

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ST. JOHN’S UNITED CHURCH OF CHRIST, an Illinois not-for-profit corporation, et al.,)	
)	
Plaintiffs,)	Case No. 03 C 3726
)	
v.)	
)	
THE CITY OF CHICAGO, an Illinois municipal corporation, et al.,)	Judge David H. Coar
)	
Defendants.)	

**BRIEF IN SUPPORT OF MOTION OF PLAINTIFFS ST. JOHN’S UNITED CHURCH
OF CHRIST, HELEN RUNGE, AND SHIRLEY STEELE FOR A TEMPORARY
RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION**

INTRODUCTION

Chicago has announced its intention to acquire through condemnation and to destroy St. Johannes Religious Cemetery as part of Chicago’s proposed Phase One expansion of O’Hare Airport. In a related appellate proceeding which does not deal with Religious Plaintiffs claims in this Court against Chicago on First Amendment, Equal Protection or RLUIPA grounds – or with Religious Plaintiffs claims against FAA for providing financial and taking other actions to assist Chicago in these First Amendment, Equal Protection or RLUIPA violations – Chicago has made a commitment not to physically disturb the bodies buried at St. Johannes Cemetery or to interfere with religious activities at the cemetery until a decision on the merits of the appellate proceeding are determined.

However, Chicago has pointedly refused to refrain from involuntary condemnation of St. Johannes Cemetery while any judicial proceedings are pending. Based on available information, unless enjoined by this Court, Chicago will seek to condemn St. Johannes Religious Cemetery and involuntarily seize ownership and possession before either the appellate proceeding or this case reaches the merits¹.

¹ Chicago did not reveal its intent to condemn St. Johannes Cemetery to the D.C. Circuit Court of Appeals; and the issue of condemnation of a religious property and the application of the First Amendment, the Equal Protection Clause, or RLUIPA (or even RFRA) to Chicago’s prospective condemnation of St. Johannes Cemetery was not before the D.C. Circuit. As discussed, *infra*, one of the hidden reasons why Chicago apparently wants to take title to St. Johannes Cemetery before this Court reaches the merits is to literally eliminate St. John’s rights under RLUIPA since RLUIPA relief is limited to a Plaintiff (here St. John’s) who “has an ownership, leasehold, easement, servitude, or other property

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Appropriate relief here is to enter an injunction order enforceable by this Court that incorporates Chicago's commitments to the D.C. Circuit, and which lasts until this Court rules on the merits of the separate First Amendment, Equal Protection and RLUIPA claims in this case. In addition, this Court should enter an injunction, similar to the agreed order entered by this Court on July 10, 2003, which prohibits Chicago from seeking to acquire title to or possession of St. Johannes Religious Cemetery until this Court decides the merits of the First Amendment, Equal Protection and RLUIPA claims.

As set forth below, the Religious Plaintiffs are clearly entitled to such preliminary injunctive relief from this Court. Chicago's threatened acquisition and destruction of St. Johannes Cemetery clearly violated the First Amendment Free Exercise Clause, the Equal Protection Clause, and the federal RLUIPA statute. Further, as discussed below, Plaintiffs clearly meet the requirements for the entry of the requested preliminary injunctive relief².

I. THE CHICAGO SPONSORED EXPLICIT EXCLUSION OF ST. JOHANNES RELIGIOUS CEMETERY FROM THE PROTECTIONS OF THE ILLINOIS RELIGIOUS FREEDOM RESTORATION ACT CLEARLY TRIGGERS PROTECTION OF THE FIRST AMENDMENT FREE EXERCISE CLAUSE.

A. The Targeting of St. Johannes Cemetery by Chicago for Religious Discrimination.

The heart of Chicago's First Amendment violation here is a blatant act of religious targeting and discrimination in the Chicago-sponsored 2003 amendment to the Illinois Religious Freedom Restoration Act, 775 ILCS 35/1 *et seq.* In the amendment to Illinois RFRA, Chicago persuaded the Legislature to single out two religious cemeteries for targeted exclusion separate and apart from every other religious institution in the State. After Chicago's visit to Springfield, the Illinois Religious Freedom Restoration Act now sported a new section 30:

The new section 30 to the Illinois Religious Freedom Restoration Act

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interest in the regulated land". 42 U.S.C. §2000 cc-5(5). Once Chicago acquires title to St. Johannes Cemetery, St. John's RLUIPA claim self destructs.

