UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

HOPE LUTHERAN CHURCH, Plaintiff,	)	
	)	No. 2:18-cv-155
-v-	)	
	)	Honorable Paul L. Maloney
CITY OF ST. IGNACE, Defendant.	)	

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR JUDGMENT ON THE PLEADINGS

Hope Lutheran Church purchased property in the General Business District of the City of St. Ignace. St. Ignace subsequently denied Hope Lutheran's request for a property tax exemption and a request for a variance. Reasoning that the zoning ordinance permits assembly halls in the General Business District, but not churches, Hope Lutheran filed this lawsuit and raises six claims. Because St. Ignace denied the requests based on reasons and criteria not included in its zoning ordinance, Hope Lutheran has pled a plausible equal treatment claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA). The other claims, however, will be dismissed.

I.

St. Ignace filed this motion (ECF No. 26) after it filed its answer to the complaint. The motion must, therefore, rely on Rule 12(c) rather than Rule 12(b), although the motions brought under the two different subsections apply the same standards. *See Lindsay v. Yates*, 498 F.3d 434, 438 (6th Cir. 2007). "For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as

true, and the motion will be granted only if the moving party is nevertheless clearly entitled to judgment.'" *Wurzelbacher v. Jones-Kelley*, 675 F.3d 580, 583 (6th Cir. 2012) (quoting *Tucker v. Middleburg-Legacy Place, LLC*, 539 F.3d 545, 549 (6th Cir. 2008)). The court need not accept the plaintiff's legal conclusions or unwarranted factual inferences. *Commercial Money Ctr. v. Illinois Union Ins. Co.*, 508 F.3d 327, 336 (6th Cir. 2007)). "To withstand a Rule 12(c) motion for judgment on the pleadings, 'a complaint must contain direct or inferential allegations respecting all the material elements under some viable legal theory.'" *Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008) (*Commercial Money Ctr.*,508 F.3d at 336).

II.

A.

Hope Lutheran generally pleads facts establishing its acquisition of the property and St. Ignace's decisions denying Hope Lutheran's requests.

Hope Lutheran Church is chartered under the Michigan District Lutheran Church Missouri Synod (District). (ECF No. 1 Compl. ¶ 11 PageID.3.) It is registered as a not-for-profit ecclesiastical corporation under Michigan law (*id.* ¶ 6 PageID.2) and enjoys tax-exempt status under 501(c)(3) through the District (*id.* ¶ 16 PageID.3). The congregation includes approximately 20-25 individuals (*id.* ¶ 4 PageID.2) and between 12 and 18 members typically attend Sunday morning services (*id.* ¶ 15 PageID.3).

Prior to 2018, Hope Lutheran rented space and met (presumably for its religious services) at the Quality Inn in St. Ignace. (*Id.* ¶¶20-21 PageID.4.) Hope Lutheran spent several years looking for property to acquire to use for its ministry. (*Id.* ¶ 20.) Hope

Lutheran found property that had previously been used as a laundry mat (*id.* ¶ 19 PageID.3) and, in August 2017, began operating a not-for-profit coffee shop ministry there, the Harbor Hope Coffee Shop (*id.* ¶ ¶ 17 and 22). On February 8, 2018, Hope Lutheran acquired the property. (*Id.* ¶ 18 PageID.3.) The area where the property is located falls under Division 7, the General Business District in the St. Ignace Zoning Ordinances. (*Id.* ¶24 PageID.4; ECF No. 1-2 Code of Ordinances.)

After purchasing the property, in June 2018, Hope Lutheran sought a property tax exemption from the St. Ignace Assessor and Zoning Administrator. (Compl. ¶ 23 PageID.4; ECF No. 1-1 Letter PageID.16.) The exemption was denied because the General Business District does not include churches as a permissible use of property.[1] (Compl. ¶ 24 PageID.4; Letter.) Hope Lutheran then filed a request for a variance using a Zoning Permit Application indicating that it wanted to remodel the property for use as a church and coffee shop.[2] (Compl. ¶ 31 PageID.6; ECF No. 1-3 PageID.44.) That request was also denied. (Compl. ¶ 32 PageID.6.)

