UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

THE ROMAN CATHOLIC ARCHDIOCESE OF KANSAS CITY IN KANSAS, et al.,	)	
Plaintiffs,	)	Case No. 2:17-cv-02186-DDC
v.	)	
THE CITY OF MISSION WOODS, KANSAS,	)	
Defendant.	)	

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

In accordance with 28 U.S.C. § 517, the United States of America files this Statement of Interest to address important issues under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc(a)(1)-(b)(1), raised by the parties in their motions for summary judgment. Section 517 authorizes the Attorney General "to attend to the interests of the United States in a suit pending in a court of the United States." 28 U.S.C. § 517. The Department of Justice is responsible for the enforcement of RLUIPA, and therefore has an interest in how courts apply the statute. 42 U.S.C. § 2000cc-2(f). The interpretation of RLUIPA in this case could affect current and future enforcement actions brought by the Department of Justice. To help ensure the correct and consistent interpretation of RLUIPA, the Department has previously filed statements of interest and appellate amicus briefs in a number of RLUIPA cases raising similar issues.[1]

[1] *See, e.g.*, *Chabad Lubavitch of Litchfield Cnty., Inc. v. Litchfield Hist. Dist. Comm'n*, 768 F.3d 183 (2d Cir. 2014); *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F.3d 548 (4th Cir.

SUMMARY OF ARGUMENT

St. Rose Philippine Duchesne Catholic Church filed a land use application with the City of Mission Woods, Kansas to convert a dilapidated single-family residence adjacent to the Church into a "Meeting House" to hold religious classes, Bible studies, youth prayer groups, and other religious activities.[2] St. Rose asserts that the Meeting House is necessary because its current facilities are at maximum capacity and additional meeting space is needed for its wide range of religious activities. The Mission Woods City Council, based on a recommendation from the City Planning Commission, denied St. Rose's application. St. Rose brought claims under RLUIPA's substantial burden and equal terms provisions, in addition to other claims, and the parties have now filed cross-motions for summary judgment.

The United States submits this Statement of Interest to aid the Court in identifying the proper standards under RLUIPA for evaluating alleged substantial burdens under RLUIPA Section 2(a), 42 U.S.C. § 2000cc(a)(1). As discussed below, "substantial burden" is a key term that the statute does not specifically define, and the United States believes a review of how courts throughout the country have approached this question will be useful to this Court.

The test the Tenth Circuit has identified for evaluating substantial burden under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb-2000bb-4, which should be applied to RLUIPA, is whether the challenged government actions have "prevent[ed]

2013); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007); *Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978 (9th Cir. 2006); *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005); *Garden State Islamic Ctr. v. City of Vineland, N.J.*, No. 1:17-cv-01209-JHR-KMW(D.N.J. Sept. 5, 2017); *O Centro Espirita Beneficente Uniao do Vegetal v. Bd. of Cnty. Comm'rs of Santa Fe Cnty.*, No. 12-cv-00105-MV-LFG (D.N.M. May 25, 2012); *Congregation Etz Chaim v. City of Los Angeles*, No. CV 10-1587 CAS (Ex), 2011 WL 12462883, at *1, 7 (C.D. Cal. Jan. 6, 2011); *Albanian Assoc. Fund v. The Twp. of Wayne*, No. 2:06-cv-3217 (D.N.J. July 19, 2007).

[2] The Roman Catholic Archdiocese of Kansas City in Kansas is also a plaintiff in this litigation, but for ease of reference, this brief will refer to the Archdiocese and St. Rose collectively as "St. Rose."

participation in conduct motivated by a sincerely held religious belief[.]" *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1138 (10th Cir. 2013), *aff'd*, 134 S. Ct. 2751 (2014). Other courts addressing substantial burden under RLUIPA have used a similar approach in evaluating the burden caused by a zoning denial. They evaluate the actual, practical impact of the restriction on the institution's religious exercise, along with other factors that help evaluate the degree to which those impacts are fairly attributable to the government restriction, which include whether the institution had a reasonable expectation of obtaining the approval, whether there are reasonable alternatives available to the institution, and whether pursuing alternatives would cause undue delay, uncertainty, and expense for the institution.

