UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

CONGREGATION ETZ CHAIM; ET AL.,

Plaintiffs,

vs.

CITY OF LOS ANGELES,

Defendant.

Case No. CV10-1587 CAS (Ex)

ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION AND BACKGROUND

This action arises out of a decade-old dispute between Congregation Etz Chaim ("the Congregation") and its neighborhood home-owners in the Hancock Park area of the City of Los Angeles. It has spawned numerous administrative, state, and federal court proceedings directed to the question of whether members of the Congregation may conduct religious services at a house located at 303 South Highland Avenue (the "Highland property") in Los Angeles, California (the "City"). The facts and procedural history of the dispute are known to the parties and summarized in this Court's May 5, 2009 order dismissing without prejudice the related matter of Congregation Etz Chaim, et al. v. City of Los Angeles, No. CV 97-5042 CAS (Ex) ("Congregation I"), on the ground that the Congregation's claim under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc et seq. ("RLUIPA"), was not prudentially ripe for judicial decision. Specifically, the Court dismissed the related action, "so as to

permit the Congregation to refile its RLUIPA claim if the City [denied] the Congregation's second [conditional use permit ("CUP")] application, or upon a more definite showing of hardship to the Congregation due to enforcement of the denial of the first CUP application." May 5, 2009 Ct. Order at 16.

On October 9, 2009, the Zoning Administrator ("ZA"), on behalf of the City, issued its decision denying the Congregation's second CUP application. The Central Area Planning Commission ("CAPC") denied the Congregation's appeal from this decision on February 24, 2010. Thereafter, on March 3, 2010, plaintiffs Congregation Etz Chaim, including the individual members thereof, and Congregation Etz Chaim of Hancock Park, a California non-profit corporation, filed the instant suit against the City alleging that the City's denial of their second CUP application violates RLUIPA. The Congregation seeks a declaration that the City's application of Municipal Code § 12.24(V)(9), which requires houses of worship to obtain a CUP, is invalid because it violates RLUIPA. Further, the Congregation requests an injunction prohibiting the City from enforcing the zoning ordinance against it and setting aside the City's denial of the second CUP application as null and void under RLUIPA; and requests that damages be awarded. Compl. ¶ 14. Further, the Congregation alleges that the action is ripe for judicial review, pursuant to this Court's May 5, 2009 order, given that the City's administrative appeal process is final. Id. ¶ 13.

On March 28, 2011, the City filed a motion for summary judgment, or, in the alternative, partial summary judgment. On April 4, 2011, the Congregation filed an opposition to defendant's motion. On April 11, 2011, the City filed a reply in support of its motion.

On March 28, 2011, the Congregation filed a motion for partial summary judgment with respect to the issue of the City's liability on its first and second claims. On April 4, 2011, the City filed an opposition to the Congregation's motion. On April 11, 2011, the Congregation filed a reply in support of its motion.

On April 27, 2011, the Court accepted the submission of an amicus curiae brief by Marci A. Hamilton on behalf of the League of Residential Neighborhoods. On April 28, 2011, the United States of America filed a statement of interest in support of plaintiffs' motion for partial summary judgment and in opposition to defendant's motion for summary judgment. On May 9, 2011, the City filed a response to the United States' statement of interest. On May 11, 2011, the Congregation filed a response to the amicus curiae brief.

Plaintiffs' motion for partial summary judgment and defendant's motion for summary judgment are currently before the Court.[1]

II. LEGAL STANDARD

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each cause of action upon which the moving party seeks judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

If the moving party meets its initial burden, the opposing party must then set out specific facts showing a genuine issue for trial in order to defeat the motion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); see also Fed. R. Civ. P. 56(c), (e). The nonmoving party must not simply rely on the pleadings and must do more than make "conclusory allegations [in] an affidavit." Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990); see also Celotex, 477 U.S. at 324. Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish

[1]On April 11, 2011, the Congregation filed a request to strike the Declaration of Lloyd Zola in support of defendant's opposition to plaintiffs' motion for partial summary judgment. On April 19, 2011, the City filed a request to strike plaintiffs' documents filed on April 18, 2011 on the basis that they were untimely filed. The Court denies both requests to strike.

the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322; see also Abromson v. Am. Pac. Corp., 114 F.3d 898, 902 (9th Cir. 1997).