Hope Lutheran filed an appeal with the Zoning Board of Appeals (ZBA) and a hearing was held on July 12, 2018. (*Id.* ¶¶ 33-34; ECF No. 1-4 Notes.) Members of the Board and members of the community expressed several concerns, including the implication for businesses with liquor licenses in the area and the precedent that would be established if the variance were granted. (*Id.* ¶¶ 36-38 PageID.6.) They also expressed concerns about

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[1] The exact nature of the request is not contained in the record. The denial letter states that the Coffee Shop is in a place not zoned for a church and, therefore, the request for a tax exemption cannot be considered. (PageID.16.) The letter then warns that if the Coffee Shop is operating as a church, it is violating the city's ordinances. (*Id.*)

[2] Hope Lutheran had been operating the Coffee Shop at the location for almost a year.

having a church in the downtown and the loss of tax revenue. (*Id.*) The Board voted unanimously to deny the variance request. (Compl. ¶ 35 PageID.6.)

B.

St. Ignace's has adopted a Code of Ordinances and Chapter 38 of the Code addresses zoning. (Code of Ordinances PageID.19-23.) The General Business District (GDB) is designed for retail stores and service establishments. (*Id.* § 38-251 PageID.41.) The GDB limits land use to specific enumerated purposes: (1) any use permitted in the Central Business District (CBD); (2) stores for carrying on skilled trades; (3) motor vehicle sales and service establishments; (4) retail service establishments; (5) parking facilities; (6) storage of goods to be sold at retail; (7) other uses similar to the above uses; (8) accessory structures for the above uses; (9) hotels and motels; and (10) living quarters, but not on the ground floor. (*Id.* § 38-252 PageID.41-42.) The CBD also limits land use to specific enumerated purposes, including : (1) retail businesses and personal service establishments in completely enclosed buildings; (2) restaurants and taverns; (3) enclosed theaters and assembly halls; (4) offices and office buildings; (5) banks; (6) municipal buildings and government offices; (7) offices and showrooms for skilled trades; and (8) newspaper offices and printing plants. (*Id.* § 38-232 PageID.40-41.) Churches are explicitly permitted in areas zoned for single families. (*Id.* § 38-121(4) PageID.34.) Churches are also permitted in areas zoned for two families (*id.* § 38-151(1) PageID.36) and areas zoned for multiple families (*id.* § 38-181(1)).

III.

In its motion, St. Ignace addresses each of the six claims advanced in the complaint. The first five claims arise under the United States Constitution. The complaint does not

include a claim labeled with the number 6. The sixth claim, labeled Count 7, arises under the Michigan Constitution.

A. First Amendment - Free Exercise and Free Speech

The First Amendment to the United States Constitution provides, in part, that "Congress shall make no law . . . prohibiting the free exercise [of religion], or abridging the freedom of speech, . . .; or the right of the people peacefully to assemble[.]" U.S. Const., amend. I.

In its response, Hope Lutheran clarifies its first two claims are brought under the First Amendment, a free exercise claim (ECF No. 30 Pl. Resp. at 6-10 PageID.251-55) and a free speech claim (*id.* at 10-11 PageID.255-56).

1. Free Exercise

Hope Lutheran asserts that the Ordinance generally permits public, private and other not-for-profit assembly uses in the General Business District but excludes churches and religious assemblies. (*Id.* at 8 PageID.253.) Hope Lutheran claims that St. Ignace's Code, "on its face and as applied . . ., treats religious assemblies worse than non-religious assemblies." (Compl. ¶ 47 PageID.8.)

The Free Exercise Clause of the First Amendment applies to state and local governments through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Mount Elliott Cemetery Ass'n v. City of Troy*, 171 F.3d 398, 403 (6th Cir. 1999). "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all 'governmental regulation of religious *beliefs* as such.'" *Emp't Div. Dept. of Human Resources*

of Oregon v. Smith, 494 U.S. 872, 877 (1990) *superseded by statute,* Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in Holt v. Hobbs*, 135 S. Ct. 853 (2015). Under *Smith*, "generally applicable laws that incidentally burden the exercise of religion do not violate the Free Exercise Clause of the First Amendment." *Holt*, 135 S. Ct. at 859 (citing *Smith*, 494 U.S. at 878-882). The Free Exercise Clause is implicated, however, by laws that discriminate against religious beliefs or regulate or prohibit conduct which is undertaken for religious purposes. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

The Sixth Circuit has considered several challenges to zoning ordinances by churches. At least two of those challenges are favorable to St. Ignace and cannot be meaningfully distinguished. In *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, 699 F.3d 303 (6th Cir. 1983), the court was confronted with facts similar to the facts here. The church purchased property in an area zoned for residential use and later requested an exception, which was denied. *Id.* at 304-05. The municipality then enacted a new zoning code, which permitted churches only in four zoning districts, which constituted approximately ten percent of the municipality. *Id.* at 305. Noting that practices flowing from religious beliefs merit protection, the court nevertheless concluded that the church did not have a Free Exercise claim. *Id.* at 306-07. The record contained no evidence that construction or use of a building was a fundamental tenet or cardinal principle of the faith. *Id.* at 307. The ordinance regulated only secular activity. *Id.* The ordinance may have resulted in a greater cost to the church—land in the areas zoned for church use was

more expensive—but the ordinance did not "pressure the Congregation to abandon its religious beliefs through financial or criminal penalties." *Id.*

In a more recent opinion issued after *Smith* and *Lukumi Babalu*, the Sixth Circuit again rejected a religious challenge to a zoning ordinance. *Mount Elliott Cemetery*, 171 F.3d at 405. The plaintiff was a not-for-profit association that operated four Catholic cemeteries. The plaintiff purchased adjacent parcels with the intention of opening a fifth cemetery. When it purchased the land, the plaintiff knew it would have to have the land rezoned to use it as a cemetery. The City of Troy denied two requests to have the property rezoned and the plaintiff sued. The court concluded that the plaintiff did not have a Free Exercise claim because the zoning ordinance was a neutral law of general applicability. *Id.*

The Third Circuit succinctly explained the rationale for rejecting Free Exercise claims brought against zoning regulations.

> [T]he Free Exercise Clause does not define land use as a religious exercise. *Cf.* 42 U.S.C. § 2000cc-5(7)(B). Indeed, several sister circuits have held that, when the plaintiff does not show that locating its premises in a particular location is important in some way to its religion and the area from which plaintiff's building is excluded is not large, there is no constitutionally cognizable burden on free exercise. We join these courts in holding that, when a religious plaintiff makes a Free Exercise challenge to a zoning regulation, it must explain in what way the inability to locate in the specific area affects its religious exercise.

Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 273-74 (3d Cir. 2007) (internal citations omitted); *see, e.g., Alger Bible Baptist Church v. Twp. of Moffatt*, No. 13-13637, 2014 WL 462354, at *4-*6 (E.D. Mich. Feb. 5, 2014) (dismissing on a 12(b)(6) motion a Free Exercise claim brought against a zoning ordinance); *Muslim Cmty.*

Ass'n of Ann Arbor and Vicinity v. Pittsfield Charter Twp., 947 F. Supp. 2d 752, 770 (E.D. Mich. 2013) (same).