² The standard for a preliminary injunction in the Seventh Circuit is well known. To prevail, plaintiff must make a threshold showing that "(1) its case has a likelihood of success on the merits; (2) no adequate remedy at law exists; and (3) it will suffer irreparable harm if the injunction is not granted." *FoodComm Intern. v. Barry*, 328 F.3d 300, 303 (7th Cir. 2003) (citing *Promatek Industries, Ltd. v. Equitrac Corp.*, 300 F.3d 808, 811 (7th Cir. 2002); *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992)). Once these three threshold conditions are met, the court must balance the harm to plaintiffs if the injunction is not issued against the harm to defendants and the public interest if it is issued. *FoodComm Intern.*, 328 F.3d at 303; *AM General Corp. v. DaimlerChrysler Corp.*, 311 F.3d 796, 804 (7th Cir. 2002).

“§30. O'Hare Modernization. Nothing in this Act [**the Illinois Religious Freedom Restoration Act**] limits the authority of the City of Chicago to exercise its powers under the O'Hare Modernization Act for the purposes of relocation of cemeteries or the graves located therein.

775 ILCS 35/30 (emphasis added)

After the passage of the new Section 30 of Illinois RFRA, the only religious institutions in the State not entitled to the protection of Illinois RFRA were these two religious cemeteries. Every other religious institution in the State – including all other religious cemeteries– still enjoyed the protection of the Illinois Religious Freedom Restoration Act.

Even a Sixth Grade Civics student would recognize this outrageous action for what it is – targeting two religious institutions and stripping away their religious legal rights simply because they stood in the way of Chicago. This narrow targeted stripping of Illinois RFRA protections was not directed across the board or at all religious cemeteries or at secular properties. Chicago's actions in stripping away Illinois RFRA protections was targeted at only two religious institutions – St. Johannes Cemetery and Rest Haven Cemetery. There is no question here that this targeting and discrimination triggers the application of our First Amendment Free Exercise of Religion rights.

The targeting³ of specific religious practices or institutions for special disfavor (here express exclusion from the protection of Illinois RFRA) is repeatedly emphasized in the Supreme Court's Free Exercise Clause decisions. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993) (strict scrutiny applies to laws that fail either of the interrelated requirements of “neutrality” or “general applicability”). A law fails the “neutrality” requirement if “the object or purpose of [the] law is the suppression of religion or religious conduct.”⁴ *Id.* at 533. The requirement of “general applicability” similarly calls for careful examination of legislative categories. *Id.* at 542. Any such law is automatically subject to strict scrutiny.⁵ This strict scrutiny necessarily means that Chicago must submit proof to this Court

³ It is critical to note that “targeting” (in the constitutional sense) does not mean “hostility to a particular religious faith.” As explained by the authorities cited herein, it simply means that the governmental actions at issue were directly at specific religious activity.

⁴ The impermissible object of a law may be apparent from its text, particularly when “it refers to a religious practice without a secular meaning discernable from the language or context.” *Id.* But facial neutrality is not dispositive, as “[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.” *Id.* at 534. Accordingly, courts must “survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.” *Id.* (internal quotations omitted).

⁵ When a law is either not neutral, or not generally applicable, Free Exercise plaintiffs need not additionally show that they have suffered a “substantial burden” on religious exercise, which is an

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demonstrating that a) there is a compelling governmental need for Chicago to acquire and destroy St. Johannes Cemetery and b) that there are no alternatives to meeting that need that would not require acquisition and destruction.

B. First Amendment Protection is Also Applicable Where Chicago's Actions Substantially Burden Religious Institutions Such As St. Johannes Cemetery Pursuant to A System of Individualized Exemptions.

As described *infra*, the City's actions will substantially burden the Plaintiffs' religious exercise. Under the First Amendment's Free Exercise Clause—and distinct from a claim that a law is non-neutral, *see supra*—substantial burdens on religious exercise are also subject to strict scrutiny review where the government had “created a mechanism for individualized exemptions,” and so imposed the burdens through systems of “individualized governmental assessment.” *Employment Div. v. Smith*, 494 U.S. 872, 884 (1963); *Sherbert v. Verner*, 374 U.S. 398 (1963).