Under this test, St. Rose has provided ample evidence of substantial burden on its religious exercise. St. Rose has also presented abundant evidence that Mission Woods has failed to show that it has a compelling governmental interest for imposing such a burden that has been pursued through the least restrictive means. This Court should therefore deny Mission Woods' motion for summary judgment on St. Rose's substantial burden claim.[3]

ARGUMENT

I. Summary judgment would be inappropriate because St. Rose has presented ample evidence that Mission Woods' denial imposed a substantial burden on its religious exercise in violation of RLUIPA.

A. The substantial burden standard.

RLUIPA's substantial burden provision, 42 U.S.C. § 2000cc(a)(1), provides that "[n]o 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 burden is justified by a compelling governmental interest and is the least

[3] The United States does not take a position on whether St. Rose is entitled to summary judgment.

restrictive means of furthering that interest. 42 U.S.C. 2000cc(a)(1)(A)-(B). St. Rose, as the plaintiff, bears the burden of persuasion on whether the government has imposed a substantial burden on its religious exercise. 42 U.S.C. § 2000cc-2(b).[4] If that showing is made, the burden then shifts to Mission Woods to demonstrate that the imposition of such a substantial burden furthers a compelling governmental interest by the least restrictive means. *See id.*; *see also Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 661 (10th Cir. 2006) (noting under RLUIPA's substantial burden provision that the government must "show [that a land use regulation] furthers a compelling governmental interest and is the least restrictive means of furthering that interest"); *Beatty v. Johnson*, No. Civ. A 702CV00506, 2006 WL 335599, at *1 (W.D. Va. Feb. 14, 2006) (explaining the parties' respective evidentiary burdens under RLUIPA's substantial burden provision).

RLUIPA requires that its language be construed broadly to protect religious exercise. 42 U.S.C. § 2000cc-3(g) ("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."); *see also Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs.*, 612 F. Supp. 2d 1163, 1171-72 (D. Colo. 2009), *aff'd*, 613 F.3d 1229 (10th Cir. 2010).

RLUIPA does not provide a new definition of "substantial burden"; rather, this is a term Congress selected with reference to Free Exercise Clause jurisprudence and RFRA. *See Grace United Methodist Church*, 451 F.3d at 661. The test for substantial burden under RFRA was

[4] Mission Woods suggests that because "religious services" would not be held in the Meeting House, the various religious activities for which St. Rose intends to use the Meeting House, such as religious education, are not covered as "religious exercise" under RLUIPA. (Def.'s Br. in Opp., Dkt. No. 46 at 38.) RLUIPA, however, applies by its terms to "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A). Activities such as religious education are plainly religious exercise under RLUIPA. *See, e.g.*, *Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 545 (S.D.N.Y. 2006), *aff'd*, 504 F. 3d 338 (2d Cir. 2007).

explained by the Tenth Circuit in *Hobby Lobby*: a government act imposes a "substantial burden" on religious exercise if it: (1) "requires participation in an activity prohibited by a sincerely held religious belief," (2) "prevents participation in conduct motivated by a sincerely held religious belief," or (3) "places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief." 723 F.3d at 1138 (quotation omitted).

Since the first and third prongs deal with objections to government-mandated actions, the second prong is applicable in the factual context of RLUIPA land use cases: where denial of a zoning permit may prevent a religious institution from engaging in religious conduct. *See, e.g.*, *Livingston Christian Schs. v. Genoa Charter Twp.*, 858 F.3d 996, 1003-04 (6th Cir. 2017) ("Other circuits have persuasively explained that land-use regulations do not typically compel plaintiffs to 'violate their beliefs' . . . . But land-use regulations can prohibit a plaintiff from engaging in desired religious behaviors, causing some courts to define a substantial burden as something that places significant pressure on an institutional plaintiff to modify its behavior."); *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F.3d 548, 556 (4th Cir. 2013) (noting that "every one of our sister circuits to have considered the question has held that, in the land use context," regulations that compel a plaintiff to modify religious behavior are substantial burdens, not merely those that compel a plaintiff to "violate its beliefs").

The Tenth Circuit has held that a "substantial burden" under RLUIPA is not limited to religious exercise that is "fundamental," but rather include substantial burdens on *any* religious exercise. *Grace United Methodist Church*, 451 F. 3d. at 662-63. The Tenth Circuit otherwise has not had occasion to address precisely what it means to "prevent[ ] participation in conduct motivated by a sincerely held religious belief" in the context of land use. *Hobby Lobby*, 723 F.3d at 1138. However, other courts applying RLUIPA within the Tenth Circuit and in other

circuits have provided guidance on what it means to prevent participation in religious exercise in the particular factual context of a zoning denial for houses of worship and other religious institutions.

Most denials of religious institutions' zoning applications will have *some* impact on religious exercise. But the question under RLUIPA is whether it can be said to have a *substantial* impact, one that prevents participation in some religious conduct. The impact on the religious institution must be "more than an inconvenience." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004). A substantial burden will not exist where "the denial of an institution's application . . . will have minimal impact on the institution's religious exercise[.]" *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007). To determine when a government-imposed burden prevents participation in religious exercise and may be deemed "substantial," courts have looked to a number of factors, examining the actual, practical impact of the restriction on the institution's religious exercise, along with other factors that help the court evaluate the degree to which those impacts are fairly attributable to the government restrictions.

Thus, in *Bethel World Outreach*, for example, the Fourth Circuit examined the material effects of overcrowding at a church's old, smaller site, including the need to hold multiple services and curtail various programs. Additionally, the court evaluated the reasonable expectation that the church had when it purchased the site to be able to build on it, the "delay, uncertainty and expense" that would be involved in trying to find an alternative site in the county, and the fact that the county issued a complete denial rather than conditioning approval on the church making alterations to its plans. 706 F.3d at 557-58.

Similarly, in *Livingston Christian Schools*, the Sixth Circuit noted that "several factors . . . are helpful in determining whether a land-use regulation has imposed a substantial burden on a religious institution," including the adequacy of the institution's current location, other alternatives to the location sought, whether the institution had a reasonable expectation that it could locate in the property for which it is seeking approval, and whether seeking an alternative location would entail delay, uncertainty and expense." 858 F.3d at 1004 (quotation and internal punctuation omitted); *see also id*. at 1004-06; *Fortress Bible Church v. Feiner*, 694 F.3d 208, 219-20 (2d Cir. 2012) (holding that town's actions preventing building of church imposed substantial burden, where church's current facilities were inadequate, and town's offer to entertain a modified plan was disingenuous); *Int'l Church of the Four-Square Gospel v. City of San Leandro*, 673 F.3d 1059, 1069-70 (9th Cir. 2011) (overturning grant of summary judgment on substantial burden question where church had presented evidence that it needed a large site, that alternatives to the chosen site were inadequate, and where searching further would entail "delay, uncertainty, and expense" that could hinder the congregation's religious exercise); *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005) (substantial burden in denial of application to allow growing church to build larger facility on land it purchased, where search for alternative would entail "delay, uncertainty, and expense").

The Tenth Circuit did not reach the substantial burden issue in *Rocky Mountain Christian Church v. Board of County Commissioners*, 613 F.3d 1229 (10th Cir. 2010). However, the trial court in that case deemed a number of impacts sufficient to establish a substantial burden, including overcrowding in Sunday school classes, a need to shorten the worship services and hold more of them, and space constraints limiting adult education courses, visiting speakers, and

outreach to new members, among others. *Rocky Mountain Christian Church*, 612 F. Supp. 2d at 1172; *see also Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1226-28 (C.D. Cal. 2002) (finding substantial burden where church demonstrated need for more space to accommodate growing congregation and provide the numerous ministry programs it sought to provide, and holding that "beyond the fundamental need to have a church, [plaintiff] has shown a religious need to have a large and multi-faceted church").

B. Application to this case.

St. Rose has produced extensive evidence showing that the denial of its land use application for the Meeting House imposes a substantial burden on its religious exercise.