Following *Smith*, *Lukumi Babalu*, *Lakewood*, and *Mount Elliott Cemetery*, St. Ignace's ordinances do not single out religious practices for disfavored treatment. St. Ignace has adopted a neutral and generally applicable zoning ordinance, typical of many cities and municipalities. The ordinance is neutral; its purpose does not distinguish between religious and secular conduct. *See New Doc Child #1 v. Congress of the United States*, 891 F.3d 578, 591 (6th Cir. 2018) ("A law is not neutral 'if the object of [the] law is to infringe upon or restrict practices because of their religious motivation,' or if 'the purpose of [the] law is the suppression of religion or religious conduct.") (edits in *New Doc*) (citation omitted); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649-50 (10th Cir. 2006) ("A law is neutral so long as its object is something other than infringement of religious practices."). Various types of commercial and non-commercial entities are excluded from the GBD. And, the ordinance is generally applicable. *See Lukumi Babalu*, 508 U.S. at 543 (explaining that a law is not generally applicable when government "in a selective manner impose[s] burdens only on conduct motivated by religious belief").

The complaint alleges no facts from which this Court can infer that St. Ignace enforces the zoning ordinance in a discriminatory manner. Hope Lutheran has not pled any facts from which this Court can infer that St. Ignace enforces the law in a manner "riddled with exemptions." *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012). Hope Lutheran has not pled any facts from which this Court could infer that the St. Ignace enacted the ordinance to target, prohibit or regulate religious beliefs or religious conduct. *See Lukumi Babalu*, 508

U.S. at 542. Hope Lutheran has not pled any facts from which this Court could infer that worshiping in the former laundry mat was essential to the faith. Finally, the use of the word "church" "among the various land uses the ordinance regulates does not establish that "it discriminates against churches on its face." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 763 (7th Cir. 2003).

Accordingly, St. Ignace is entitled to dismissal of Hope Lutheran's Free Exercise claim, which is Count 2 in the Complaint.

2. Free Speech

Hope Lutheran reasons that the zoning regulations violate the free speech clause by treating expressive conduct differently, citing *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218, 2227 (2015).

The free speech clause of the First Amendment applies to the States through the Fourteenth Amendment. *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1050 (6th Cir. 2015). Laws regulating the communicative content of a message are presumptively unconstitutional and will be upheld only when the government establishes that the regulation is narrowly tailored to serve a compelling government interest. *Reed*, 135 S. Ct. at 2226. A law is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227. Typically, courts will uphold content-neutral zoning ordinances that have incidental effects on free speech, so long as the ordinances were designed to serve a substantial government interest and leave open alternative avenues of communication. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986)

(explaining time, place, and manner regulations); *Prime Media, Inc. v. City of Brentwood, Tennessee*, 398 F.3d 814, 818 (6th Cir. 2005).

Hope Lutheran has not pled facts sufficient to state a free speech claim. Initially, St. Ignace has not prohibited Hope Lutheran from expressing any message and has not prohibited Hope Lutheran from assembling for religious purposes. For years, Hope Lutheran assembled and expressed their message at a hotel, an establishment permitted within the GBD. The pleadings contain no allegations that St. Ignace will not allow Hope Lutheran to use the Quality Inn for its religious assemblies.

Assuming the Court should consider the ordinance, St. Ignace's zoning ordinances are content-neutral. The ordinances do not distinguish between types of expressive conduct; the ordinances distinguish between building uses. Hope Lutheran focuses exclusively the restriction placed on churches in the GBD. But, the ordinances place restrictions on all sorts of secular uses of buildings as well. Multi-family dwellings cannot be placed in areas zoned for single families. Open-market fruit stands are permitted in the GBD, but not in the CBD. Junkyards can only be located in the industrial districts. Hope Lutheran has not pled any facts from which this Court can infer that St. Ignace adopted or enforced the ordinance with an animus toward religious expression. At best, the ordinances have an incidental effect on religious expression. Zoning ordinances serve a substantial government interests, including public health and safety, as well as traffic and parking needs. (Code of Ordinances § 38-1 Purpose PageID.24.) As indicated above, Hope Lutheran has ample alternative avenues for its expression. Hope Lutheran could continue to return to the hotel, it could rent one of the theaters, or it can operate its church in one of the districts where churches are permitted.

Accordingly, St. Ignace is entitled to dismissal of Hope Lutheran's free speech and assembly claim, which is Count 1 in the Complaint.