The Seventh Circuit recently explained that pre-*Smith* First Amendment practice used the “individualized assessment” test as an alternative standard (in addition to the targeting standard discussed in Part A, *supra*) to provide First Amendment Free Exercise Protection. In construing RLUIPA (discussed, *infra*) the Court held that the provision of RLUIPA that applies its own strict scrutiny standard to “systems of individualized assessments of the proposed uses for the property involved,” 42 U.S.C. § 2000cc(a)(2)(C), “codifies *Sherbert v. Verner*.” *Sts. Constantine and Helen Greek Orthodox Church v. City of New Berlin*, 396 F.3d 895, 897 (7th Cir. 2005) (emphasis added). Lower courts applying Free Exercise doctrine since *Smith* have applied this “individualized assessment” doctrine with particular frequency in the land-use context:

Land use regulation often involves “individualized governmental assessment of the reasons for the relevant conduct,” thus triggering *City of Hialeah* scrutiny. *Id.* at 537. For example, local authorities may be asked to decide whether the historic preservation of a district outweighs the financial interests of a specific parcel owner. *Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879, 886 (D. Md. 1996).

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element of a distinct free exercise claim. *See Brown v. Borough of Mahaffey*, 35 F.3d 846, 849-50 (3d Cir. 1994) (rejecting “substantial burden” requirement for discrimination claims, because they “have never limited liability to instances where a ‘substantial burden’” was proven, and because it “would make petty harassment of religious institutions and exercise immune from the protections of the First Amendment.”). *See also Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995) (declining to reach distinct “substantial burden” claim under RFRA, because law was not neutral under Free Exercise Clause).

Al-Salam Mosque Fdn. v. City of Palos Heights, 2001 WL 204772, at *2 (N.D. Ill. Mar. 1, 2001).⁶

More particularly, courts since *Smith* have found eminent domain actions to involve systems of individualized assessments under the First Amendment, so that the substantial burdens they impose on religious exercise would still trigger strict scrutiny after *Smith*,⁷ serving to confirm the continuing vitality of pre-*Smith* precedents that also applied strict scrutiny to substantial burdens imposed through the eminent domain process.⁸

There is “individualized assessment” here from several perspectives. We are unaware of any case where a public agency has been allowed to condemn a religious institution without first meeting the strict scrutiny test. Even more on point we are unaware of any example other than St. Johannes Cemetery where Chicago – or any other governmental body in the State of Illinois – had sought to condemn religious property without first making the evidentiary demonstrations required by the Strict Scrutiny doctrine. To Religious Plaintiffs’ knowledge only St. Johannes

⁶ See also *Murphy v. New Milford Zoning Com’n*, 402 F.3d 342, 352 (2d Cir. 2005) (adopting individualized assessments principle in land use context, citing *Hialeah* and *Sherbert*); *Congregation Kol Ami v. Abington Tp.*, 2004 WL 1837037, at *11 (E.D. Pa. Aug. 17, 2004) (recognizing the “already-accepted individualized assessment doctrine” in the land use context); *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792, at *14 (W.D. Tex. Mar. 17, 2004) (recognizing, in land use context, that “[t]he applicability of strict scrutiny to the individualized assessment process was reaffirmed in *Hialeah*.”); *Keeler v. Mayor and City Council of Cumberland*, 940 F. Supp. 879, 885 (D. Md. 1996) (holding that landmark ordinance “has in place a system of individualized exemptions”); *Alpine Christian Fellowship v. County Comm’rs*, 870 F. Supp. 991, 994-95 (D. Colo. 1994) (holding that denial of special use permit triggered strict scrutiny because determination was made under discretionary “appropriate[ness]” standard); *Korean Buddhist Dae Won Sa Temple v. Sullivan*, 953 P.2d 1315, 1344-45 n.31 (Haw. 1998) (“The City’s variance law clearly creates a ‘system of individualized exceptions’ from the general zoning law.”); *First Covenant Church v. City of Seattle*, 840 P.2d 174, 181 (Wash. 1992) (holding that landmark ordinances “invite individualized assessments of the subject property and the owner’s use of such property, and contain mechanisms for individualized exceptions”); *Hale O Kaula Church v. Maui Planning Commission*, 229 F. Supp. 2d 1056 at 1072 (D. Hawaii. 2002) (“Section [2(a)(2)](c) codifies the ‘individualized assessments’ doctrine, where strict scrutiny applies.”) (quoting *Lukumi*, 508 U.S. at 537); *Cottonwood*, 218 F. Supp. 2d at 1221 (RLUIPA “merely codifies numerous precedents holding that systems of individualized assessments, as opposed to generally applicable laws, are subject to strict scrutiny.”); *Freedom Baptist Church*, 204 F. Supp. 2d at 868 (“What Congress manifestly has done in this subsection [2(a)(1) and 2(a)(2)(C)] is to codify the individualized assessments jurisprudence in Free Exercise cases that originated with the Supreme Court’s decision in *Sherbert*”). See also *Dedicated to Youth Ministries v. City of Berwyn*, Civ. No. 03-07101, *slip op.* at 5-7 (Cook Cy. Cir. Ct. July 29, 2003) (applying strict scrutiny to denial of conditional use permit to church).

