

STATE OF MICHIGAN
COURT OF APPEALS

SHEPHERD MONTESSORI CENTER MILAN,

Plaintiff-Appellant,

v

ANN ARBOR CHARTER TOWNSHIP, ANN
ARBOR CHARTER TOWNSHIP ZONING
OFFICIAL and ANN ARBOR CHARTER
TOWNSHIP ZONING BOARD OF APPEALS,

Defendants-Appellees.

FOR PUBLICATION
August 26, 2008
9:00 a.m.

No. 272357
Washtenaw Circuit Court
LC No. 00-001072-AS

ON REMAND
Advance Sheets Version

Before: Saad, C.J., and Hoekstra and Smolenski, JJ.

SAAD, C.J.

This case is on remand from our Supreme Court. In *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315; 675 NW2d 271 (2003) (*Shepherd I*), this Court reversed the trial court’s grant of summary disposition to defendants on plaintiff’s claims that defendants’ denial of a variance for plaintiff to use property adjacent to its Catholic Montessori day care center to operate a faith-based school violated 42 USC 2000cc of the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the Equal Protection Clause of the United States Constitution, US Const, Am XIV, § 1, and the Michigan Constitution, Const 1963, art 1, § 2. *Id.* at 318-319. This Court remanded the case for consideration of whether defendants’ denial of the variance imposed a “substantial burden” on plaintiff’s religious exercise and to consider various aspects of feasibility and economic hardship associated with alternative sites for the school. *Id.* at 329-333. On remand, the trial court again granted summary disposition in defendants’ favor.

In the second appeal, *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 275 Mich App 597; 739 NW2d 664 (2007) (*Shepherd II*), we ruled that the trial court failed to correctly apply the “substantial burden” factors as set forth in *Shepherd I*, that defendants’ denial of the zoning variance imposed a substantial burden on plaintiff’s religious exercise contrary to RLUIPA and, because defendants provided no evidence of a compelling governmental interest, plaintiff was entitled to summary disposition on its RLUIPA claim. *Id.* at 609-610. On plaintiff’s equal protection claim, we ruled that defendants treated Rainbow Rascals, a secular entity, more favorably than plaintiff, a religious entity. *Id.* at 613-614. Defendants conceded that plaintiff and Rainbow Rascals are similarly situated, and defendants offered no reason to

justify its refusal to permit plaintiff to operate its faith-based school in the same space that Rainbow Rascals had operated its day care program. *Id.* For these reasons, and because defendants offered no evidence to show that their denial of plaintiff's variance request was narrowly tailored to achieve a compelling governmental interest, we held that plaintiff is entitled to summary disposition on its equal protection claim. *Id.*

In lieu of granting defendants' application for leave to appeal, the Supreme Court vacated our ruling in *Shepherd II*, and remanded the case for reconsideration in light of *Greater Bible Way Temple of Jackson v City of Jackson*, 478 Mich 373; 733 NW2d 734 (2007), which was decided approximately one month after we decided *Shepherd II*. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 480 Mich 1143 (2008). Specifically, the Supreme Court instructed us to "reconsider whether the denial of the zoning variance imposed a 'substantial burden' on the plaintiff's religious exercise, i.e., whether the denial of the variance "coerce[s] individuals into acting contrary to their religious beliefs." *Id.*, quoting *Greater Bible Way*, 478 Mich at 401 (internal quotation marks and citation omitted).

In *Greater Bible Way*, the plaintiff church alleged violations under RLUIPA after the city of Jackson denied its request to rezone its property from single-family residential to multiple-family residential. *Greater Bible Way*, *supra*, 478 Mich at 377-378. The plaintiff wanted to build an apartment complex across the street from its church. *Id.* at 377. After a bench trial, the court found that the defendants had violated RLUIPA and this Court agreed. *Id.* at 378. Our Supreme Court reversed and held that RLUIPA does not apply because a "refusal to rezone the property did not constitute an 'individualized assessment'" under RLUIPA. *Id.* at 391. Although that ruling was dispositive, the Court proceeded to consider whether any violation of RLUIPA had occurred, "[a]ssuming" that RLUIPA applied. *Id.* at 391. The Court addressed whether the city's refusal to rezone the property constituted a "substantial burden" on the plaintiff's religious exercise:

[W]e believe that it is clear that a "substantial burden" on one's "religious exercise" exists where there is governmental action that coerces one into acting contrary to one's religious beliefs by way of doing something that one's religion prohibits or refraining from doing something that one's religion requires. That is, a "substantial burden" exists when one is forced to choose between violating a law (or forfeiting an important benefit) and violating one's religious tenets. A mere inconvenience or irritation does not constitute a "*substantial* burden." Similarly, something that simply makes it more difficult in some respect to practice one's religion does not constitute a "*substantial* burden." Rather, a "substantial burden" is something that "coerce[s] individuals into acting contrary to their religious beliefs[.]" [*Id.* at 400-401, quoting *Lyng v Northwest Indian Cemetery Protective Ass'n*, 485 US 439, 450; 108 S Ct 1319; 99 L Ed 2d 534 (1988) (emphasis added).]

The Court ruled that Greater Bible Way Temple failed to establish a substantial burden on its religious exercise:

The city is not forbidding plaintiff from building an apartment complex; it is simply regulating where that apartment complex can be built. If plaintiff wants

to build an apartment complex, it can do so; it just has to build it on property that is zoned for apartment complexes. If plaintiff wants to use the property for housing, then it can build single-family residences on the property. In other words, in the realm of building apartments, plaintiff has to follow the law like everyone else.

While [the zoning ordinance] may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city, it does not prohibit plaintiff from providing housing. Whatever specific difficulties [plaintiff church] claims to have encountered, they are the same ones that face all [land users]. The city has not done anything to coerce plaintiff into acting contrary to its religious beliefs, and, thus, it has not substantially burdened plaintiff's exercise of religion [*Greater Bible Way, supra*, 478 Mich at 401-402 (quotation marks and citations omitted).]

The Court reversed and remanded for entry of judgment in favor of the defendants.

In light of the Supreme Court's interpretation of RLUIPA, we are compelled to reach a similar result. As set forth in *Greater Bible Way, supra*, 478 Mich at 400, to establish a RLUIPA violation, plaintiff must show that the denial of the variance request "coerces" individuals into acting contrary to their religious beliefs. Plaintiff did not show that the denial of the variance forces plaintiff to do something that its religion prohibits, or refrain from doing something that its religion requires. Plaintiff did not allege that the property at issue has religious significance or that plaintiff's faith requires a school at that particular site. *Shepherd I, supra*, 259 Mich App at 332. Rather, the evidence suggests that, notwithstanding substantial evidence of prohibitive cost and a lack of available, suitable space, plaintiff *could* operate its school at another location in the surrounding area, and plaintiff conducted a real estate search toward that end. In other words, plaintiff may operate a faith-based school, but it must do so on property that is zoned for schools. *Greater Bible Way, supra*, 478 Mich at 401-402. Under the Supreme Court's reasoning, the denial of the variance does not constitute a substantial burden on plaintiff's religious exercise and, therefore, the trial court correctly granted summary disposition to defendants on the RLUIPA claims.

With regard to plaintiff's equal protection claim, the Supreme Court's remand order does not alter our prior holding that plaintiff is entitled to summary disposition. The Supreme Court instructed us to reconsider our judgment in light of *Greater Bible Way*, which did not involve an equal protection claim and, therefore, the legal analysis in that case does not affect our holding. Defendants conceded that plaintiff and Rainbow Rascals were similarly situated, and defendants failed to offer a reason for refusing to permit plaintiff to operate its school in the same space that Rainbow Rascals had operated its day care program. *Shepherd II, supra*, 275 Mich App at 613-614. Further, defendants offered no evidence to show that their denial of plaintiff's variance request was narrowly tailored to achieve a compelling governmental interest. *Id.* at 614. As we explained in *Shepherd II*:

Evidence established that defendants denied plaintiff a variance to operate an educational program in the same space formerly occupied by the similarly situated Rainbow Rascals, notwithstanding that there would be far fewer children

in the school and that it would cause fewer traffic and density problems. Indeed, as clarified at oral argument on appeal, after several years of litigation it is un rebutted that defendants have not offered a reason to plaintiff why it was denied the opportunity to operate its school in the identical space that Rainbow Rascals operated its daycare program. Thus, we hold that defendants have treated a secular entity more favorably than plaintiff, a religious entity. The burden then shifted to defendants to show that their denial of plaintiff's variance was precisely tailored to achieve a compelling governmental interest, *Shepherd I, supra* at 334, and defendants offered no evidence or argument on this point. Accordingly, the trial court erred when it failed to grant summary disposition to plaintiff. [*Id.* at 613-614.]

Accordingly, though the Supreme Court's holding in *Greater Bible Way* compels us to affirm the trial court's grant of summary disposition to defendants on plaintiff's RLUIPA claim, we reaffirm our holding that the application of the zoning ordinance violated the equal protection guarantee of the United States Constitution. In light of this violation, the decision of the Ann Arbor Charter Township Zoning Board of Appeals "was contrary to law and the trial court erred when it affirmed the [zoning board of appeals] denial of plaintiff's request for a variance." *Shepherd II, supra*, 275 Mich App at 614. Again, therefore, "[w]e remand this case to the trial court to enter judgment in favor of plaintiff and to reverse the [zoning board of appeals] denial of plaintiff's variance request." *Id.* We retain jurisdiction.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski