

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY**
Justice

IAS PART 16

THE CITY OF NEW YORK, NEW YORK CITY
ECONOMIC DEVELOPMENT CORPORATION,

INDEX NO. 8151/2003

Plaintiffs,

MOTION

DATE May 10, 2005

- against -

MOTION

CAL.NO. 7

ABUNDANT LIFE ALLIANCE CHURCH OF NEW
YORK, et al.,

Defendants.

The following papers numbered 1 to 11 read on this motion by the defendant Abundant Life Alliance Church of New York for summary judgment dismissing the plaintiffs' complaint and for summary judgment on its counterclaims for declaratory and injunctive relief.

	<u>PAPERS NUMBERED</u>
Notice of Motion/Affid(s)-Exhibits-Memo of Law.....	1 - 5
Affid(s) in Opp.-Exhibits-Memo of Law.....	6 - 8
Affid(s) in Opp.-Exhibits.....	9 - 10
Replying Memorandum of Law.....	11

Upon the foregoing papers the motion is determined as follows:

The plaintiffs commenced this action seeking declaratory and injunctive relief against the defendants Abundant Life Alliance Church of New York ("Abundant Life") and the Board of Directors of College Point Plaza Unit Owners Association, Inc. ("College Point Plaza"). Specifically, the plaintiffs seek a determination that Abundant Life is violating the restrictive covenant in its deed by using its property as a house of worship and demand Abundant Life be permanently enjoined from operating a church on the premises. The plaintiffs also seek to compel the defendant College Point Plaza to enforce the restrictive covenant in the deed.

In its answer, Abundant Life asserts numerous counterclaims and cross-claims for declaratory and injunctive relief pursuant to, inter alia, the United States and New York State constitutions. Fundamentally, Abundant Life seeks a declaration that the plaintiffs and

College Point Plaza have, by seeking to curtail its use of the property as a church, violated its constitutional rights to free worship and assembly. Abundant Life also seeks a permanent injunction barring plaintiffs and College Point Plaza from attempting to curtail its religious activities.

The papers establish that on or about August 5, 2002, Abundant Life purchased a condominium which is one of thirteen attached warehouse units located at 15-19 132nd Street in College Point, for the purpose of operating a church. The property at issue is located within the College Point II Urban Renewal Area ("URA"), in an area specifically designated as Industrial Area A. Abundant Life is a Christian and Missionary Alliance denominational church with approximately 160 official members. College Point Plaza is a not-for-profit corporation charged with administrating and enforcing the restrictive covenants on property within the College Point II Urban Renewal Area.

The deed for the premises at issue contains a restrictive covenant requiring, inter alia, Abundant Life to "comply and conform to the College Point Industrial Development Plan" and the condominium offering plan restricts the use of the property to those purposes "in accordance with Municipal (M1-1) Zoning Regulations".

Use of the property in the URA is governed by the Urban Renewal Plan ("URP") which was first promulgated in 1971 and underwent four amendments before Abundant Life acquired its property. The plan incorporated by reference into Abundant Life's deed was the fifth amended plan and does not list churches as a permitted use in Industrial Area A.

It is undisputed that Abundant Life was aware of these restrictions before it purchased the property. Indeed, prior to consummating the purchase of the premises, Abundant Life's prior counsel had the church sign an acknowledgment that Abundant Life's intended use of the premises was prohibited and that the church was proceeding with the transaction against the advice of its counsel. Despite having full knowledge that its intended use of the property was prohibited, Abundant Life proceeded to physically convert the interior of the premises, without the required building permits, to accommodate the operation of a church and began holding regular religious services. To date, Abundant Life has not received the required approval from any agency of the City of New York to operate a church on the property.

On or about January 3, 2003, Jill I. Braverman, Esq., senior counsel for the plaintiff New York City Economic Development Corporation ("EDC"), sent a letter to the defendant College Point Plaza and Group Realty Corp. demanding these entities take action to block Abundant Life's illegal use of the premises. The EDC has been designated by the New York City Department of Housing Preservation and Development ("HPD")

to administer the URP on its behalf.¹ At an executive board meeting of College Point Plaza held on January 7, 2005 it was resolved that the Board would notify Abundant Life that its use of the premises violated the restrictions in its deed. On March 7, 2003, Abundant Life filed a land use review application with the New York City Department of City Planning ("DCP") whereby it sought to amend the URP and a variance from the M1-1 zoning requirements.² On April 1, 2003, before the DCP made any official response to the application by Abundant Life, the plaintiffs City of New York ("City") and EDC commenced this action. Three days later, by letter dated April 4, 2003, DCP notified Abundant Life and its counsel that the application filed on March 7, 2003 was rejected since, in its view, applications to amend the URP must identify EDC and HPD as co-applicants.

In support of its motion, Abundant Life summarized the sole argument raised in its memorandum of law as a claim that the "City, acting through the EDC and the City Department of Planning, has violated the Constitution in opposing the Church's application for permission to operate in the Urban Renewal Zone and for seeking to force the Church to discontinue it's [sic] religious activities".

Contrary to the plaintiffs' assertion in opposition, both the City and EDC were required to treat Abundant Life differently from other enterprises in the URA (See e.g., Diocese of Rochester v Planning Bd. of Brighton, 1 NY2d 508, 523; Genesis Assembly of God v Davies, 208 AD2d 627, 628). The mere fact that this proceeding entails restrictions on property pursuant to an urban renewal plan as opposed to zoning regulations is of no moment since the Urban Renewal Law and zoning regulations have, at their core, the same general purpose, specifically protection and promotion of "the safety, health, morals and welfare of the people of the state" (General Municipal Law §501; Westchester Reform Temple v Brown, 22 NY2d 488, 493). Therefore, the court can not discern a logical basis to, as urged by plaintiffs, distinguish the case law authority relied upon by Abundant Life in support of their motion on the basis that this matter concerns an urban renewal plan rather than zoning regulations. Thus, it was beholden upon the plaintiffs to exercise

¹ Pursuant to the Urban Renewal Law and the New York City Charter, HPD is the agency charged carrying out the dictates of the Urban Renewal Law (See, General Municipal Law §505; New York City Charter §1802[6][e]).

² During the pendency of this action, the M1-1 Zoning Regulations were amended to permit churches in such zoned areas as a matter of right. However, the URP expressly provides that "if there is a conflict between the controls imposed by the Zoning Resolution and the controls imposed [in the URP], the more restrictive, [in this case the URP], will govern".

"greater flexibility" when considering Abundant Life's use of the property, and "every effort to accommodate [their] religious use" had to be made (Genesis Assembly of God v Davies, supra; see also, Rosenfeld v Zoning Bd. of Appeals, 6 AD3d 450; Young Israel v Town of Hempstead Bd. of Zoning Appeals, 221 AD2d 646, 647).

The plaintiffs next postulate is that the existence of a restrictive covenant in Abundant Life's deed incorporating the URP unconditionally prohibits any possible use of the premises as a church. Specifically, plaintiffs contend that since the express language of the deed binds Abundant Life to abide by the dictates of URP as of the time they took the deed, any subsequent amendment to the URP by application is precluded. However, such argument is unpersuasive since it appears that plaintiffs have misread the restrictive covenant in the deed they rely upon. The deed requires the grantee (Abundant Life) to abide by the URP "dated May 21, 1971, as amended". Such language acknowledges not only that Abundant Life must abide not only to amendments existing at the time of the transfer of the property, but also any possible subsequent amendments.

Additionally, the case authority cited by the plaintiffs to support their claim that they have an unfettered ability to enforce a restrictive covenant against a religious house of worship is distinguishable to the facts at bar since none of the cases relied upon by plaintiffs had a governmental entity as the creator and enforcer of contested deed restriction. Obviously, there are fundamental constitutional prohibitions that control governmental restrictions on the rights of the populace to engage in religious practices which are inapplicable to private individuals and institutions. Consequently, these cases are of minimal precedential value in the present case.

Likewise, the plaintiffs' attempt to distinguish those cases which require preferential treatment of religious uses of property from this matter on the basis that the property occupied by Abundant Life is located in an industrial as opposed to a residential area is unsupported by any appellate level authority and is unpersuasive.

However, application of the aforementioned principles of special accommodation and preferential treatment to the present case presents a challenging issue as this case does not arise in the customary procedural mold. In virtually every case cited by the parties, particularly those relied upon by Abundant Life, or those revealed by the court's own research, judicial review of a zoning board's determination of a religious entity's application was sought by way of a special proceeding commenced pursuant to Article 78 of the Civil Practice Laws and Rules. Here, there has been no formal public review of Abundant Life's present non-conforming use of the property by any administrative agency empowered to regulate land use in the City of New York. Instead, plaintiffs preemptively instituted this declaratory judgment action while Abundant Life's application was pending.

Moreover, it is clear from the record adduced that Abundant Life's application to the DCP was officially rejected not because of any administrative policy against houses of worship in the URA, but rather an alleged technical deficiency in the application, namely the absence of EDC and HPD as co-applicants. As such, the question of whether Abundant Life was afforded an appropriate accommodation must at a minimum concern EDC's decision to compel the defendant to cease its activities via litigation rather than the customary administrative review process.

It is apparent that EDC has taken the position that it is not required to treat churches any differently from other entities who operate or intend to operate in the URA. Melanie Lenz, EDC's Vice-President for Real Estate Development, testified at her deposition that it was her understanding that EDC absolutely did not have to attempt to accommodate Abundant Life in any manner in its use of the premises. Herbert Hardy Adasko, EDC's Senior Vice-President of Planning, had no recollection who made the decision to oppose Abundant Life's operation of a church in the URA and was not aware if the topic was even discussed prior to the above decision being made. This position is confirmed by the plaintiffs' memorandum of law submitted in opposition wherein they specifically argue that New York law did not require an accommodation in this case.

Notwithstanding any perceived defect in Abundant Life's application to DCP, the tact taken by the plaintiffs with respect to Abundant Life is untenable as the Court of Appeals has invalidated "blanket bans on religious or educational uses in particular communities in favor of a case-by-case review, endorsing the special use permit application process as the proper procedure for addressing expansion requests" (Pine Knolls Alliance Church v Zoning Bd. of Appeals, ___ NY3d ___, 2005 NY Slip Op 7732). Based on this reasoning, the court finds the plaintiffs' action is premature. Prior to filing this action, Abundant Life filed with the DCP an application to amend the URP to permit their property to be used as a church. Before that application could even be processed, the plaintiffs short-circuited the administrative process by filing this action.

It is also clear however that those branches of Abundant Life's motion alleging the special accommodation due religious institutions equates to automatic permission for Abundant Life to continue its activities unchecked are untenable as it is well settled that churches are not exempted from land use restrictions and review (See e.g., Cornell University v Bagnardi, 68 NY2d 583, 594). For this court to accept defendants argument in toto and permit the property to be used as a church especially in light of the factual circumstances surrounding Abundant Life's acquisition of the property would completely and improperly subvert the entire statutory and regulatory schemes created for land use review as well as take the decision making process away

from the administrative agencies charged and skilled in such tasks and thrust it upon the judiciary.

Plaintiffs' argument opposing that Abundant Life's request for a judicially mandated review of its application is fatally defective. Plaintiffs' assertion that any application to amend an urban renewal plan must be joined by EDC and/or HPD is unsupported. There are no express provisions in the Urban Renewal Law, New York City Charter or the Rules of the City of New York that these agencies must join an application to amend an urban renewal plan. Although HPD is authorized to "prepare" an urban renewal plan and "represents the city in carrying out" the provisions of the Urban Renewal Law (See, General Municipal Law §505[1], 502[5]; New York City Charter §1802[6][e]), the law does not expressly vest that agency with exclusive control over what modifications may even be submitted for review by the CPC. Only the URP itself makes stated mention of amendments to the plan and it provides that the "City may amend this plan at any time" (See, URP section G[1]). This generalized language simply confirms that the City of New York, through the CPC following the Uniform Land Use Review Procedure ("ULURP") (See, 62 RCNY §2-01, et seq.) can authorize a change to the URP. It does not, as conclusively stated by plaintiffs, limit who may petition for such an amendment.

Therefore, the court finds that the appropriate "accommodation" in this case is to direct that the application by Abundant Life submitted to the DCP, be certified as complete and forwarded to the New York City Planning Commission ("CPC") for review and determination. Based upon the facts of this case, the court finds that the EDC failed to properly accommodate Abundant Life before seeking to curtail their religious activities, and that the appropriate and established administrative and political review process should have and must be completed before relief is sought by either aggrieved party from the court. To the extent Abundant Life seeks a holding that the URP at issue is itself invalid or unconstitutional, the court finds defendant has not established a legal basis for such drastic relief in its moving papers.

Accordingly, based upon the foregoing, the motion for summary judgment by the defendant Abundant Life is granted only to the extent that it is

ORDERED, that the plaintiffs' complaint is dismissed, and it is

ORDERED, that the defendant Abundant Life's counter claims are granted to the extent that the additional defendant on the counter claims the New York City Department of City Planning and the New York City Planning Commission are directed to certify Abundant Life's land use review application filed with the DCP on March 7, 2003 as complete, and shall process said application pursuant to the ULURP, and it is

ORDERED, that the defendant Abundant Life's counter claims are otherwise dismissed.

Dated: December 21, 2005

Peter J. Kelly, J.S.C.