B. Equal Protection

Hope Lutheran asserts that the zoning ordinance, on its face and as applied, discriminates against certain types of land use based on the suspect class of religion in violation of the Equal Protection Clause of the Fourteenth Amendment. (Compl. ¶ 62.) In its response, Hope Lutheran explains that the ordinance "does not treat similarly situated uses alike." (Pl. Resp. at 18 PageID.263.) Hope Lutheran also insists that the "ZBA's decision to deny the Church a use variance was on account of the religious nature or affiliation of the church's assembly." (*Id.*)

The Fourteenth Amendment provides, in part, that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV § 1. The United States Supreme Court has described this passage as "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). "To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff 'disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis.'" *Ctr. for Bio-Ethical Reform v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (citation omitted); *see Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564, 575 (6th Cir. 2008) ("However, the basis for any equal protection claim is that a locality has treated similarly situated individuals differently.").

The complaint contains two allegations from which this Court might infer that St. Ignace treated Hope Lutheran differently than similarly situated organizations. First, Hope Lutheran pleads "[u]pon information and belief, there are nonreligious assembly uses and not-for-profit uses operating in both the CBD and GBD in the city." (Compl. ¶ 29 PageID.5.) Second, Hope Lutheran asserts "Mr. John Arnold said that there were other non-profit organizations already operating on the main street in St. Ignace's business district." (*Id.* ¶ 39. PageID.6.) For the second statement, Hope Lutheran cites notes from the July 12 hearing on its appeal to the Zoning Board of Appeals, which are attached to the complaint.

On these facts, Hope Lutheran has not pled sufficient facts to support an Equal Protection claim. The Court need not accept as true the allegation in paragraph 29, which is made "upon information and belief." Following the Supreme Court's decisions in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Sixth Circuit has held that, in some situations, factual assertions made "upon information and belief" are the sort of conclusory factual allegations that must be ignored when a court evaluates the sufficiency of a pleading. *See In re Darvocet, Darvon, and Propoxyphene Prods. Liab. Litig.*, 756 F.3d 917, 931 (6th Cir. 2014) ("The mere fact that someone believes something to be true does not create a plausible inference that it is true."). More specifically, the Sixth Circuit has held that allegations about similarly situated persons made "upon information and belief" do not meet the required pleading standard for an Equal Protection claim. *See 16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 506 (6th Cir. 2013). The existence of similarly situated entities in the CBD and the GBD is not the sort of information that would be exclusively in the possession and control of St.

Ignace. *See Cassidy v. Teaching Co., LLC*, No. 2:13-cv-884, 2014 WL 1599518, at *3 (S.D. Ohio Apr. 21, 2014) (finding permissible the use of "upon information and belief" pleadings when the facts are in the possession and control of the defendant and collecting cases).

The Court also need not accept as true the allegation in paragraph 39, Hope Lutheran's assertion that a ZBA Board Member admitted that non-profit organizations operate in the business district. Ordinarily, courts do not consider documents outside the pleadings on a motion to dismiss. *See* Fed. R. Civ. P. 12(d). But, where a document is attached to the complaint, is referenced in the complaint, and is integral to the claim, the court can consider the document as part of a Rule 12 motion. *See* Fed. R. Civ. P. 10(c); *Commercial Money Ctr.*, 508 F.3d at 335-37. Hope Lutheran's assertion in paragraph 39 of the complaint is an incomplete representation of the record from the hearing before the ZBA. The notes from the hearing contain the following statement: "Jon Arnold, other nonprofit on mainstreet do pay taxes and they put into charities." (ECF No. 1-4 Meeting Notes PageID.47.) This statement establishes that Hope Lutheran was asking to be treated differently than other nonprofits in the business district. The notes do not establish that St. Ignace was treating similarly situated organizations differently.