In light of the facts presented by the nonmoving party, along with any undisputed facts, the Court must decide whether the moving party is entitled to judgment as a matter of law. See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 631 & n.3 (9th Cir. 1987). When deciding a motion for summary judgment, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citation omitted); Valley Nat'l Bank of Ariz. v. A.E. Rouse & Co., 121 F.3d 1332, 1335 (9th Cir. 1997). Summary judgment for the moving party is proper when a rational trier of fact would not be able to find for the nonmoving party on the claims at issue. See Matsushita, 475 U.S. at 587.

III. DISCUSSION

The parties each move for summary judgment on the issue of whether the City's denial of plaintiff's application for a CUP violated RLUIPA.[2] Plaintiff challenges the City's denial of a CUP pursuant to three provisions of RLUIPA. The first, 42 U.S.C. § 2000cc(a)(1) (the "Substantial Burden Provision") provides: "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

[2]There does not appear to be any dispute that RLUIPA applies to the situation before the Court, nor could there be. See International Church of the Foursquare Gospel v. City of San Leandro, 2011 WL 1518980 (9th Cir. April 22, 2011) at *6 ("As a preliminary matter, RLUIPA applies if ' . . . [the] burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes ... individualized assessments of the proposed uses for the property involved.' The City's treatment of the Church's applications constitutes an 'individualized assessment.' Further, the City's Zoning Code undeniably is a 'system of land use regulations' within the meaning of RLUIPA because it is a system of 'zoning [laws] ... that limits or restricts a claimant's use or development of land.") (Internal citations omitted).

the government demonstrates that imposition of the burden on that person, assembly or institution–(A) is in furtherance of a compelling interest; and (B) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1). The second two provisions, which arise under a separate subsection of RLUIPA entitled "Discrimination and exclusion," provide: "(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. [(the "Equal Terms Provision")]; (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. [(the "Non-discrimination Provision")]." 42 U.S.C. § 2000cc(b)(1)-(2). Plaintiffs challenge the City's action under the Substantial Burden provision, the Equal Terms Provision and the Non-discrimination Provision.

A. Plaintiff's § 2000cc(a) Claim

To the extent plaintiff's claim arises under section 2000cc(a)(1), the City argues that the denial of the CUP application did not substantially burden plaintiff's religious exercise. City's Mot. at 2. The City contends that plaintiff cannot meet the standard laid out in Midrash Sephardi, Inc. v. Town of Surfside, 366 F. 3d 1214, 1227 (11th Cir. 2004) (cited with approval in Guru Nanak Sikh Society of Yuba City v. County of Sutter, 456 F. 3d 978, 988 (9th Cir. 2006)), which provides that "a 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct." Id. at 3, quoting Midrash, 366 F. 3d at 1227. In this case, the City argues that the Congregation's only need for the CUP at issue stems from "convenience–[the building's] relative close proximity to the residences of its members." City's Mot. at 6.

The City argues that the denial of the CUP therefore caused only an "inconvenience," which does not rise to the level of a substantial burden. Id. The City contends that "courts within the Ninth Circuit have been reluctant to find that a denial of an application to use a particular property as a house of worship imposes a substantial burden on religious exercise when there are alternative sites within a short distance." Id. Moreover, "[t]he City disputes the Congregation's assertion that it has not been able to find an alternate location. . . . the Congregation has only looked for alternate locations once, and that was between 1994 and 1995. That effort resulted in the purchase of the current property. It has not looked for alternate locations since. Whereas recently, Lloyd Zola, a land use planner, was able to find 65 properties on La Brea Avenue ranging in size from about 1,500 to 14,000 sq. feet, including several that were for lease or sale. (See Declaration of Lloyd Zola in Support of City's Opposition to MPSJ, ¶¶ 14-23 and Exhibit A to Zola Declaration, incorporated here by reference.) Therefore, if the Congregation has not been able to find an alternate location, it is because it has not bothered to look in over a decade." City's Reply at 8.[3]