⁷ *Cottonwood Christian Center v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Ca. 2002); *Keeler v. Mayor and City Council of Cumberland*, 940 F. Supp. 879 (D. Md. 1996).

⁸ See, e.g., *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 872 (2d Cir. 1988); *Order of Friars Minor of the Province of The Most Holy Name v. Denver Urban Renewal Auth.*, 527 P.2d 804, 805 (Colo. 1974).

Cemetery (and at one time Rest Haven Cemetery) out of all the religious institutions in the State of Illinois were selected for such “individualized assessment”.

The “individualized assessment” of these two religious cemeteries did not stop at disparate treatment as compared to other religious cemeteries. At Chicago’s request, the Illinois Legislature in the OMA⁹ (the same law that gutted Illinois RFRA protection for these religious cemeteries) proceeded to remove a whole host of non-religious protections from only these two religious cemeteries while preserving these non-religious protections for every other religious and secular cemetery in the State¹⁰.

Moreover, Religious Plaintiffs have met the “substantial burden” requirement for this prong of the Free Exercise Guarantee. As shown by the affidavits of Rev Michael Kirchoff, Robert Sell, Helen Runge, Shirley Steele, and Randy Putman (attached as Exhibits H-L of the Second Amended Complaint (as well as the supplemental affidavits of Randy Putman and Robert Sell, attached hereto as Exhibits A and B), Chicago will cause substantial injury to the religious beliefs of the Religious Plaintiffs by the act of acquisition of the consecrated sacred ground alone or by the compounding desecration of moving the graves and destroying the religious cemetery. (See discussion of the requirements for “substantial injury” *infra*.)

C. The Courts Have Consistently Applied the First Amendment Strict Scrutiny Test To Prohibit the Taking of Religious Property Without the Government First Demonstrating Compelling Need and Absence of An Alternative.

Regardless of whether the courts have applied the targeting test (which does not require substantial burden, *see* fn. 5, *infra*) or the individualized assessment test, the courts have uniformly held that government must meet the First Amendment Strict Scrutiny test before being allowed to condemn religious property.

Federal and state decisions reviewing the taking of church property under the Free Exercise Clause consistently enjoin such action by applying the “strict scrutiny” standard:

Where the property belongs to a religious organization and is essential to its activities or is unique and of a special religious significance, condemnation has been considered as an interference with the free exercise of religion as protected by the First Amendment to the United States Constitution, and has been held to be justified only if the taking was required by a substantial interest which could not be accomplished through any other reasonable means.

⁹ P.A. 93-0450 attached hereto at Exhibit C, also known as “OMA” or “O’Hare Modernization Act.”

¹⁰ For example in OMA strips these two religious cemeteries of the protection of the State Human Skeletal Remains Protection Act, 20 ILCS 3440/0.01, *et seq.*, and the State Vital Records Act, 410 ILCS 535/1, *et seq.*, while leaving in place these non-religious protections for every other cemetery in the state – religious and secular alike.

26 AM. JUR. 2d *Eminent Domain* § 130. This principle has been applied time and time again by the courts in enjoining such proceedings.

Recently, a federal court in California ruled that strict scrutiny applied to a city's taking of property that a church planned to use for religious activity:

Here, Cottonwood is seeking to build a church, not a skyscraper. Its proposed use is unquestionably religious, not commercial. Thus, as discussed *infra*, there is substantial burden on Cottonwood's religious exercise, and therefore the strict scrutiny standard is invoked.

Cottonwood, 218 F. Supp. 2d at 1224. That court enjoined any eminent domain action by the City of Cypress to take Cottonwood Christian Center's land that was slated for religious purposes, ordering that "the City of Cypress and the Cypress Redevelopment Agency (Defendants) may not take any additional steps: (1) in furtherance of an eminent domain action against Cottonwood Christian Center (Cottonwood); or (2) towards taking possession of Cottonwood's property (the Cottonwood Property) through the power of eminent domain, including without limitation, applying for an order of immediate possession of the Cottonwood Property." *Id.* at 1232.

Other courts agree that strict scrutiny applies where government would take sacred ground.¹¹ In ruling that a regulatory taking of a church's property violated a church's Free Exercise rights, the Maryland federal district court held that the taking was not justified by a compelling governmental interest. *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 886-87 (D. Md. 1996, motion to vacate denied, 951 F. Supp. 83 (D. Md. 1997). Therefore, the city's actions "as a matter of law, . . . impermissibly violate[d] the Church's right to the free exercise of religion protected by the First Amendment." *Id.*

Similarly, the Second Circuit found merit in a seminary's Free Exercise challenge to the taking of its property and enjoined the taking after applying strict scrutiny:

Turning to the question of whether the condemnation of the Seminary's property is essential to achieve a compelling state interest, it is well settled that a limitation by the government on the free exercise of religion is permitted only when the state can demonstrate that a compelling interest justifies the restriction and that no alternate means of accomplishing the state's compelling interest are available.

Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855, 872 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989).

¹¹ The supplemental affidavits of Randy Putman and Bob Sell clearly establish that Chicago's seizure of ownership of the sacred ground of St. Johannes Cemetery would be a sacrilege and in itself cause a serious injury to the religious beliefs of the Religious Plaintiffs.

II. THE DISCRIMINATION AGAINST ST. JOHANNES RELIGIOUS CEMETERY IN THE CHICAGO SPONSORED ELIMINATION OF ST. JOHANNES FROM THE PROTECTION OF THE ILLINOIS RFRA ALSO TRIGGERS STRICT SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE.

Like the Free Exercise Clause, the Equal Protection Clause calls for strict scrutiny when the government discriminates according to the suspect classification of religion. *See New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (noting classifications presumptively unconstitutional if “drawn upon inherently suspect distinctions such as race, religion, or alienage”). *See also United States v. Batchelder*, 442 U.S. 114, 125 (1979) (“The Equal Protection Clause prohibits selective enforcement based upon an unjustifiable standard such as race, religion, or other arbitrary classification.”) (internal quotation omitted). This closely tracks the anti-discrimination protection of the Free Exercise Clause. *See Smith*, 494 U.S. at 886 n.3 (“Just as we subject to the most exacting scrutiny laws that make classifications based on race, or on the content of speech, so too we strictly scrutinize governmental classifications based on religion.”) (citations omitted). Here there can be no question that the 2003 Chicago-sponsored express exclusion of St. Johannes Cemetery (and Rest Haven Cemetery) from protection of the Illinois RFRA – while continuing the strong IRFRA religious protection for every other religious institution in the state (including every other religious cemetery) – violated the Equal Protection Clause and requires Chicago to demonstrate to this Court under the strict scrutiny doctrine of the Equal Protection Clause that: a) there is a compelling governmental need to acquire and destroy St. Johannes Cemetery and b) there is no alternative to meet that need which would not destroy St. Johannes Cemetery.

III. RLUIPA BARS CHICAGO FROM ACQUIRING OR DESTROYING ST. JOHANNES RELIGIOUS CEMETERY.

A. The Prohibition of RLUIPA.

The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc, *et seq.* (RLUIPA) contains the following prohibition:

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.

42 U.S.C. § 2000cc(a)(1). (Emphasis added.)

In furtherance of this burden-shifting prohibition on government action RLUIPA also places the burden of persuasion on **all issues** other than substantial burden of religious exercise **on the government**. RLUIPA § 2000cc-2(b). RLUIPA also states:

Broad Construction

This chapter shall be construed in **favor of a broad protection of religious exercise**, to the **maximum extent permitted** by the terms of this chapter and the Constitution.

42 U.S.C. § 2000cc-3(g). (Emphasis added.)

RLUIPA further provides that a person of institution whose religious beliefs and practices are “substantially burdened” by a state or local government’s proposed acts may bring an action for judicial relief to enforce RLUIPA against the state or local government in a judicial proceeding (*i.e.*, a federal district court).

The individual and collective prohibition of these provisions of RLUIPA is that – once Religious Plaintiffs establish that Chicago’s actions will cause “substantial harm” to their religious beliefs and practices – Chicago is expressly prohibited by the RLUIPA statute from taking the challenged action until Chicago can present evidence demonstrating to this Court that there is: 1) a “compelling governmental need” to acquire and destroy St. Johannes Cemetery and 2) no alternative to meet that need that would not require destruction of St. Johannes Cemetery.