Even if Hope Lutheran had identified similarly situated groups that were treated differently, it has not alleged sufficient facts to demonstrate that its fundamental rights were burdened. As explained above, St. Ignace did not prevent Hope Lutheran from worshipping in the GBD. Hope Lutheran had been conducting services at the Quality Inn, without interference from St. Ignace. When Hope Lutheran purchased property to relocate its worship service, St. Ignace declined to issue a tax exemption and a variance. The complaint

does not establish why the location of the property was essential to the exercise of Hope Lutheran's fundamental rights.

For these reasons, St. Ignace is entitled to dismissal of the Equal Protection Claim. This claim, however, will be dismissed without prejudice. *See Alger Bible Baptist Church*, 2014 WL 462354, at *7 (allowing the plaintiff to attempt to plead sufficient facts to state an Equal Protection claim).

C. Religious Land Use and Institutionalized Persons Act (RLUIPA)

Count 4 of the complaint asserts a substantial burden claim under the RLUIPA. Count 5 of the complaint asserts an equal terms claim under the RLUIPA.

1. Substantial Burden—42 U.S.C. § 2000cc(a)

Hope Lutheran contends that application of the ordinance imposes a substantial burden on its religious exercise and that the ordinance is not the least restrictive means of furthering a compelling government interest. (Compl. ¶ 69 PageID.11.)

RLUIPA, among other things, protects the use of land for religious activities. RLUIPA prohibits the government from regulating land use in a manner that substantially burdens a religious exercise. 42 U.S.C. § 2000cc(a)(1).[3] The RLUIPA defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A). The Sixth Circuit explained that, to have a viable

[3] 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.

substantial burden claim, the plaintiff must establish that the burden imposed on its religious exercise has "some degree of severity." *Livingston Christian Schs. v. Genoa Charter Twp.*, 858 F.3d 996, 1003 (6th Cir. 2017). When reviewing a substantial burden claim, courts should consider several factors: (1) whether the plaintiff has a feasible alternative location where it can carry on its mission; (2) whether the plaintiff has or will suffer substantial delays, uncertainties, and expenses because of the regulation; (3) whether the plaintiff's own actions resulted in the burden; and (4) whether the municipality's decision making process was arbitrary, capricious, or discriminatory. *Id.* at 1004. For the first factor, alternative locations, courts should consider whether the existing facilities were adequate or inadequate to carry out the "core functions of [the plaintiff's] religious activities." *Id.* at 1006-07. For the third factor, the plaintiff's own actions, the court stated that "a burden is not substantial when the plaintiff imposes the burden upon itself." *Id.* at 1009 (citation omitted).

Hope Lutheran has not pleaded sufficient facts to state a substantial burden RLUIPA claim. Only the first factor weighs in favor of Hope Lutheran. The complaint asserts that the Quality Inn location was not adequate to serve its religious mission because of the additional cost for renting the space during the week and because the temporary location made it difficult to provide outreach services to the community. (Compl. ¶ 21 PageID.4.) The complaint also asserts that Hope Lutheran spent years trying to find a "property of its own." (*Id.* ¶ 20.) The complaint does not explain why Hope Lutheran settled on the former laundry mat.

The remaining factors all weigh in favor of St. Ignace. The decision to purchase the property to use as a church created a self-imposed burden. Hope Lutheran knew or should

have known that the zoning regulations do not permit churches in the GBD. Hope Lutheran has not pleaded facts to establish it had a reasonable expectation that it would be granted a variance or tax exemption. In the complaint, Hope Lutheran does not identify any other organization, religious or secular, that received a tax exemption or a variance in the GBD. As explained above, Hope Lutheran learned about other nonprofits operating in the GBD *after* it purchased the property.