The City further argues that even if the Court were to find that the denial did impose a substantial burden, that the action taken was narrowly tailored to address a compelling government interest. Id. at 7. The City argues that its compelling interest

[3]The Congregation argues that this declaration should be stricken, because the City "failed to disclose any expert witnesses or provide any expert reports before the discovery cut-off." Congregation's Reply at 15, n. 8. Moreover, the Congregation argues, "it is entirely unclear on what basis Mr. Zola can opine about what is suitable for the Congregation. He has no personal knowledge of the Congregation's needs, including the structure it requires to accommodate its religious practices, and its disabled members, or of the congregants' physical inability to walk to La Brea. . . . As the Ninth Circuit recognized in *International Church*, it is up to the Congregation, and not the City to determine what is suitable." Id. at 14-15. Additionally, the Congregation argues, this contention fails to take into account "the religious significance of 303 S. Highland [itself]. . . . Besides the fact that the Congregation has prayed at 303 S. Highland for 15 years, in good faith reliance on the Settlement Agreement and the understanding of the City, this location was consecrated in a particularly holy manner." Id. at 16.

was to "uphold[] its Comprehensive Zoning Plan and [to] protect[] the health, safety and welfare of . . . its residents." Id. at 12. In support of its argument, the City outlines the findings made in reaching the decision to deny the CUP, specifically that the CUP raised parking, traffic, and safety concerns. Id. at 9-12. For example, the ZA found that the building itself had been expanded since the original denial of the Congregation's application, but that the number of parking spaces had simultaneously been reduced to two. Id. at 10. "Based on the above and due to the ambiguity surrounding the size of the assembly . . . the [ZA] [was] unable to determine the number of required parking spaces . . . the parking requirement for auditoriums and churches is that for every five fixed seats, one space should be provided while one space is required for every 35 square feet of floor area for the auditorium and or sanctuary area. The sanctuary area has not been clearly defined herein." Id., citing AR 770. "[T]he lack of adequate parking raises concerns regarding traffic and parking congestion." City's Mot. at 11, citing AR 771. "The ZA pointed out that a greater public has voiced strong written and verbal opposition . . . arguing that the use as proposed will substantially increase traffic and parking problems resulting from banquet operations, valet parking, regularly scheduled religious activities, other uses of the site, excessive floodlighting . . . and unclear use of the basement." City's Mot. at 11, citing AR 776. The City also reports that the ZA found that "the use would be materially detrimental to the character of the development in the immediate neighborhood, which "is a well established single family area recently awarded an HPOZ [Historical Preservation Overlay Zone] designation." City's Mot. at 12.

The action taken, the City argues, was the least restrictive means of furthering these interests. Id. The City argues that it could not have taken any more limited action because the Congregation requested a variance for reduced parking in connection with their request for a CUP. Id. at 13. The City argues that the ZA could not have approved the "institutional use of the Property" proposed by the Congregation with the proposed

reduced parking, particularly because such a variance would run with the land and there could "be no assurance of a future sale of property to another religious group who might not have such a nearby residential congregation." Id.

Plaintiffs argue that they are entitled to summary judgment because the City's repeated denial of their applications for a CUP does constitute a substantial burden on their religious exercise, and because the City cannot show that the denial of a CUP was in furtherance of a compelling governmental interest. Even if it could, the Congregation argues, the City cannot show that it was the least restrictive means of furthering that compelling governmental interest. Congregation's Mot. at 19.