B. Chicago Seeks To Implement A Land Use Regulation (i.e., A Law Or Laws To Control And Prevent St. Johns Use Of St Johannes As A Religious Cemetery) Within The Meaning Of RLUIPA.

RLUIPA defines “land use regulation” in § 2000cc-5(5):

The term “land use regulation” means a **zoning or landmarking law, or the application of such a law, that limits or restricts a claimant’s use or development of land** (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest. (Emphasis added.)

St. Johannes Cemetery was sanctified, established and put into use in 1849, which was well before any zoning laws existed. When Chicago first expanded its boundaries to include St. Johannes, the cemetery became a “lawful, non-conforming use” under the Chicago Zoning Code. As such St. John’s retained the legal right to continue to use and develop St. Johannes in all respects consistent with a religious cemetery.

The O’Hare Modernization Act (“OMA”) imposed severe restrictions on St. John’s use or development of St. Johannes. The OMA clearly strips away every protection St. Johannes (and its owner St. John’s) has to the protection of its current land use as a religious cemetery and

changes the designated use of St. Johannes as a religious cemetery to a use as “airport property” – authorizing Chicago to change the land use from religious cemetery to a concrete airport runway.

“When an ordinance constitutes an attempt by a government to regulate the use of a piece of property, it is an act of zoning.” *Sagamore Park v. City of Indianapolis*, 885 F.Supp. 1146, 1150 (S.D.IN. 1994), referencing *Pro-Eco, Inc. v. Board of Commissioners of Jay County, Indiana*, 776 F.Supp. 1328, 1371 (S.D.IN. 1990) aff’d 956 F.2d 635 (7th Cir. 1992).

Thus, the OMA itself, to the extent that it restricted the use of St. Johannes by changing the zoning designation of the cemetery, constitutes a “zoning law” under RLUIPA, which Chicago now seeks to implement. The fact that the OMA was enacted by a state and not local government is immaterial. *Hale Okaula Church v. Maui Planning Commission*, 229 F.Supp.2d 1056, 1070 (D.HA. 2002)(“the Court finds that [the state laws at issue] are ‘land use regulations’ for purposes of RLUIPA.”).

Furthermore, condemnation actions against religious property are subject to the constraints of RLUIPA. *See Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1222 (C.D. Cal. 2002) (holding that condemnation proceedings “fall under RLUIPA’s definition of ‘land use regulation’ which is defined as ‘a zoning or landmarking law, or the application of such a law, that limits or restricts the claimant’s use or development of land’ 42 U.S.C. § 2000cc-5(5). . . . It would unquestionably ‘limit[] or restrict []’ Cottonwood’s ‘use or development of land.’”). More recently, in *Faith Temple Church v. Town of Brighton, N.Y.*, 2005 WL 66210 (W.D.N.Y. 2005), another district court upheld the application of RLUIPA against a condemnation proceeding.

In sum, Chicago seeks to implement a land use regulation which will prevent St. John’s United Church of Christ from using its land as a religious cemetery, and RLUIPA applies.

Finally, Chicago’s ardent desire to be free to condemn St. Johannes Cemetery before this Court can get to the merits carries a hidden benefit for Chicago. If Chicago can take title to St. Johannes Cemetery before this Court reaches the merits Chicago’s condemnation of St. Johannes literally eliminate St. John’s rights under RLUIPA since RLUIPA relief is limited to a Plaintiff (here St. John’s) who “has an ownership, leasehold, easement, servitude, or other property interest in the regulated land”. 42 U.S.C. §2000 cc-5(5). Once Chicago acquires title to St. Johannes Cemetery, St. John’s RLUIPA claim self destructs. But here again, Chicago’s lack of sensitivity to religious rights becomes self evident. Chicago is using the condemnation power against a religious organization (here St. John’s) to deprive St. John’s of the very religious protection (RLUIPA and analogous First Amendment type protections) Congress mandated to protect religious institutions. Chicago’s eminent domain-RLUIPA subterfuge in and of itself violates St. John’s First Amendment rights.

C. **Chicago's Actions Will Impose A Substantial Burden On Plaintiffs' Religious Exercise.**

Significantly, FAA has conceded that desecration of St. Johannes Cemetery will substantially burden Plaintiffs' religious exercise.