Hope Lutheran argues that it "had a reasonable expectation that it could use the Property for its religious assembly because nonprofit assembly uses are permitted as of right in the GBD." (Pl. Resp. at 23 PageID.268.) The Court considers two possible expectations" (1) use for religious assembly and (2) use for nonprofit assembly. Hope Lutheran does not identify any portion of the ordinance on which its purported nonprofit assembly expectation is based. The ordinance permits assembly halls in the GBD without distinguishing between for-profit and nonprofit assembly halls. Hope Lutheran's expectation that it would use the building for religious assembly was not reasonable. The ordinance appears to distinguish between churches and assembly halls. The two terms are used separately to describe permitted uses. (Code of Ordinances § 38-232(4)) "assembly halls"; *id.* § 38-121(2) "churches"). In addition, the specificity of the variance request establishes that Hope Lutheran did not have the expectation to use the building as an assembly hall, religious or otherwise. Hope Lutheran did not ask St. Ignace for permission to remodel the laundry mat as an assembly hall. Hope Lutheran asked St. Ignace for a tax exemption and then for a variance from the ordinance to use the building as a church.

The second factor and fourth factors also weigh in favor of St. Ignace. The delay, uncertainty and expense from imposition of the regulation lasted little more than one month. Hope Lutheran asked for the tax exemption in early June and that request and the variance request were concluded by mid-July. And, the delay and uncertainty occurred only because Hope Lutheran asked to operate a church in a district that does not permit that use. Finally, Hope Lutheran has not pleaded any facts suggesting that the decision-making process was arbitrary or capricious or that St. Ignace has evidenced a discriminatory intent in its decision. Hope Lutheran does point to the meeting note which summarizes the statement of one person at the meeting: "have a church in front and back but doesn't want a church down town main street." (Meeting Notes PageID.47.) That individual is not identified as member of the ZBA. (*Id.* PageID.45.) A single, isolated comment at a meeting is not the sort of evidence of community bias that other circuit courts have relied upon. *See, e.g., Jesus Christ is the Answer Ministries, Inc. v. Baltimore Cty., Maryland*, 915 F.3d 256, 263 (4th Cir. 2019) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977)).

Therefore, St. Ignace is entitled to dismissal of Hope Lutheran's substantial burden RLUIPA claim.

2. Equal Terms—42 U.S.C. § 2000cc(b)(1)

Hope Lutheran asserts that St. Ignace's ordinances, on their face and as applied, treat religious assemblies or institutions on less than equal terms with non-religious assemblies and institutions. (Compl. ¶ 75 PageID.11.)

RLUIPA requires that land use regulations treat religion and non-religious assemblies and institutions on equal terms. 42 U.S.C. § 2000cc(b)(1).[4] RLUIPA does not define the words "assemblies" or "institutions."[5] The Sixth Circuit summarized the elements of an equal terms claim. *Tree of Life Christian Schs. v. City of Upper Arlington, Ohio*, 905 F.3d 357, 367 (6th Cir. 2018) *cert. denied* 2019 WL 266837 (May 13, 2019). In *Tree of Life*, the Sixth Circuit adopted the majority approach, identifying opinions from the Third, Seventh and Ninth Circuits. *Id.* at 368-68 (citations omitted). A plaintiff must show (1) it is a religious assembly or institution, (2) subject to a land use regulation, (3) that the regulation treats the plaintiff on less than equal terms when compared with (4) a nonreligious assembly or institution. *Id.* at 367 (citing *Primera Igesia Bautista Hispana of Boca Raton, Inc. v. Broward Cty.*, 450 F.3d 1295, 1307-08 (11th Cir. 2006)).

The court considered, at length, how parties should identify comparable assemblies or institutions for the purpose of determining equal treatment. *Id.* at 367-69. All of the circuits that have examined the issue have indicated that the comparable assembly or institution must be "similarly situated *with regard to the regulation at issue*." *Id.* at 368. The Sixth Circuit refined the inquiry to force a comparison based on "legitimate zoning criteria set forth in the municipal ordinance in question." *Id.* at 369.

Hope Lutheran has pleaded sufficient facts to state an equal terms claim under RLUIPA. Hope Lutheran has pleaded that it is a religious institution or assembly and that

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[4] 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.