The Congregation disputes the City's characterization of the issue as one of "convenience." Congregation's Opp. at 10. Plaintiffs argue that there are "no suitable alternatives. Even if all the congregants were physically able to walk the additional distance to the commercial zone (it is undisputed that they are not) there is no other synagogue in the commercial zone that adheres to this Congregation's particular sect of Chassidism, or which holds its services in Yiddish. Further, it is undisputed that there are no ready and financially feasible alternatives in the commercial zone, or anywhere, as the Congregation spent $1,300,000 in reliance on the Settlement Agreement and has no more money left to buy any property unless and until 303 S. Highland is sold."[4] Id. at

[4]The City argues that its "good faith effort at settlement cannot be used as proof of a prior inconsistent position. (See F.R.E., Rule 408)." City's Opp. at 10. The Congregation argues that this contention is "meritless. The Settlement Agreement, which was defended vigorously by the City for 7 years, is not privileged and is a ***matter of public record***. The Settlement Agreement and the limited scope of use it allowed were expressly invoked as a basis for seeking the second CUP, and the request to continue its terms was before the ZA. The City never objected, nor could it, as it agreed that this was the chosen course upon remand. To repudiate the limited use the City allowed as ***legal*** under the LAMC and now to assert that the fact of the Settlement Agreement and the City's defense of it must be wiped from the record is the ultimate in bad faith. FRE 408 is no bar. These are not confidential negotiations. The fact and terms of the Settlement Agreement are

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Moreover, plaintiffs argue that the standards put forth by the City are inapplicable to the instant situation and that the applicable standard to this dispute in the Ninth Circuit compels a finding of substantial burden. First, they argue, "*Guru Nanak* and *Grace Church*, which provide that the ***complete denial of a CUP without any reasonable expectation that one will be allowed constitutes a substantial burden***, govern this case." Id. at 10 (emphasis in original). The Congregation argues that there can be no reasonable expectation that any future applications will be granted. "In sum, the City denied the CUP on the basis that no single-family home in Hancock Park can be converted to religious use, even though the LAMC expressly permits it by CUP. In categorically denying the CUP, for the second time, repudiating the conditions the City agreed to in settlement, and refusing to consider any conditions to mitigate impacts, the City has indicated that the Congregation can never obtain a CUP at 303 S. Highland or anywhere in the R1 zone of Hancock Park." Congregation's Mot. at 16. Further, "*International Church* expressly rejected any contention that the denial of zoning permits to religious entities does not constitute substantial burden whenever 'other viable sites in the relevant jurisdiction ultimately exist[]' and it expressly reversed the district court's reliance on *San Jose Christian College v. City of Morgan Hill*, 360 F. 3d 1024, 1035 (9th Cir. 2004) . . . to reach the opposite conclusion. . . . The Ninth Circuit stated the applicable rule, which is 'that a burden need not be found insuperable to be held substantial' . . . . And when the religious entity 'has no ready alternatives, or where the alternatives require substantial 'delay, uncertainty, and expense,' a complete denial of the [religious institution's] application might be indicative of a substantial burden.'" Congregation's Opp. at 16, citing International Church, 2011 WL 50528 at *8.

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admissible to show the fact and scope of the Congregation's permitted and continuing use, and its good faith reliance on the City's approvals." Congregation's Reply at 20.

Further, the Congregation argues, the City has not demonstrated a compelling interest. To the extent that the City, in essence, is arguing that their compelling interest is to enforce their own zoning code, the Congregation argues this definition of a compelling interest would make "RLUIPA a nullity. Indeed, the Ninth Circuit in *International Church* rejected this reasoning and the finding of a compelling interest in preserving lands for industrial use simply 'because such preservation is required by the City's General Plan." Congregation's Opp. at 18, citing International Church, 2011 WL 50528 at *10-11. Moreover, the Congregation argues that "[w]hile the City may have a compelling interest in protecting health and safety, generalized and speculative concerns about traffic and parking are not compelling. No court has ever held that traffic or parking concerns where there is no ***evidence*** of any threat to public health or safety are compelling interests for purposes of RLUIPA." Congregation's Opp. at 18. Further, "[t]hat the City allows secular institutions with traffic and parking impacts in the HPOZ undercuts the strength of its interest." Congregation's Reply at 19. "Nor is the City's interest in preserving the pristine character and development of Hancock Park compelling. . . . The City's argument, again, nullifies RLUIPA–as if government interests in preserving the integrity of residential zones is sufficiently compelling to justify exclusion of religious assemblies and institutions then RLUIPA is meaningless." Congregation's Opp. at 20.

Even if the City could show that its interests were compelling, the Congregation argues that it cannot show that "a complete and unconditional denial" of their request was the least restrictive means to protect those interests. Id. at 21. "The City has failed to adduce any evidence whatsoever that there existed no alternatives other than an outright ban or that no conditions could have mitigated its concerns; nor ar the ZA's 'findings' evidence. It is undisputed that ZA failed to consider any alternatives or mitigating conditions whatsoever, including the ***six-car-per-weekday*** parking restriction the Settlement Agreement allowed, and that he failed to conduct any traffic or parking

studies. The City has failed to show how an outright ban on communal prayer by ***worshippers who walk to services***, the majority of whom the ZA found live within 3-5 blocks of the *shul* and would walk to services even if their faith did not demand it, narrowly furthers an interest in traffic." Id. at 22. With respect to the City's arguments regarding preservation of the HPOZ, plaintiffs contend that it is meritless because "the HPOZ regulates structures not use." Id. at 23. With respect to the City's concerns about the reduced parking, the Congregation argues that the reduction was undertaken with the City's permission, that the ZA incorrectly applied the parking requirements for a "full-blown institutional church use," and "the City has offered no explanation why the ZA failed to consider or impose condition[s] that would reduce parking needs." Id. at 24.

The Court concludes that plaintiffs are entitled to summary judgment on the issue of the City's liability with respect to their first claim. In reaching this conclusion, the Court first determines that the denial of the CUP did, in fact, impose a substantial burden on plaintiffs' religious exercise. The Court does not find compelling the City's argument that the possibility that the Congregation could find an alternative location precludes a finding of substantial burden, in light of the Ninth Circuit's decision in International Church rejecting this argument and holding that "a burden need not be found insuperable to be held substantial." International Church, 2011 WL 50528 at *8. The Court finds that the facts of the instant case are analogous to those considered in Grace Church and Guru Nanak. As in Grace Church, "[f]requently during the mandatory CUP process established by Defendants, [plaintiffs] experienced hostility to its application." Grace Church, 555 F. Supp. 2d at 1136. Also as in Grace Church, the relevant administrative body indicated that it either was not able to or would not apply RLUIPA, and denied the application based in part on a purported desire to comply strictly with the General Plan, despite the existence of multiple non-residential sites in the R-1 zone.

As in Guru Nanak, "the history . . .[of the Congregation's] application processes, and the reasons given for ultimately denying these application, to a significantly great extent lessened the possibility that future CUP applications would be successful." Guru Nanak, 456 F. 3d at 989. The City's reasons for denying the application and unwillingness to address their concerns through mitigating conditions rather than complete denial support the Court's conclusion. While the plaintiffs' two applications in Guru Nanak were for two different locations, the Court does not find this distinction relevant, as there are equally strong reasons, based on the procedural history of this case, to conclude that any future applications by the Congregation would also be rejected. As noted by the United States in its Statement of Interest, "the City denied the Congregation's second CUP for the same reasons it denied the first application–that it wanted to avoid a precedent for religious uses, that the use would infringe on the historic residential nature of the neighborhood, and that the use raised parking and traffic concerns. . . . The City also found that the property now did not have sufficient parking spaces, despite the fact that the City had required their removal . . . As a result, despite the fact that the municipal code expressly provides a way by which churches can locate in the R1 zone–by obtaining a CUP–the City has made abundantly clear that it will not allow a religious use to ever successfully obtain a CUP to locate in the R1 zone of Hancock Park, much like the futility emphasized by the Ninth Circuit in finding a substantial burden in Guru Nanak. RLUIPA was enacted to prevent exactly such actions." Statement of Interest at 4.