...the religious objectors appear to have provided ample documentation for the religious grounds underlying their opposition to the relocation of those buried at the two cemeteries. The statements from religious objectors examined by the IFAA are replete with references to Scripture, Church creeds, and other recognized religious beliefs. As stated earlier, the FAA accepts these statements as genuine expressions of individuals. Applying the test described above, **the agency intends to find that their religious practices are likely to be substantially burdened if these cemeteries are relocated to another site.**

Final Environmental Impact Statement, ¶ 5.22.7.1
(July 2005) (Emphasis added).

Chicago's plans to desecrate St. Johannes Cemetery will substantially burden the religious exercise and beliefs of Plaintiffs under RLUIPA in several respects. Chicago's enforcement of the OMA itself imposes a substantial burden on Plaintiffs' religious exercise. The addition of § 30 to the Illinois Religious Freedom Restoration Act ("IRFRA") strips Plaintiffs of any rights they have under IRFRA to defend against eminent domain proceedings, and substantially increases the likelihood that they will lose St. Johannes Cemetery.

Similarly, the OMA, by stripping Plaintiffs of the right to use and develop St. Johannes in a manner consistent with a religious cemetery while changing the permitted land use from religious cemetery to "airport property" constitutes a substantial burden.

Additionally, Chicago's planned desecration of the cemetery substantially burdens Plaintiffs' rights under traditional Free Exercise Clause jurisprudence, which is incorporated into § (a)(1) of RLUIPA. Finally, as set forth in the Supplemental Affidavits of Randy Putman and Robert Sell, the very act of Chicago seizing secular ownership of sacred consecrated ground – ground dedicated and consecrated to God – is itself a sacrilege and a severe injury to the religious beliefs of the Religious Plaintiffs.

In *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997), the Seventh Circuit examined Free Exercise law and identified three circumstances in which government imposes a "substantial burden" on religious exercise.¹² Chicago violates all three in this case.

¹² "We hold, therefore, that a substantial burden on the free exercise of religion, within the meaning of the Act, is one that [(1)] forces adherents of a religion to refrain from religiously motivated conduct, [(2)] inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or [(3)] compels conduct or expression that is contrary to those beliefs." *Mack*, 80 F.3d at 1179.

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First, desecrating the cemeteries will “inhibit . . . conduct . . . that manifests a central tenet of [their] religious beliefs.” *Mack*, 80 F.3d at 1179. Destroying the cemeteries not only “inhibits,” but ***completely precludes*** Plaintiffs from fulfilling their religious obligation to care for their fellow Christians, and to ensure that their full participation in the Resurrection is not jeopardized by disturbance of the sacred ground where they were laid to rest until Resurrection Day. *See* Affidavit of Helen Runge ¶ 13, Exhibit B; Affidavit of Michael Kirchoff ¶¶ 7-11, Exhibit C; Affidavit of Randy Putman ¶¶ 4-9, Exhibit D; Affidavit of Shirley Steele ¶ 8, Exhibit E; Affidavit of Robert James Sell ¶¶ 22-24, Exhibit F. (All attached to Second Amended Complaint.)

Second, the City’s desecration of St. Johannes Cemetery will impose a substantial burden by forcing the Plaintiffs to “refrain from religiously motivated conduct.” *Mack*, 80 F.3d at 1179. It is beyond dispute that condemnation of the cemeteries will prevent the Plaintiffs from carrying out their religiously motivated obligation to care for their deceased fellow Christians, and to ensure that their full participation in the Resurrection and, thereby their salvation, is not jeopardized. *See* Runge Aff. ¶ 13; Kirchoff Aff. ¶¶ 9-12; Putman Aff. ¶¶ 13-14; Steele Aff. ¶ 8. It is similarly established that the cemetery represents a ***unique*** religious place for the Plaintiffs to engage in a variety of religious activities, which the City’s taking will additionally preclude. *See* Steele Aff. ¶ 9.

Third, should Chicago require Plaintiffs to relocate St. Johannes Cemetery, such would “compel[] conduct . . . that is contrary to [the Church’s] beliefs,” (*Mack*, 80 F.3d at 1179) by compelling Plaintiffs to abandon their present holy ground and to establish a new place of holy ground for burials. *See* Putman Aff. ¶ 13; Steele Aff. ¶ 8; Runge Aff. ¶ 9.