[5] In another passage, the RLUIPA prohibits governments from imposing a land use regulation that "unreasonably limits religious assemblies, institution, or structures within a jurisdiction." 42 U.S.C. § 2000cc(3)(B).

it is subject to a land use regulation. Hope Lutheran has also pleaded that it has been treated on less than equal terms with nonreligious assemblies or institutions. Specifically, theaters, assembly halls, municipal buildings and hotels and motels are all permitted in the GBD, while churches and religious assemblies are not permitted. (Compl. ¶¶ 27 and 28 PageID.5.)

St. Ignace argues that the primary motivations for the decision denying Hope Lutheran's requests were revenue maximization, maximizing the character of the GBD, and prioritizing the availability of liquor licenses. (Def. Br. at 20 PageID.219.) Indeed, each of those ideas were discussed at the meeting where the ZBA ultimately denied the request for a variance. (Meeting Notes.) In *Tree of Life*, the Sixth Circuit concluded that revenue maximization was a legitimate zoning criteria. 905 F.3d at 371. There, the municipality, Upper Arlington, had a master plan that stressed the need to create new revenue and explicitly stated that efforts should be made to expand employment to increase tax revenues from personal income taxes. *Id.* at 361. Upper Arlington authorized commercial offices on less than five percent of the city's land, and the master plan also indicated that commercial office use provided more income to the city than any other land use. *Id.*

St. Ignace's response does not undermine Hope Lutheran's factual allegations. In the attempt to undermine the comparable assemblies and institutions with respect to the regulations at issue, St. Ignace discusses criteria found nowhere in its ordinances. Revenue maximization is not a criteria identified anywhere in St. Ignace's ordinances. And, municipal buildings and governmental offices are permitted in both the CBD and the GBD, which typically do not generate revenue. Similarly, concerns with liquor licenses are not included as a criteria in any of the ordinances. At best, St. Ignace attempts to regulate the character if

the CBD and the GBD by promoting offices, and retail and service establishments. (Code of Ordinances § 38-231 CBD; *Id.* § 38-251 GBD.) On this criteria, Hope Lutheran has identified a comparable use. The CBD and GBD both permit assembly halls and theaters, which use buildings in a manner similar to the manner in which Hope Lutheran would use its building. In all three buildings, people would gather (assemble) for a limited time for a particular purpose.

On these factual allegations, St. Ignace is not entitled to dismissal of Hope Lutheran's equal treatment claim. Hope Lutheran has pled facts to support a plausible equal treatment claim.

D. Michigan Constitution

Hope Lutheran alleges St. Ignace violated various rights protected by the Michigan Constitution: the Free Exercise Clause, the Free Speech Clause, the Freedom of Assembly Clause, and the Equal Protection Clause. (Compl. ¶ 82 PageID.12.)

The parties agree that Hope Lutheran's state law constitutional claims and federal law constitutional claims overlap and should be subjected to the same analysis. (Def. Br. at 24-25 PageID.223-24; Pl. Resp. at 25 PageID.270.) Hope Lutheran requests that, should the Court conclude that the federal constitutional claim should be dismissed, that the Court dismiss its state law constitutional claims without prejudice.

St. Ignace is entitled to dismissal of the state laws constitutional claims. Having dismissed the federal claims on the merits, the state law claims must also be dismissed on the merits.

IV.

St. Ignace is entitled to the dismissal of Hope Lutheran's free exercise and free speech claims, the equal protection claim, the RLUIPA substantial burden claim and the claims brought under the Michigan Constitution. For those claims, Hope Lutheran has not pleaded sufficient facts to state a plausible claim. However, St. Ignace is not entitled to dismissal of Hope Lutheran's RLUIPA equal treatment claim. Hope Lutheran has identified comparable entities based on the legitimate zoning criteria in the zoning ordinance. St. Ignace's explanation for why the Hope Lutheran and other secular entities should be treated differently are not based on the criteria in the zoning ordinance.

ORDER

For the reasons provided in the accompanying Opinion, St. Ignace's motion for judgment on the pleadings (ECF No. 26) is **GRANTED IN PART and DENIED IN PART.**

IT IS SO ORDERED.

Date: May 22, 2019

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge