No. 22-10773

In the United States Court of Appeals for the Eleventh Circuit

VISION WARRIORS CHURCH, INC.,
Plaintiff – Appellant,
v.
CHEROKEE COUNTY BOARD OF COMMISSIONERS,
Defendant,
HARRY JOHNSTON, STEVE WEST, RAY GUNNIN, BENNY CARTER, COREY RAGSDALE, both individually and in their official capacities as members of the Cherokee County Board of Commissioners, et al.
Defendants – Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia, 1:19-cv-03205-MHC

APPELLANT'S REPLY BRIEF

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No. 22-10773, *Vision Warriors Church, Inc. v. Harry Johnston, et al.,*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26, counsel for Appellant Vision Warriors Church, Inc., certifies that the following have or may have an interest in the outcome of this case/appeal:

- American Center for Law & Justice (law firm for Appellant)
- Carter, Benny
- Chapman, Michael
- Cherokee County, a municipal corporation
- Cohen, Mark H., presiding district court judge
- Compagnone, Christina (formerly Christina Stierhoff and Counsel for Appellant)
- Davis, Angela E. (Counsel for Appellees)
- Dodson, Patrick Doyle (Counsel for Appellees)
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- Ekonomou, Andrew J. (Counsel for Appellant)
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- Gunnin, Ray

- Intact Insurance Specialty Solutions, a subsidiary of Intact Insurance Group USA LLC, a subsidiary of Intact Financial Corporation, Toronto Stock Exchange symbol IFC
- Jarrad & Davis, LLP (law firm for Appellees)
- Johnston, Harry
- Manion, Francis J. (Counsel for Appellant)
- Miles Hansford & Tallant, LLC (law firm for Appellant)
- Ragsdale, Corey
- Southerland, Abigail (Counsel for Appellant)
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- Vision Warriors Church, Inc.,
- West, Steven
- Zimmerman, Erik (Counsel for Appellant)

Dated: August 16, 2022

Respectfully submitted,

/s/ Abigail Southerland

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The arguments presented by the County on appeal demonstrate the impossible task before them of demonstrating that there is no genuine dispute of material fact as to whether it violated federal law under the Fair Housing Act (FHA), Americans with Disabilities Act (ADA), the Equal Protection Clause and/or the Religious Land Use and Institutionalized Persons Act (RLUIPA).

Vision Warriors (VW) is the only Christ-centered, faith-based residential program for individuals recovering from addiction in Cherokee County. Appendix 8, at 28 (PSUMF ¶ 55)[1]; Appendix 7, at 63 (Driskell Depo. at 318: 1-4). It operates at half the cost of most recovery centers fulfilling a similar mission. *Id.* at 64-65 (Driskell Depo. at 319-320). This case is about the unprecedented measures taken by, and shifting justifications provided by, the County to strip this organization of previously obtained zoning approval and an occupancy permit, effectively banning it from the Property and *all* residential zoning districts within the County. The decision to completely reverse course occurred only *after* neighborhood opposition arose.

The County's strategy for explaining away its unprecedented action, the conflicting testimony of its own officials, and admissions by other officials that portions

[1] In its opening brief, VW cites to Doc. 104-2, Pl.'s Statement of Undisputed Material Facts ("PSUMF"). Defendants-Appellees' response to these facts is available in the record at Doc. 124. Now that the Appendix has been filed, VW will cite to the Appendix page number for Doc. 124 for all PSUMF cited.

of the zoning process may have been unfair, *see* Appellant's Opening Brief (hereinafter "VW Br."), is to blame VW with conjecture intended to cast it in an unfavorable light. The County makes unfounded claims that VW and the prior non-profit owner of the Property, Happy Acres, may not have been upfront about their intended uses. The County's own documentation, however, fails to support this narrative. Building and other permits,[2] occupancy permits issued to both organizations,[3] and approval letters from top zoning officials[4] and the County attorney[5] all affirm that both VW and Happy Acres were upfront regarding the use of the Property. Further, regarding VW's proposed use, testimony was even provided by one of the County's top planning and zoning officials confirming there was no misunderstanding, Appendix, Vol. 8, at 52[6] (PSUMF ¶ 89), and that VW properly filled out its Tenant Occupancy Change ("TOC") permit application, which was then granted by the County. Appendix 7, at 14-15 (Watkins Depo. at 17:23-18:2).

[2] Appendix 3, at 214-234 (construction, building, and plumbing permits issued to Happy Acres over the years).

[3] Appendix 3, at 235 (occupancy permit for Happy Acres); Appendix 4, at 103 (occupancy permit for VW clearly indicating a use of "church/transitional housing for men").

[4] Appendix 3, at 238-246 (Lee's certifications of zoning in 2018 affirming existing buildings on the property included a primary home, detached garage, dormitory, and chapel, and that guests may be housed in the dormitory).

[5] Appendix 3, at 237 (letter from County attorney in 1996 approving use of warehouse to manufacture and ship wooden pallets).

[6] Appellant's Appendix is cited as "Appendix."

Indeed, the County has done all it can to distract from the real inquiry here: why did two of its departments independently sign off on zoning certification and a TOC permit if these uses were so clearly illegal or non-conforming? And how is it that the County decided to undermine those decisions only after neighborhood opposition arose? Notably, while the County has more recently attempted to suggest that its thorough review of VW's zoning certification was naturally triggered by issuance of the TOC permit (rather than the neighborhood opposition), that contention is discounted by testimony from the County's Planning and Zoning Director, Watkins. Mr. Watkins confirmed that issuance of the TOC permit triggers an inspection by the fire marshal to check *fire code compliance* – not to re-evaluate zoning certification. *See* Appendix 7, at 15 (Watkins Depo. at 18:10-15); *see also* Appendix 8, at 188 (citing testimony that Watkins decided to look into VW because of neighborhood complaints).

VW's unjust and unlawful treatment, however, did not stop with revocation of zoning approval. VW was then subjected to a biased zoning application process and was denied permission to operate in the same manner as similarly situated uses that are permitted in the same residential district. VW had no real hope of obtaining relief on its administrative appeal since the very same officials who led the charge to revoke its zoning and TOC permit, and subsequently deny its request for permission to operate as a religious institution and dormitory, presided over its appeal. Indeed, testimony offered by two County officials indicates that VW may not have received a fair process due to the County Commission Chairman's premature announcements that the

Commissioners would not vote in favor of VW, that other Commissioners would follow suit, and that VW would need to sue the County for relief.[7]

The County cannot meet its burden to show that it is entitled to summary judgment on all claims, as its entire defense rests on unsupported assertions of fact. Specifically, as a defense to almost every claim brought by VW, the County asserts that VW is not *completely* prevented from utilizing the Property because it could still house four (4) unrelated individuals in a single-family home. *See* Appellees' Br., at 36 (citing Doc. 101-30, § 4.3 (zoning ordinance definitions)); *id.* at 23 ("This case is not about whether VW can house any of its members on the Property. The Zoning Ordinance allows up to four unrelated individuals (disabled or not) to live together in a single-family residential zoning district. Accordingly, VW members have an equal opportunity to reside on the Property as any other citizen would."); *id.* at 34 (asserting same to argue no discriminatory effect); *id.* at 37-38 (asserting same to suggest VW has not demonstrated necessity in regard to the reasonable accommodation claim); *id.* at 58 (asserting the same to suggest no substantial burden under RLUIPA). A review of the zoning ordinance, however, debunks this assertion. Section 4.3 specifically *excludes* organizations from qualifying as a "family." *See* Appendix 4, at 27 (§ 4.3 of zoning ordinance defining "family."). The zoning ordinance defines family as follows:

[7] Appendix 8, at 71 (¶¶ 127-128) (admitting Chairman made these comments); *id.* at 73-74 (¶¶ 132-133) (offering testimony by County officials indicating it would be unfair for a board commissioner to determine/announce how they will vote prior to attending the hearing).

> Family. An individual, or two or more persons related by blood, marriage, adoption or guardianship, *or a group of not more than four unrelated persons*, occupying a single dwelling unit; provided however that domestic servants employed on the premises may be housed on the premises without being counted as a separate family or families. *The term "family" does not include any organization or institutional group.*

Id. (Emphasis added).[8]

Similarly, while the County also suggests that the Property was and is simply a single-family residential lot, all documentation demonstrates this is not true. As the County's own planning report for the Property confirms, the Property consists of two large parcels/tracts of land totaling 6.49+ acres. Appendix 5, at 89. Tract 1 is 2.899 acres and contains two large buildings: a workshop consisting of 2,605 square feet and a main building (dormitory/chapel) consisting of at least 8,517 square feet. *Id.* Tract 2 consists of 3.5 acres and holds three buildings: a home consisting of 2,562 square feet and two garages (one is 1,450 square feet and the other is 594 square feet). *Id.* As pictures in the report show, there are five pre-existing buildings on the Property including a house, two garages, a main building (regularly referred to by the zoning department as a church/dormitory), and a workshop. *Id.* at 91. A wooded area provides a natural barrier and separates the main building and workshop from bordering lots. *Id.* at 93.

[8] Importantly, if this Court determines – like the district court – that the reasonable accommodation claim hinges upon whether VW is permitted as an organization to operate as a family with just four (4) individuals, summary judgment in favor of the County would be improper because this fact is – at a minimum – disputed in light of County's own zoning ordinance.

Additionally, the County asserts throughout its brief that VW operates as a temporary shelter[9] for "55 men every day, 365 days a year, with a rental payment required or the men get kicked out." *See* Appellees' Br., at 17; *id.* at 49 (failing to provide any citation to the record). VW is not housing 55 residents 365 days a year on the Property. Absolutely no evidence in the record is cited by the County to support this assertion. While VW originally indicated that it would like to house up to 55 residents, the maximum number of occupants remains undetermined because the County has refused to issue a determination regarding fire and building code compliance, much less consider an agreeable number in the zoning process. *See* Appendix 4, at 121 (noting that the Fire Marshal inspected the premises and VW "is awaiting a determination as to the capacity allowed pursuant to this Certificate of Occupancy"). As the evidence in the record shows, at the time the County was evaluating VW's request, it housed a total of 19 residents. *Id.* VW has since explained that its maximum capacity is approximately 36. Appendix 8, at 40 (PSUMF ¶ 63); Appendix 7, at 55-56 (Driskell Depo. at 110-111).

Finally, VW does not "kick out" men from the program for failure to pay a suggested donation of $600 per month.[10] This incorrect claim is directly refuted by the

[9] *See* Appellees' Br., at 17 (citing Doc. 111, 64:3-8) (seemingly suggesting that VW considers it a "temporary shelter," but the testimony provided does not support this assertion). As VW has already demonstrated, it does not meet any of the hallmarks of a temporary shelter as defined by the NAICS Code, nor has it ever referred to itself as such. County officials regularly referred to VW as a dormitory and church or religious institution. VW Br., at 32-33.

[10] The County cites to an affidavit from a witness never identified by Defendant during discovery and objected to by VW (Doc. 125). While the district court did not rule on

record. Appendix 3, at 129 (explaining that residents are asked to help defray living expenses by contributing up to $600 monthly, depending upon their ability to pay; "VWC believes that requiring resident members to contribute something to room and board encourages a strong work ethic and sense of accomplishment for their efforts"); *see also* Appellees Supp. Appendix 5, at Doc. 105-9, at 13.

With the factual corrections discussed above in mind, review of the legal claims at issue in this case demonstrates that the County is *not* entitled to summary judgment any claim.

I. FHA and ADA Claims.

A. Intentional Discrimination

In *Hallmark Developers, Inc. v. Fulton County*, 466 F.3d 1276 (11th Cir. 2006), the Court discussed two ways to show that a zoning decision was based on intentional discrimination: showing that a discriminatory factor "played some role" in the decision (under a multi-factor test), or that the "decision-making body acted for the sole purpose of effectuating the desires of private citizens. . . ." *Id.* at 1283-84. The County latched onto the second one and declared that VW has failed to meet this standard. Appellees' Br., at 24 (discussing the court's analysis of this second test in *Hallmark* and also

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the issue of admissibility, the district court's opinion and order does not include any mention of this affidavit or of information Defendant attempted to provide through this improper submission. *See generally* Appendix 8, at 178 (Doc. 132).

analyzing the multi-factor test). VW, however, has presented facts and legal argument under the first test. VW Br., at 26-35.

Before addressing the County's argument with regards to the multi-factor test, the County's reliance on *His House Recovery Residence, Inc. v. Cobb County*, 806 Fed. Appx. 780, 785 (11th Cir. 2020), requires discussion. In *His House Recovery*, this Court found no evidence to suggest that the county had unevenly enforced its ordinance, or was unjustified in denying the use permit, where only circumstantial evidence was presented and there was no evidence of different treatment or showing that the County had unevenly enforced the ordinance. His House sought to occupy a single-family dwelling within a neighborhood association and exceed the maximum occupancy allowed. *Id.* at 782. Neighbors and county officials alike expressed *well-founded* concerns based on an established history of prior violations by His House. Moreover, His House was unable to demonstrate that any similarly situated non-handicapped uses were permitted or had been permitted in the past. *Id.* at 785. Finally, there was no evidence demonstrating that His House had obtained prior zoning approval, only to have it subsequently revoked.

In stark contrast to *His House Recovery*, the Property here is *not* a small single-family residential home/lot subject to neighborhood association guidelines. VW's use of the Property's pre-existing buildings was substantially similar to the prior uses of the Property that occurred for thirty years, so claims that VW's use was not compatible with neighboring properties, or that it would change the character of the neighborhood, are unsupported. There was also no history of concerning conduct by VW residents.

Once more, the Property could have been used as a dormitory (a similarly situated use) as a matter of right by VW or anyone else without regulation or restriction. In sum, *His House Recovery* does not provide a similar fact pattern and is unpersuasive as support for the County's attempt to disclaim any improper motive or intent.

The County also suggests that there is no *direct* evidence here of intentional discrimination by County officials. There rarely is in cases of discrimination. *Hallmark Developers, Inc.*, 466 F.3d at 1283 (noting that explicit statements of discrimination are decreasing). This is why *circumstantial* evidence and analysis of the multi-factor test is "used to establish requisite intent." *Id.* There is, nonetheless, direct evidence of discriminatory treatment of Vision Warriors compared to similarly situated uses. This is addressed in more detail directly below (and in the opening brief).

Discriminatory impact/effect

Undisputed record evidence in this case – *e.g.,* the County's zoning ordinance – demonstrates that VW's residents have been treated differently than similarly situated non-disabled citizens. *See His House Recovery*, 806 Fed. Appx. at 784 (noting that an intentional discrimination/disparate treatment claim requires a plaintiff to show that he has been treated differently than similarly situated non-handicapped people); *see also Hallmark*, 466 F.3d at 1286 (noting discriminatory effect can be shown by demonstrating "housing options significantly more restrictive for members of a protected group than for persons outside that group") (citation omitted).

The County admits that its classification of VW as a "Temporary Shelter" bans it from *all* residential zoning districts. VW Br., at 27. As VW details in its opening brief, similarly situated uses (dormitories and *religious organizations operating temporary shelters free of charge*) are permitted by right and/or with special permission in the same residential zoning districts. *Id.* at 46-48; *see also* Appendix 8, at 42-43 (PSUMF ¶¶ 70-71); Appendix 4, at 98-99. In sum, if VW housed college students and/or operated a fraternity or sorority instead of disabled individuals in recovery, its use would have been permitted *by right* at the time it purchased the Property, and VW would not be banned from all residential zoning districts. Appendix 8, at 42-43 (PSUMF ¶¶ 70-71).

Likewise, if VW operated a temporary shelter *free of charge*, rather than requesting that its residents at some point provide a minimal financial commitment, its use would be permitted by special permission. Appendix 4, at 98-99 (permitting places of worship[11] to operate accessory uses including "temporary shelter, transitional housing, and other similar facilities that are provided free of charge in furtherance of the ministry and/or goals of the Place of Worship"). The unfair treatment here is further highlighted by the fact that the County amended its ordinance and specifically included this special condition (providing that only shelters provided *free of charge* would be permissible accessory uses for places of worship/religious institutions). The County knew this

[11] "Place of Worship" is defined as "[a] permanent structure built for the purpose of accommodating a Religious Organization in its exercise of religious worship, prayer and/or religious instruction." Appendix 4, at 96.

would exclude VW from operating under this definition. *Id.* at 7 (adopted October 16, 2018); Appendix 4, at 104, 121 (indicating to the County as early as May and June of 2018 that VW operated as a church and dormitory and requested a monthly financial contribution from residents to defray costs).

In an attempt to diminish the import of this differential treatment and the definitiveness of its ban, the County argues that VW is not "prevented from housing up to four members [people] on the Property" consistent with the definition of "family." Appellees' Br., at 27. As VW has explained above, this argument is not sustainable. Even if this was correct, however, the County's argument obscures the fact the other analogous uses discussed above are *not* limited to four people. Discriminatory government acts that greatly reduce, but do not fully eliminate, an entity's ability to operate are still unlawful.

Other factors

With regards to the other *Hallmark* factors, this case, unlike many, does not hinge upon a few suspect comments made by government decisionmakers in rendering an otherwise logical and supportable zoning determination. However, the County's change of heart, which undisputedly occurred only after neighborhood opposition arose, is certainly relevant. Appellees' Br., at 30 (admitting there was significant opposition here compared to other applications, but asserting that such a fact is irrelevant); *id.* at 28

(arguing that the County's specific mention of this opposition to VW is also irrelevant).[12]

There is a mountain of other evidence demonstrating unprecedented action, departure from normal criteria, and unsupportable and inconsistent reasoning for zoning determinations that establishes – at a minimum – that a genuine issue of fact remains as to whether VW's residents' disability played a role in the County's decisions. *Hallmark,* 466 F.3d at 1283. The County urges this Court to construe the evidence in *the County's* favor, Appellees' Br., at 25-30 (arguing that the Court should infer or presume "innocence" in its admittedly "elaborate" and "very rare" actions), but that is not the proper standard here where only the County moved for summary judgment on this claim. *DA Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254, 1265 (11th Cir. 2007) (all reasonable inferences that can be drawn from it must be viewed in the light most favorable to the non-moving party").

Further, the County's attempt to distinguish *Caron Found. of Fla., Inc. v. City of Delray Beach*, 879 F. Supp. 2d 1353 (S.D. Fla. 2012), from this case is unavailing. Just as

[12] The County's assertion that there is no citation to the record to support this fact is refuted by Appendix 8, at 45 (PSUMF ¶ 76) (citing Defendants' Answer (Doc. 46, ¶ 76)) (admitting that, in its meetings with VW, it "advised" it of the neighborhood opposition).

in *Caron*, there is a history here of restricting disabled individuals' access to housing,[13] and the County *did* amend its ordinances in a manner directly effecting VW. *See Supra*.

B. Reasonable Accommodation

For many of the same reasons cited above, the County's defense against VW's reasonable accommodation claims also fails, and VW is entitled to summary judgment.

Refusal/Denial

For the first time on appeal, the County suggests it did not "refuse" VW's request for accommodation; however, there was no dispute or argument from the County on this issue in the district court. Appendix 8, at 212 ("Regarding Vision Warriors' reasonable accommodation claim, the parties only dispute whether the requested accommodation was necessary and reasonable."). Nonetheless, the record clearly shows that VW placed the County on notice of its legal duty to provide a reasonable accommodation, made its request known on four different occasions over the span of a year or more, *see* Appendix 8, at 47, *et seq*. (PSUMF ¶¶ 77, 84-85, 112, 126); Appendix 5, at 102-108, and made several requests for reasonable accommodation (via a special use application, rezoning application and administrative appeal). Appendix 8, at 64, *et seq*. (PSUMF ¶¶ 113-116, 125, 130). There is also no dispute that Defendants denied

[13] *See* Appellees' Br., at 33, fn. 6 (acknowledging the prior lawsuit); Appendix 7, at 150 (notice by Blue Mountain Recovery Center of violations of the FHA and ADA by Cherokee County).

each of VW's zoning requests and its appeal. *Id.* at 70 (PSUMF ¶ 125); *id.* at 72 (PSUMF ¶ 130).[14]

Necessity

The County's argument regarding necessity, or lack thereof, is based on the unsupportable argument that VW's request was for a variance to house more than four unrelated individuals (the limit imposed by the County's definition of "family"). *See* Appellees' Br., at 38 (citing no other evidence except the definitions section of the zoning ordinance, Doc. 101-30, § 4.3). As explained above, this argument fails pursuant to the clear language in the zoning ordinance excluding an organization from operating as a "family." Further, VW never requested a variance in this case, nor would it. The Property is not set up to operate as a mere single-family dwelling. All evidence in the record, including VW's zoning applications and its legal demand letters, make undisputedly clear that its request was to operate as a dormitory or similarly situated use.

Even if the County's variance argument was valid, VW has demonstrated necessity, *i.e.*, the "link" between its residents' recovery and the need to operate a residential program for more than four unrelated persons. *See* VW Br., at 39-41 and fn. 14. Additionally, it is unsurprising that where, as here, a non-profit ministry (operating

[14] The County was fully aware of its legal obligations; just two years prior to VW's request for reasonable accommodations, the County was sued for violations of the FHA and ADA by a recovery group home, including for refusal to provide a reasonable accommodation. Appendix 8, at 75-76 (PSUMF ¶¶ 135-136); Appendix 7, at 150.

at a low cost to its residents)[15] has invested in a large property containing five buildings specially designed for a large residential program, and obtained assurances from the local government to do so, it could not financially sustain the drastic reduction of the use of the property to a mere single-family home. Case law affirms that both affordability and group living (that exceeds the size of a traditional family) are essential components to a disabled individual's recovery. *Id.* at 39-40.

In sum, and as VW has demonstrated, it is necessary for VW residents to be able to reside in, rather than be banned from all, residential zoning districts in the County. VW Br., at 37-38. VW is requesting an equal opportunity – not a "better" one as the County suggests. But for such an accommodation, it will be denied any semblance of an opportunity – much less one that allows them to live in a dwelling of their choice. *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1225 (11th Cir. 2008).

Reasonableness

The County makes no attempt to argue any financial burden, and its attempt to argue a fundamental alteration is based solely on an excerpt from the zoning ordinance governing the R-80 district. Appellees' Br., at 44 (citing Doc. 101-30, 7.1-2). The Property is located in a mixture of both the R-80 and R-20 districts. The County's planning report – specific to VW's zoning request – is devoid of any assertion that VW

[15] VW provides its recovery program at 50 percent of the cost of other recovery centers, making its financial burden all the more significant. Appendix 7, at 64-65 (Driskell Depo. at 319-320).

will fundamentally alter the area. Appendix 5, at 93 (discussing "impact" and making no mention of any fundamental or negative impact). The planning report also discusses future land uses and indicates that both areas (R-80 and R-20) include "residential, as well as semi-public and institutional uses." *Id.* at 94 (discussing future development and also stating that one of the parcels is in an area "designed to support existing neighbors with compatible residential and commercial development"). The report also confirms there are no concerns with traffic. *Id.* at 88-89. These facts, combined with the fact that (1) two different departments within the County previously signed off on VW's use, and (2) the Property has been used in an almost identical manner for more than three decades without so much as a complaint of a fundamental alteration, foreclose any argument of unreasonableness here.

The evidence presented supports summary judgment in favor of VW on its reasonable accommodation claim. At a minimum, however, there remains a genuine issue of material fact, and VW should be given the opportunity to present its case to a jury.

II. Equal Protection Clause.

The County's principal arguments were already addressed in VW opening brief. There are, however, a few mischaracterizations of facts by the County that require a response.

Happy Acres

There is absolutely no evidence that Happy Acres – at any time it owned the Property – operated "clandestinely." Appellees' Br., at 48. It is also misleading to suggest that Happy Acres was denied permission to operate a church/dormitory; it was never denied such a request. It was, instead, denied a rezoning request to subdivide the parcels into half-acre lots and erect several additional single-family residences on the Property. Appellees Supp. Appendix, at Doc. 101-6, at 6. These are two entirely different zoning decisions. Notably, operation of a dormitory would not have required any zoning permission.

All of the County's documentation indicates that, with each and every building erected, Happy Acres properly sought and obtained all necessary approval, including building and plumbing permits, certificates of occupancy, and even a letter from the County Attorney when adding another use. *See supra* fn. 2-5. The County's assertion of knowledge of Happy Acres' dormitory use[16] is not disputed in light of Mrs. Young's testimony that regular inspections of the Property were conducted by the County. Appellees Supp. Appendix 7, at Doc. 110, at 191.[17] Regardless, even more recently, both

[16] The County strategically refers to Happy Acres' use as a "Temporary Shelter" throughout its brief. There is, however, no evidence that it would have been properly classified as such. Notably, this use was not one recognized in the ordinance at the time Happy Acres began operating its mission in the late 1980s. *See generally* Appellees Supp. Appendix 5, at Doc. 101-27 (1988 Zoning Ordinance. It still remains undefined in the County's zoning ordinance.

[17] Further, as the County indicates in its briefing, when a certificate of occupancy is issued, it triggers the process for an inspection. Accordingly, an inspection of Happy Acres' church building would have occurred.

Ms. Lee (the County's top zoning official) and the building permit office raised no objections, and confirmed these ongoing uses were no problem. *See supra.*

Finally, in regard to the woodshop and large detached garage on the Property, VW's use is neither commercial nor more intensive than Happy Acres. VW does not operate the woodshop as "a commercial furniture manufacturer for sale to the general public." This is another mischaracterization of VW's testimony. VW residents have made Adirondack chairs as well as a few planters boxes at the request of a supporter. These were not sold on the Property. They were delivered to a nearby nursery who sells them and gives the proceeds to VW. Appellees Supp. Appendix 12, at Doc. 111, at 223 (Driskell Depo. 223:20-225:8). Once more, VW does not run a commercial car repair shop or provide repairs for the general public. It uses the garage to teach residents a job skill and repairs are made for residents and members and supporters of the recovery community. *Id.* at 221-222.VW does not charge labor for repairs but accepts donations. *Id.*

Other uses

Ever since the County first announced its intention to revoke zoning approval and ban VW from all residential zoning districts, VW has asserted that it should be treated like a dormitory and/or religious institution – not a temporary shelter. No new claim has been raised here. VW has consistently asserted a claim for violation of the Equal Protection Clause, from the complaint through the appeal. Appendix 1, at 53-55;

Appendix 6, at 133; Doc. 104-1, at 33 (noting in its equal protection challenge that dormitory is/was a comparable use permitted under the County's zoning ordinance).

While the County attempts to re-package VW's equal protection claim as a facial challenge, the primary case relied upon by VW – *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) – is one involving an as applied challenge. VW's argument is that the County's *application* of its zoning ordinance to classify VW as a "Temporary Shelter" effectively bans VW from residential zoning districts and results in unequal treatment.

Finally, VW has presented ample evidence demonstrating the similarities between a "Temporary Shelter" and "dormitories." Such evidence can be found within the County's zoning ordinance, the NAICS Code definitions, and County officials' testimony discussing the two uses. VW Br., at 31-32, 55. There is no meaningful distinction in the County's zoning ordinance here regarding these other uses as it pertains to intensity of use, minimum or maximum occupancy, building layout, or the like. In fact, the uses in this case are more similar than those in cases cited in VW's opening brief. Indeed, and according to the County, the only difference between VW and a dormitory is the type of individuals who reside there. Likewise, the only difference between a religious institution's accessory use of "temporary shelter" and VW's use is that VW asks residents to contribute financially. (Of course, religious institutions often request donations as well.) The County makes no attempt, much less offers any evidence, to establish any meaningful difference between the uses. As such, there is no genuine issue in dispute regarding the County's different treatment of VW compared

to other similarly situated uses, or regarding the lack of a rational basis for the different treatment.

III. RLUIPA Substantial Burden

In its counterargument to VW's substantial burden claim, the County (like the district court) relies on a standard rejected by this Court in *Thai Meditation Ass'n of Ala., Inc. v. City of Mobile,* 980 F.3d 821, 830 (11th Cir. 2020), that "to qualify [as a substantial burden], a regulation must completely prevent religious activity or tend to force adherents to forego religious precepts." Appellees' Br., at 45-48 (citing *Midrash Sephardi, Inc. v. Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004)) (arguing that "VW does not allege that its ministry would actually have to shut down," and that "VW failed to plead that it was entirely prevented from religious exercise on the Property"). As this Court has made very clear, "whatever the term 'substantial' means, it most assuredly does *not* mean complete, total, or insuperable." *Thai Meditation Ass'n,* 980 F.3d at 830 (emphasis in original) (internal citations omitted). Indeed, "modified behavior, if the result of government coercion or pressure, can be enough." *Id.* at 831.

In *Thai Meditation*, the plaintiff alleged a substantial burden after the city voted not to approve its application to operate its religious facility in a residential zone and make significant alterations to the property, including the addition of a 2,300 square-foot meditation building, a 2,000 square foot cottage to host visiting monks, a 600 square-foot restroom facility, and associated parking. *Id.* at 827. The city cited traffic and environmental concerns in support of denying the application. *Id.* In reviewing

plaintiff's RLUIPA claim, this Court confirmed that the plaintiff's "building a center with the alleged purpose of teaching Dharmakaya meditation falls squarely within RLUIPA's definition of 'religious exercise,'" and concluded that the city *may* have imposed a substantial burden on their religious exercise. *Id.* at 829. The Court provided several factors for the district court to consider on remand, including (1) whether plaintiff demonstrated a genuine need for more space; (2) the extent to which the zoning policy deprives plaintiff of viable means by which to engage in protected religious exercise; (3) whether there is a "nexus" between coerced conduct and plaintiff's religious exercise; (4) whether the decision-making process reflects any arbitrariness that might evince animus or suggest plaintiff has been "jerked around"; (5) whether the denial was final or whether plaintiff had an opportunity to submit modified applications; and (6) whether the burden is attributable to the government or self-imposed. *Id.* at 832.

Applying those same factors here, along with the proper legal standard (rather than the hypotheticals and assumptions the County proposes), VW has sufficiently alleged a substantial burden. The first factor is not applicable here. VW is not requesting to significantly alter the Property or add buildings. As to the second and third factors, VW clearly alleges that the County's zoning determination deprives it of viable means to engage in its religious mission. *See* Doc. 33, at ¶¶ 111, 129 (Defendants' zoning actions will effectively shut down its ministry). The County's suggestion that the residential component of the ministry could be a separable part and/or is not a religious

precept of its mission, *see* Appellees' Br., at 48, is unsupported by the evidence. *See* Appendix 1, at 61, ¶ 5 (VW is a faith-based ministry for men in recovery); *id.* at 63, ¶ 13 (VW "provides support services to men striving to overcome addiction through a residential program"); *id.* at 65, ¶ 20 (a "*residential* program is an *integral and essential* part" of its care for those struggling to overcome addiction) (emphasis added); *see also id.* at ¶¶ 21, 56. Even the County acknowledges that the residential component is VW's "*principal use* of the property." *Id.* at 79, ¶ 84 (emphasis added).

The County's argument is also contrary to RLUIPA's text. *See* 42 U.S.C. 2000cc-5(7)(A) (noting RLUIPA's broad definition of religious exercise which includes certain activities such as the use of land and encompasses such activities "whether or not [they are] compelled by, or central to, a system of religious belief"). Further, as discussed previously, the County's suggestion that VW can simply operate as a "family" with no more than four (4) people—besides being contrary to the ordinance—does not eliminate or lessen the substantial burden imposed by the improper elimination of VW's ability to host its residential program.

Finally, the remaining three factors are also met here: VW was "jerked around" through unprecedented actions taken in response to unfounded community opposition, the denial was final (VW sought reasonable accommodations which were denied, and exhausted its appeal with the County), and there is no self-imposed burden (VW actually sought and obtained approval prior to purchasing the Property). The County makes no attempt to meet its burden to prove that substantially burdening VW's religious exercise

is the least restrictive way to further a *compelling* governmental interest. Accordingly, Plaintiff has sufficiently plead a claim of substantial burden under RLUIPA and should be permitted to move forward with litigation of this claim.

Dated: August 16, 2022

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed R. App. P. 32(g), because it contains 5,806 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) according to the Microsoft word count function.

I further certify that the brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Garamond font.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was electronically filed with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit on August 16, 2022 using CM/ECF, which then served such filing upon the following registered counsel of record for Plaintiffs-Appellees:

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