First, it has presented abundant evidence of the need for extra space. St. Rose has produced evidence that it is "in need of additional space to alleviate crowding and scheduling conflicts . . . to better facilitate religious programs and meetings for its congregation," (Pl.'s Br. in Supp. of Partial Summ. J., Dkt. No. 42 at 15), and that it would use the Meeting House for "youth and adult religious education, youth groups, meetings for church activities, and church business meetings." (Pl.'s Compl. at ¶58, Dkt. No. 1.) Father Fongemie testified that space for youth education in St. Rose's current facilities are at "maximum capacity." (Fongemie Dep., Dkt. No. 46-3 at 36:10-23; *see also id*. at 33:15-20; *id*. at 181:22-182:14.) In addition, Father Nolan testified that there are more church groups "wanting to meet on Friday, Saturday[,] and Sunday than we have capacity to accommodate," (Nolan Dep., Dkt. No. 42-3 at 41:11-23), and that other activities designed to reach the broader community have to be curtailed. (*Id*., Dkt. No. 46-4 at 78:11-80:25.)

Mission Woods suggests that the denial of St. Rose's land use application is just an "inconvenience" that the Church can solve by using its building more efficiently. (Def.'s Br. in

Supp. of Summ. J., Dkt. No. 40 at 28-29; *id*. at 6 (SOF No. 31).) But as both Father Nolan and Father Fongemie testified, the Church building already operates at maximum capacity, and there is no evidence to support Mission Woods' contention that St. Rose can shift one group that is meeting in a room at maximum capacity to another room that is also in use and at maximum capacity. (Fongamie Dep., Dkt. No. 46-3 at 36:10-23; *id*. at 33:15-20; Nolan Dep., Dkt. No. 42-3 at 74:2-18.)

Mission Woods spends much time in its opposition memorandum arguing that there is no real need for St. Rose to have additional space, and therefore, there is no substantial burden on its religion. (Def.'s Br. in Opp., Dkt. No. 46 at 38-40.) Yet a few pages later, in arguing for why it has a compelling interest in preventing use of the Meeting House, Mission Woods contends that the Meeting House could have over 115 people in it day and night creating noise, traffic, parking, and safety issues on West 51st Street.[5] (*Id*. at 42-44.) But the City cannot have it both ways. If there are as many people who would use the Meeting House as Mission Woods fears, then the City has conceded that there would be a great deal of religious exercise curtailed if the Meeting House is not allowed to operate, and has thus effectively conceded that a substantial burden has been imposed on St. Rose. What narrowly tailored measures might be imposed to address noise, traffic, and excessive use of the facility, if such concerns are supported by the facts, is a separate question that Mission Woods is required to prove under the compelling governmental interest inquiry once a substantial burden on religious exercise is established. 42 U.S.C. § 2000cc-2(b).

Second, in addition to presenting considerable evidence of the need for more space, St. Rose has presented similarly detailed evidence showing how it would be burdened by being

[5] As discussed at pages 15-16 below, the Church estimates a much lower number: typically 20 to 36 attendees at events, with 60 to 80 once a week during Mass.

denied this particular property. St. Rose planned to operate the Meeting House as part of the Church campus. (Fongemie Dep., Dkt. No. 42-4 at 33:15-18, 182:15-23; *see also* Nolan Dep., Dkt. No. 46-4 at 180:16-23.) Because of the lack of available real estate in Mission Woods, the Meeting House is virtually the only property sufficient to meet St. Rose's needs. (*See* Nolan Dep. at 131:8-132:19, attached as Ex. 1 to App'x.) The Meeting House is right next to St. Rose's parking lot; indeed, it is less than a minute walk from St. Rose's sanctuary to the back of the property. (*Cf.* Pl.'s Compl., Dkt. No. 1 at ¶57; *see also* Ex. F to Pl.'s Compl., Dkt. No. 1.) St. Rose parishioners can easily walk between the Church's sanctuary and the Meeting House without ever having to use the public sidewalk, and can avoid walking down West 51st Street altogether. (Tietze Dep. at 33:4-11, attached as Ex. 2 to App'x; *see also* Dunn Dep., Dkt. No. 40-10 at 40:21-41:10.)

Before purchasing the Meeting House, St. Rose did consider purchasing the abandoned Westwood Christian Church property, which is located directly across Rainbow Boulevard from St. Rose. (Nolan Dep. at 131:8-132:19, attached to Ex. 1 to App'x.) But that property was not a suitable alternative to the Meeting House. The building would have required extensive renovation and ongoing maintenance, which made it cost-prohibitive for St. Rose. (*Id.*); *see also Sts. Constantine*, 396 F.3d at 901 (noting that requiring a church to use "a lot more effort . . . than . . . calling up some real estate agents" was evidence of a substantial burden). Moreover, the purchase of Westwood Christian Church would have required parishioners to walk across Rainbow Boulevard, a busy four-lane parkway, which would have raised additional traffic and pedestrian safety issues.

St. Rose submitted significant evidence that it reasonably chose this house for the site of its Meeting House, and that it had a reasonable expectation that Mission Woods would grant its

land use application based on the fact that churches and synagogues are permitted uses under the Mission Woods City Code. Indeed, houses of worship are *only* allowed in residential zones such as this one. (Pretrial Order, Dkt. No. 37 (Stipulated Facts Nos. 24-26); *see also* Def.'s Br. in Supp. of Summ. J., Dkt. No. 40 at 8 (SOF Nos. 48-50)

There is no dispute that Mission Woods' denial of St. Rose's land use application was absolute, another factor courts consider in evaluating substantial burden. (*See* Pl.'s Reply in Supp. of Partial Summ. J., Dkt. No. 51 at 6; *see also* Def.'s Br. in Supp. of Summ. J., Dkt. No. 40 at 12, 17 (SOF Nos. 66, 92).) Under Kansas law, Mission Woods could have unilaterally imposed conditions on the use of the Meeting House, such as restricting parking on West 51st Street, as an alternative to outright denial of St. Rose's land use application, but there is no evidence that the City considered that possibility. K.S.A. § 12-755(a)(5) (stating that a "governing body may adopt zoning regulations which may include . . . provisions which provide for the issuance of special use or conditional use permits"); *see also Westchester Day Sch.*, 504 F.3d at 352 (finding substantial burden where village did not consider alternatives to complete denial of church's request to build new facilities); *Bethel World Outreach Ministries*, 706 F.3d at 558 (finding it "significant" in substantial burden analysis that county government "completely prevented" church from building new facilities on its property).

St. Rose has presented abundant evidence suggesting that Mission Woods' denial has imposed a substantial burden on its religious exercise, and the City has failed to show that there is no genuine issue of material fact on this issue. The Court should therefore deny Mission Woods' motion for summary judgment unless the City is able to show that no factual dispute exists that it has a compelling governmental interest in imposing a substantial burden on St.

Rose's religious exercise and that it has pursued it in the least restrictive way. This, the City cannot do, as discussed below.

II. Mission Woods has not shown that it is entitled to summary judgment on the question of whether its denial of St. Rose's application was the least restrictive means of furthering a compelling governmental interest.

A. The RLUIPA standard for compelling governmental interest and least restrictive means.

RLUIPA makes it unlawful for a municipality to impose a substantial burden on religious exercise through land use regulations unless it establishes that imposing such burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000cc(a)(1)(A)-(B).

A "compelling governmental interest" means an interest of the highest order. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972) (in the First Amendment context, compelling governmental interest includes abating "substantial threat[s] to public safety, peace or order"); *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 138 F. Supp. 3d 352, 418-19 (S.D.N.Y. 2015) (applying *Yoder* standard in case alleging violation of RLUIPA and Free Exercise). To be a compelling governmental interest, a government concern must be "grounded on more than mere speculation, exaggerated fears, or post-hoc rationalizations." *West v. Grams*, 607 F. App'x. 561, 567 (7th Cir. 2015) (quotation omitted). "Congress borrowed its language from First Amendment cases applying perhaps the strictest form of judicial scrutiny," and "[t]hat test isn't traditionally the sort of thing that can be satisfied by the government's bare say-so." *Yellowbear v. Lambert*, 741 F.3d 48, 59 (10th Cir. 2014); *id.* at 58 ("[F]actually unsupported 'post-hoc rationalizations' aren't the stuff of summary judgment victories in RLUIPA cases (or in most any other).").

Even where a RLUIPA defendant can show it has a compelling governmental interest, such defendant is further required to prove that it has used the least restrictive means possible to advance that interest. *Yellowbear*, 741 F.3d at 56-57; *see also Hobby Lobby*, 723 F.3d at 1143 (same standard under RFRA). To meet this heavy burden, a defendant "must show that there are 'no other alternative forms of regulation' which would fulfill the state interest" that the municipality asserts is compelling. *Murphy v. Zoning Comm'n of Town of New Milford*, 148 F. Supp. 2d 173, 190 (D. Conn. 2001).

B. Application to this case.

Mission Woods contends that the Meeting House, if approved, implicates compelling governmental interests because it would lead to increased noise and increased traffic on West 51st Street, which would create parking issues and affect pedestrian safety. (Def.'s Br. in Supp. of Summ. J., Dkt. No. 40 at 30-32.) Mission Woods makes no showing, however, that these alleged concerns rise to the level of a compelling governmental interest that justified the denial of St. Rose's application.

While traffic and parking can certainly implicate pedestrian safety issues, mere generalized concerns about traffic and parking are insufficient to prove a compelling governmental interest. *E.g.*, *Westchester Day Sch.*, 504 F.3d at 353 ("The Village claims that it has a compelling interest in enforcing zoning regulations and ensuring residents' safety through traffic regulations. However, it must show a compelling interest . . . in the particular case at hand, not a compelling interest in general.") (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432 (2006)); *see also Reaching Hearts Int'l, Inc. v. Prince George's Cnty.*, 584 F. Supp. 2d 766, 788 (D. Md. 2008) ("A 'compelling interest' is not a

general interest but must be particular to a specific case."), *aff'd*, 368 F. App'x 370 (4th Cir. 2010) (per curiam).

St. Rose addressed the traffic, parking, and pedestrian safety concerns raised by the City Council and residents in public hearings on the land use application for the Meeting House. In two public hearings, St. Rose presented a traffic study by a traffic engineer, using two standard traffic engineering methodologies, which showed that the Meeting House would only generate 25 additional car trips (12 to 13 cars) to St. Rose at peak times and 18 additional car trips (9 cars) on a typical weekday. (RCAKC-00135-36, Dkt. No. 47-17; *see also* City MW 0704-05, Dkt. No. 51-3.)

In response, Mission Woods did not present any evidence to substantiate that parking or traffic on West 51st Street would pose a safety concern. It did not produce its own analysis or traffic study that controverted the statements of St. Rose's traffic engineer. (Fisher Dep., Dkt. No. 40-2 at 48:17-23.) Nor did it contend that St. Rose's traffic engineer failed to rely upon widely accepted traffic engineering standards and methodologies in producing the study. (Tietze Dep. at 40:15-18, attached as Ex. 2 to App'x.) Mission Woods only argues that "human nature" supports its conclusion that parishioners will drive and park on West 51st Street because it's close to the Meeting House. (Def.'s Br. in Opp., Dkt. No. 46 at 47.) But that argument is based upon "mere speculation," and thus, Mission Woods' parking, traffic, and pedestrian safety concerns cannot be compelling interests under RLUIPA. *West*, 607 F. App'x at 567; *Rich v. Secretary Dep't of Corrections*, 716 F.3d 525, 533 (11th Cir. 2013).

Further, St. Rose has introduced evidence that the Meeting House would not create parking issues on West 51st Street because the house would be designed to be accessed from St. Rose's campus. St. Rose has 37 spaces in its own parking lot, and agreements with the City of

Westwood, Kansas, the University of Kansas Medical Authority, and Shawnee School District No. 512 for additional parking, giving the Church a total of 275 total parking spaces. (Pretrial Order, Dkt. No. 37 at 3 (Stipulated Fact No. 12); *see also* (Pl.'s Br. in Supp. of Partial Summ. J., Dkt. No. 42 at 6 (SOF No. 25).) The architectural renderings submitted with St. Rose's land use application made clear that the entrance to the Meeting House would be in the back of the property toward the Church. (Tietze Dep. at 33:4-11, attached as Ex. 2 to App'x; *see also* Dunn Dep., Dkt. No. 40-10 at 40:21-41:10.) The renderings show that a pathway would connect St. Rose's sanctuary and parking lot to the Meeting House, which parishioners could use without ever having to drive or park on West 51st Street. St. Rose made this representation in public hearings on the application, which the City Council took to be true. (*See* Tietze Dep. at 33:4-11, attached as Ex. 2 to App'x.)

Mission Woods also argues that use of the Meeting House would lead to increased noise because the property could legally accommodate up to 115 people inside. (Def.'s Br. in Supp. of Summ. J., Dkt. No. 40 at 31-32.) Mission Woods says that St. Rose representatives were unclear and gave inconsistent representations about the proposed use of the Meeting House, so City officials reasonably assumed that the Meeting House would be used to its maximum occupancy. (Def.'s Reply in Supp. of Summ. J., Dkt. No. 50 at 11-12; *see also* Def.'s Br. in Supp. of Summ. J., Dkt. No. 40 at 32.) This is not supported by the evidence.

In its land use application, St. Rose represented that the "approximate average use [at the Meeting House would] be two to three groups meeting simultaneously with 10 or 12 people in each"—in other words, between 20 and 36 people. (RCAKC-00626, Dkt. No. 47-4.) In public hearings on the application, St. Rose represented that the average number of occupants at the Meeting House would be around 25, which is within the numerical range that the Church

represented in its land use application. (City MW 0705, Dkt. No. 51-3.) St. Rose has also represented in this litigation that the maximum occupancy on a given day at the Meeting House would range between 6 to 30 people, except for Sunday, where the number of occupants could reach 60 to 80 parishioners between each of the Church's three Masses. (Fongemie Dep., Dkt. No. 47-2 at 182:15-23; *see also* Nolan Dep., Dkt. No. 47-1 at 211:17-212:15.) Mission Woods does not present any evidence to support its conclusion that, contrary to St. Rose's representations, the Meeting House would be used at the legal maximum occupancy of 115 people seven days a week and thereby generate excessive noise.

Mission Woods' contention that denial of St. Rose's land use application was the least restrictive means of pursuing its compelling governmental interests, and that there is no genuine dispute on this issue, should be rejected. (Def.'s Br. in Supp. of Summ. J., Dkt. No. 40 at 32.) Mission Woods argues that its denial was justified because St. Rose "flatly refused to agree" to time and occupancy limits on the Meeting House. *Id*. But the issue is not whether St. Rose rejected a particular alternative or not, but whether Mission Woods has proven that *no* such alternative exists. As the Tenth Circuit explained in *Yellowbear*, "[an applicant's] rejection of alternatives the *government* offers doesn't address the question whether *his* suggested alternatives suffice to achieve the government's asserted compelling interest." *Id*. (emphasis in original). RLUIPA therefore requires Mission Woods, not St. Rose, to show why the Church's "suggested alternatives" do not "suffice to achieve the government's asserted compelling interest." *Id*. at 63; *see also Murphy*, 148 F. Supp. 2d at 190.

Under the *Yellowbear* standard, Mission Woods cannot meet its burden. If Mission Woods had legitimate concerns about preserving the residential nature of West 51st Street, then it could have addressed such concerns in a less restrictive way by conditionally approving the

application. *Soc'y of Am. Bosnians & Herzegovinians v. City of Des Plaines*, Nos. 13 C 6594, 15 C 8628, 2017 WL 748528, at *9 (N.D. Ill. Feb. 26, 2017) (summary denial of application is not the least restrictive means where the ability to impose conditions exists and the protection of the government's compelling interest could have been accomplished through conditions); *see also Westchester Day School*, 504 F.3d at 352 (finding substantial burden where Jewish school could not reallocate space in its existing building and local government denied school's application without considering conditions). For example, the City Council could have approved the application subject to the condition that no parishioner park on West 51st Street. That is something St. Rose would have clearly agreed to since it offered to instruct parishioners not to park on West 51st Street repeatedly in public hearings on its application. (City MW 0704-05, Dkt. No. 51-3; *see also* City MW 0721, Dkt. No. 51-4; RCAKC 00002, Dkt. No. 51-6.).[6]

Alternatively, the City could have enforced its neutral, generally applicable noise, traffic, and parking ordinances against St. Rose parishioners. (City MW 0720, Dkt. No. 51-4.) Under those ordinances, Mission Woods could directly regulate noise, traffic, and parking without controlling the number of people present in the Meeting House. *See Murphy*, 148 F. Supp. 2d at 190 (finding that imposition of a cap on participants in religious activity was not the least restrictive means of addressing traffic concerns when city government could have "directly regulate[d] the increased volume of traffic"); (City MW 005310, Dkt. No. 42-6 (City Code excerpts).) Yet Mission Woods fails to demonstrate why the application of its ordinances could not address its purported concerns. *Yellowbear*, 741 F.3d at 63 (to show least restrictive means, "the government's burden here isn't to *mull* the claimant's proposed alternatives, it is

[6] Relatedly, since parking is legal on West 51st Street, Mission Woods could have also considered restricting parking to residents of West 51st Street and their guests by using parking signs or parking permits while avoiding the need to impose conditions on St. Rose's use of the Meeting House altogether.

to *demonstrate* the claimant's alternatives are ineffective to achieve the government's stated goals") (emphasis in original). Although Mission Woods asserts that its generally applicable ordinances are insufficient to address the purported problems that would result from the Meeting House, City Councilmember Fisher and City Planning Commissioner Ralls conceded it is possible that they are. (Def.'s Br. in Opp., Dkt. No. 46 at 44-45; *see also* Fisher Dep., Dkt. No. 40-2 at 79:13-16, 82:13-83:1; *see also* Ralls Dep., Dkt. No. 46-11 at 29:17-30:9.)

Even if Mission Woods demonstrated that existing ordinances were insufficient, the City Council had two other alternatives to complete denial. As it has done previously in other instances, the City Council could have considered amending its ordinances to account for the anticipated use of the Meeting House. (*See* City MW 02874-76, Ex. H-7 to Tietze Decl., Dkt. No. 40-8.) The City Council, for example, amended its noise ordinance to accommodate Pembroke Hill School after residents on West 51st Street complained about noise coming from the School's outdoor tennis courts and soccer fields. (Fisher Dep., Dkt. No. 40-2 at 78:8-79:3; *see also* City MW 02874-76, Ex. H-7 to Tietze Decl., Dkt. No. 40-8.) The amended noise ordinance incorporated time restrictions on use of the tennis courts and soccer fields that Pembroke Hill School negotiated. (City MW 02874-76, Ex. H-7 to Tietze Decl., Dkt. No. 40-8.) The City Council, again, also could have imposed conditions on St. Rose's use of the Meeting House in accordance with Kansas law, which gives municipalities great flexibility to impose appropriate conditions to mitigate the impacts of land use if reasonable and supported by evidence. K.S.A. § 12-755(a)(5); *see also Water Dist. No. 1 of Johnson Cnty. v. City Council of City of Kansas City*, 871 P.2d 1256, 1262 (Kan. 1994) (noting that a city may impose conditions that are "rationally related" to its asserted objectives and "not unreasonable or oppressive").

Thus, just as Mission Woods has not demonstrated a lack of genuine issues of material fact on the substantial burden question, the City has not done so with regard to its burden to prove that its actions were the least restrictive means of furthering a compelling governmental interest.

CONCLUSION

For the foregoing reasons, Mission Woods' request for summary judgment on St. Rose's substantial burden claim should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the United States District Court for the District of Kansas through the CM/ECF system, which will send a Notice of Electronic Filing to registered CM/ECF participants.

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