Moreover, the Court rejects the City's characterization of the burden on the Congregation as a mere "inconvenience." As described by the United States of America in its statement of interest: "Plaintiffs have demonstrated a substantial burden on their religious exercise. The Congregation has provided ample evidence that many of its congregants would be physically unable to walk farther to another location, as required by their religion. . . . The fact that the Congregation practices a unique Chassidic sect of

Judaism, and that the Congregation's rabbi is the only Witznitzer Rebbe in the country, means that the congregants and the rabbi will be particularly burdened if the Congregation is not permitted to continue operating at its current location." Id. at 3.

Additionally, the Court finds that the City has not met its burden to show that there is a compelling government interest, nor their burden to show that the action taken was narrowly tailored to address any such interest. To the extent that the City argues that it has an interest in strictly maintaining the residential nature of the neighborhood, this contention is undercut by the number of sites in the R-1 zone that are used for non-residential purposes, "which demonstrate that the City has not 'consistently and vigorously protected' that interest." Id. at 9. Moreover, the Court agrees with the Congregation that this approach would render RLUIPA a nullity. Additionally, while the City refers to its broad interest in protecting the health, safety and welfare of its citizens, and parking and traffic concerns in relation to those interests, they present no evidence "that any traffic or parking concerns actually existed, nor that such concerns could not be mitigated in such a way as to allow the Congregation's use at the subject property." Id. at 7.

In light of the foregoing, the Court GRANTS plaintiffs' motion with respect to their first claim.

B. Plaintiff's § 2000cc(b)(1) Claim

Plaintiffs argue that they are entitled to summary judgment on their Equal Terms Provision claim to the extent it alleges an as-applied challenge. While the Ninth Circuit has not yet construed this provision, leading to some uncertainty about the correct test to to be applied, plaintiffs cite a Central District case, Vietnamese Buddhism Study Temple in Am. v. City of Garden Grove, 460 F. Supp. 2d 1165 (C.D. Cal. 2006), which followed the Eleventh Circuit's test for as-applied challenges. Congregation's Mot. at 35-36. "Under this test, the Congregation bears the initial burden of persuasion to produce prima facie evidence to support a claim alleging an equal terms violation. If the

City's application of the LAMC to the Congregation is found to violate the equal terms provision, the denial may be upheld only if the City establishes that its denial was the least restrictive means of achieving a compelling government interest." Id. at 36.

The Congregation argues that it has made out a *prima facie* case based on the identification of numerous similarly situated secular uses that are permitted while its use was denied without consideration of potentially mitigating conditions. Id. at 36. "Even if this Court declines to find substantial burden, summary judgment is warranted because the record is undisputed that the City has treated the Congregation on less than equal terms with secular institutional uses in the R1 zone and other residential zones of Hancock Park. . . .By allowing nonreligious assembles [sic] and institutions to locate and operate in the residential zone, including the R1 zone, but refusing to approve the Congregation's continuing religious use in the residential zone, the City violated RLUIPA." Id. at 35. The Congregation lists these non-religious institutions, including the Wilshire Country Club, Los Angeles Tennis Club, and Marlborough School. Id. The Congregation argues that the uses it points to "as comparators are similarly situated because they are in Hancock Park's residential zone, and thus are not permitted to operate as a matter of right but instead must obtain a CUP pursuant to LAMC § 12.29. The Congregation's evidence shows that private schools including Marlborough and Yavneh Hebrew Academy obtained CUPs for nonreligious use, and the City does not dispute this. The Congregation's evidence shows that Los Angeles Tennis Club and Wilshire Country Club operate without a CUP, and the City does not dispute that. The Congregation's evidence shows that the City allows the British Consul General to hold regular gatherings without a CUP." Congregation's Opp. at 28. Further, plaintiffs argue, the City cannot establish that it had a compelling state interest or that it pursued the least restrictive means of achieving that interest, as discussed with respect to their argument regarding the Substantial Burden provision. Congregation's Mot. at 36.

