a	a	a
Parking Lot, Structured	Pr	Pr	C	C	C
Parking Lot, Surface	Pr	C	C	C	C
Parking of Recreational Vehicles, Watercraft, and Trailers	a	a	a	a	a
Parking of Trucks and Trailers	a	a	a	a	a
Pet Shelters	a	a	a	a	a
Places of Worship or Churches	P	P	P	P	P
Playhouses	a	a	a	a	a
Playground, Public	P	P	P	P	P
Recreation Center, Public	P	P	P	P	P
Private Schools	P	P	P	P	P
Public Schools	P	P	P	P	P

Article 1.	Use Residential District			
	R-4	RCD2	RCD3	RCD4
Open Sided Structure	a	a	a	a
Park	P	P	P	P
Parking of Motor Vehicles	a	a	a	a
Parking Lot, Structured	C	C	C	C
Parking Lot, Surface	C	C	C	C
Parking of Recreational Vehicles, Watercraft, and Trailers	a	a	a	a
Parking of Trucks and Trailers	a	a	a	a
Pet Shelters	a	a	a	a
Places of Worship or Churches	P	P	P	P
Playhouses	a	a	a	a
Playground, Public	P	P	P	P
Recreation Center, Public	P	P	P	P
Private Schools	P	P	P	P
Public Schools	P	P	P	P

Article 1.	Use Residential District				
	R-S	R-1	R-2	R-3	RO-3
Swimming Pools, Private	a	a	a	a	a
Swimming Pools, Public	C	C	C	C	C
Tennis Courts, Private	A	A	A	A	A
Tennis Courts, Public	C	C	C	C	C
Utility Structures	C	C	C	C	C

P=Permitted Use, C=Conditional Use, Pr=Prohibited Use, A=Major Accessory Use and Structure, a=Minor Accessory Use and Structure

[1]See Home Occupation Table 5B

[2] Provided that any lot or tract in such use shall not be less than five acres in size

(Per Ordinance No. 106-2009)

Article 1.	Use Residential District			
	R-4	RCD2	RCD3	RCD4
Swimming Pools, Private	a	a	a	a
Swimming Pools, Public	C	C	C	C
Tennis Courts, Private	A	A	A	A
Tennis Courts, Public	C	C	C	C
Utility Structures	C	C	C	C

P=Permitted Use, C=Conditional Use, Pr=Prohibited Use, A=Major Accessory Use and Structure, a=Minor Accessory Use and Structure
[1]See Home Occupation Table 5B

[2] Provided that any lot or tract in such use shall not be less than five acres in size

(Per Ordinance No. 106-2009)

* * *

42 U.S.C. § 2000cc

Protection of land use as religious exercise

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which--

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or

system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

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.

(2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits

No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

42 U.S.C. § 2000cc-2

Judicial relief

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) Burden of persuasion

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

* * *

42 U.S.C. § 2000cc-3

Rules of construction

* * *

(g) Broad construction

This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

* * *

42 U.S.C. § 2000cc-5

Definitions

In this chapter:

(1) Claimant

The term "claimant" means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term "Free Exercise Clause " means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government

The term "government"--

(A) means--

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity

The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The 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.

Excerpts from Deposition Transcript of Todd Marrah

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Q. Okay. And of those rejected, how many do you think were rejected for academic reasons, about how many percentage-wise maybe?

A. 70.

Q. How many for behavioral reasons?

A. 25 percent.

Q. And how many for lack of space?

A. In the year 2009 I'm going to say 5 percent.

Q. 5 percent of?

A. At the middle school. Let me define at the middle school and high school level is what we would be talking about here.

Q. So I understand you correctly, 5 percent of those rejected would have been in the category of insufficient space?

A. Space limitations.

* * *

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A. So there were probably several at the middle

school and high school level.

Q. And several being -- can you --

A. Three to four.

Q. Three to four total or each?

A. I would say probably four total.

Q. Okay. Now, did you ever report to the board that

there were students being rejected for lack of space?

A. Yes, we frequently discussed crowding issues at

the upper school campus.

* * *

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Q. You said again how many do you think were

rejected in 2010?

A. Between 25 and 35 percent.

* * *

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Q. And for lack of space?

A. I'm going to say 5 percent for 2010.

* * *

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Q. Okay. And how many did not re-enroll because you did not move into the new facility?

A. I'm going to say about ten families.

Q. And what did they say about not moving into the new facility, was the education -- were they dissatisfied with the quality of the education they were receiving?

A. Just had a conversation in the last two weeks with a family for the coming school year who said we were holding on hoping to have you in that new facility and not having to put our students in separate facilities but wanting to have all of our children in one building so we will lose three students from that family for the coming year over our inability to be able to use our new facility.

Q. So the reason for one family is that they want all their students at one -- in one facility for purposes of dropping them off and picking them up and all that; is that right?

A. That's correct.

Q. What about these other ten from 2010?

A. That conversation is common.

Q. What were their reasons?

A. Similar, we were hoping to have it all

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consolidated, we didn't want to put our 6th grader in one campus and having to drive your 2nd grader to another campus, we were hoping you'd be in a new facility by now, since you're not, we can't drive to two different facilities in the morning.

Q. Okay. So did all ten of them that left use that reason, they all had multiple children in your school?

A. I don't know that I can say all ten. Let me say that we heard that quite a bit.

Q. Of the ten you heard it --

A. Say seven or eight times.

* * *