Fourth, Chicago’s apparent attempt to seize ownership of the sacred ground of St. Johannes Cemetery will inflict a substantial injury on the Religious Plaintiffs. Under the belief system of the St. John’s religious community (including the Religious Plaintiffs) Chicago’s seizing of ownership of the sacred, consecrated ground would be a grievous injury to the religious beliefs of the St. John’s religious community.

Nor is it satisfactory to argue that even if Chicago condemns St. Johannes Cemetery and seizes ownership from St. John, that the sacred property can be later returned to its religious owner. The very act of the secular seizing of ownership of sacred ground is itself a sacrilege and a serious injury to Religious Plaintiffs’ religious beliefs. Using the same logic there would be no

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The court acknowledged that the standard was also applicable under the First Amendment to those laws that did not fall under *Smith* (*i.e.*, laws that are “neutral and generally applicable”). *See id.* at 1178 (noting that such definition was “faithful” to “the approach that the courts took before *Smith*”).

religious harm if the United States seized ownership and control of the Temple Mount in Jerusalem or the Holy Ka'ba in Mecca (or Holy Name Cathedral in Chicago) as long as the United States let Jews, Muslims and Catholic visit and use their respective sacred properties. It makes no difference that the St. John's religious community is a small church and that St. Johannes Cemetery is a small religious property. Religious Plaintiffs are entitled to the same protection of the First Amendment and RLUIPA as the most prominent of religions.

IV. THERE IS NO COMPELLING NEED FOR CHICAGO TO SEIZE OWNERSHIP OF ST. JOHANNES CEMETERY AND THERE IS NO COMPELLING NEED TO DESTROY THIS RELIGIOUS CEMETERY. FURTHER, THERE ARE ALTERNATIVES WHICH CAN ACCOMPLISH ANY GOVERNMENTAL NEED WHILE PRESERVING THE RELIGIOUS CEMETERY.

First, there is no compelling governmental need for Chicago to seize ownership of St. Johannes Cemetery during the period while this Court determines the merits of this case. Chicago certainly has not identified such a "compelling need" to engage in summary condemnation of a religious cemetery. Even if there were such a need, this Court could set an accelerated discovery and trial schedule on the issues of compelling need and availability of alternatives.

Second, in the longer term, it is becoming painfully obvious that much of Chicago's and the FAA's claims of compelling need and lack of alternatives are simply public relations hype. *See* October 31, 2005 affidavit of former FAA Administrator Joseph Del Balzo which clearly shows why: a) there is no compelling governmental need to acquire and destroy St. Johannes Cemetery and b) why there are several alternatives to meet any legitimate governmental need without such destruction. (Attached as Exhibit 3 to Brief in Support of Villages' and Mitchell's Motion for a Temporary Restraining Order and/or Preliminary Injunction.)

CONCLUSION

The Religious Plaintiffs have met the requirements for both a Temporary Restraining Order and a Preliminary Injunction. Religious Plaintiffs will clearly succeed on the merits of their First Amendment and RLUIPA claims. Any attempt by Chicago to condemn the sacred consecrated ground of St. Johannes Cemetery while this Court reaches the final merits of Religious Plaintiffs' claims will result in serious and irreparable injury to the religious beliefs of Religious Plaintiffs. There is no demonstrated harm in requiring Chicago to withhold condemnation efforts until this Court reaches a final decision on the merits. Finally there is a huge public interest in the enforcement of the First Amendment Free Exercise rights and RLUIPA of religious minorities. Indeed, Congress in RLUIPA has declared the public interest lies in the vigorous enforcement and protection of these rights.

For all of the above reasons¹³ Religious Plaintiffs respectfully ask this Court to enter a Temporary Restraining Order and a Preliminary Injunction

1. Enjoining Chicago from taking any action to acquire or physically disturb in any way St. Johannes Cemetery pending the decision of this Court on the merits of pending the decision of this Court on the merits of Religious Plaintiffs' claims.
2. Enjoining Chicago from taking any action to interfere with the rights of the Religious Plaintiffs and the St. John's religious community from accessing St. Johannes Cemetery and from conducting religious exercises and activities at the cemetery during the pendency of this action.

Respectfully submitted

October 31, 2005

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¹³ Religious Plaintiffs also join in the motion for TRO and Preliminary Injunction of the Village of Bensenville, Elk Grove Village, and Roxanne Mitchell for the reasons set forth therein.