Plaintiffs further argue that the LAMC violates the Equal Terms Provision on its face. Congregation's Reply at 25. "[T]he LAMC facially discriminates against religious uses to the extent secular assemblies and institutions, including parks, playgrounds, and community centers, as well as adult education classes, child day care services and homeless shelters are allowed in the R1 zone as a matter of right but churches and houses of worship are not." Id. "On its face § 12.08 categorically treats religious assemblies on less than equal terms to the extent it permits nonreligious assemblies to operate in the R-1 zones as a matter of right, and religious assemblies are excluded unless they obtain a CUP." Congregation's Opp. at 26.

The City argues that plaintiffs cannot make out a prima facie case for an as-applied challenge under strict scrutiny because the institutions they proffer as "comparators" are not similarly situated, because each of their uses has been approved on their respective sites since the 1920s.[5] City's Mot. at 19-22. The City further argues

[5] The Congregation argues in opposition that "[t]he age of the secular uses or the date they were approved has no bearing on whether they are similarly situated for purposes of RLUIPA." Congregation's Opp. at 29. The United States also argues that this reasoning should rejected, in part because "one of the stated purposes of RLUIPA was to prevent discriminating against new religious entities in favor of already established religious and nonreligious entities." Statement of Interest at 20. Similarly, the Congregation notes that "[i]t is significant to recognize that, at the time these secular assemblies and established churches were built in residential zones, Jews were not allowed to buy houses in Hancock Park." Congregation's Opp. at 29. The Congregation additionally argues that the distinction offered by defendant "ignores the undisputed fact that the Congregation is established, too, and that it sought continuation of a preexisting use that the City permitted expressly for 7 years and tacitly before that." Congregation's Reply at 22. The City argues that this contention is unavailing because "the referenced institutions were permitted in and around Hancock Park *ab initio*. . . . On the other hand, the Congregation's initial use of the Property as a synagogue or shul was illegal from the beginning in 1994 or 1995. Second, as previously discussed, under F.R.E. Rule 408, the Congregation is prohibited from using the Settlement Agreement to impeach the City or impugn its discretionary approval process. And finally, even if it were permitted to do so, the City should not be blamed or faulted for the Ninth Circuit's invalidation of the Settlement Agreement." City's Reply at

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that rational basis review is more appropriate because"L.A.M.C. § 12.24(W)(9) is . . . a neutral ordinance of general applicability." Id. at 18. The City argues that the statute is neutral because "a church or synagogue is not the only use not allowed by right in an R1 zone. The City's Comprehensive Zoning Plan similarly does not permit several non-religious uses in an R1-1 zone by right, but only by a CUP process. These include auditoriums (L.A.M.C. § 12.24(U)(2)), educational institutions, (L.A.M.C. § 12.24(U)(6)), fraternity or sorority houses (L.A.M.C. § 12.24(W)(21), private clubs (L.A.M.C. § 12.24(W)(35))." Id. Therefore, the City argues, "rational basis review is the appropriate standard for evaluating the constitutionality of the ordinance in question." Id. at 23, citing Centro Familiar, 615 F. Supp. 2d at 995-996, 1000 ("A zoning ordinance does not violate the equal terms provision, even if it permits some secular assemblies or institutions and exclude religious assemblies . . . so long as there is a neutral and generally applicable principle for doing so . . . . Since the equal terms provision codifies free exercise principles, rational basis review must be applied where the government shows that the unequal treatment identified by a religious organization actually stems from a neutral and generally applicable principle."). The City argues that there are "[e]ach of the institutions identified above is located at a site with a long history of institutional use. . . .This reason alone qualifies as a legitimate, neutral and generally applicable land use principle behind what appears to be disparate treatment of these institutions as compared to the congregation." Id. at 23-24.

The City also argues that plaintiffs cannot support a facial challenge to the ordinance, "not only because it is not in the Complaint, but also for the fact that . . . church use is not the only use not permitted by right in the R-1 zone." City's Reply at 13.

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The Court finds that plaintiffs have sufficiently made out a prima facie case of unequal treatment.[6] Defendant's only contention in response to plaintiffs' case is that the "comparators" listed by plaintiffs are not similarly situated because their uses of the respective sites are longstanding. The Court concludes that this is a distinction without a difference for purposes of RLUIPA. The Court reaches this conclusion in part because a contrary determination would seem to undercut the purposes of RLUIPA. "[O]ne of the stated purposes of RLUIPA was to prevent discriminating against new religious entities in favor of already established religious and nonreligious entities." Statement of Interest at 20, citing H.R. Rep. 106-219 at 19. For the reasons discussed above with respect to plaintiffs' Substantial Burden claim, the Court concludes that defendant has not shown a narrowly tailored action to further a compelling government interest. Moreover, even if the Court were to apply rational basis review, the Court finds that the City has not adequately demonstrated the existence of a "neutral and generally applicable principle" behind their action. For the reasons described above, the Court finds that the use of the history of institutional use is not an appropriate principle to apply in this context.

Because the Court finds that defendant's action is in violation of RLUIPA pursuant to § 2000cc(b)(1), the Court need not reach plaintiffs' argument that it also violates § 2000cc(b)(2).

C. Issues raised in the parties' joint status report re: injunction and appeal

Following the hearing on this matter, on May 31, 2011, the parties submitted a joint status report regarding the scope of the preliminary injunction and defendant's

[6] The Court addresses this argument only with respect to plaintiffs' as-applied challenge. As noted by defendant, the Congregation does not allege a facial challenge to any ordinance in its complaint, and therefore the Court does not reach the parties' arguments regarding a facial challenge to LAMC § 12.08.

request for interlocutory appeal.[7] In that report, the City indicated that it was "not willing or able to stipulate that it will not enforce its codes against Plaintiffs." Joint Status Report at 14. The City further argued that it would not enter into such a stipulation because it did not wish to be "perceived as acquiescing to the unauthorized use or being accused of inconsistency should a dispute arise in the future between the City and Plaintiffs with regard to the use of the Property." Id. at 15. In so stating, the City indicates that its concern arises from this Court's rejection of its argument regarding Rule 408 of the Federal Rules of Evidence in connection with evidence of the 2001 Settlement Agreement. The City asserts without foundation that the Court's instant findings were reached in reliance on the 2001 Settlement Agreement, and that the Court herein finds that "the City should have considered the conditions of the Settlement Agreement as a model for furthering its governmental interest." Id. at 16. In fact, the Court agrees with defendant that the terms of that agreement are inadmissible under Rule 408 to prove a prior inconsistent position taken in furtherance of settlement, but finds that conclusion has no effect on the current order. The Court does not find herein that the City was required to impose the exact conditions agreed to in the Settlement Agreement, only that the City failed to consider adequately consider mitigating conditions as a general matter. Similarly, the City's suggestion that the Court in this order relies on the disputed fact that the Congregation expended substantial sums remodeling the residence in reliance on the settlement agreement misapprehends this order. Id. at 15. To the extent the City requests further briefing on the above issues, the Court denies the request and agrees with the Congregation that the proper procedure for challenging the instant order is on a motion for reconsideration.

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[7] On June 2, 2011, the City filed objections to the joint status report.

IV. CONCLUSION

In accordance with the foregoing, the Court hereby GRANTS plaintiffs' motion for partial summary judgment with respect to the City's liability and DENIES defendant's motion for summary judgment.

The Court further PRELIMINARILY RESTRAINS AND ENJOINS the City's denial of the requested CUP and any enforcement actions by the City that would prevent the Congregation from continuing the use of the property requested therein. The Court further orders that the Congregation may not make any use of the property that is inconsistent with its requested CUP, which the Court understands to impose the same uses and restrictions as those set forth in the 2001 Settlement Agreement.

The Congregation shall submit a proposed form of order.

With respect to plaintiff's request for a trial on damages, the Court requests that each side submit a brief within fourteen (14) days not in excess of ten (10) pages as to the issue of whether the Congregation is entitled to recover compensatory damages, and the scope of those purported damages. No declarations shall be submitted in connection with this briefing.

IT IS SO ORDERED.

Dated: July 11, 2011

Christina A. Snyder

CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE