SIXTH DIVISION
March 6, 2015

No. 1-13-1809

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOAN DACHS BAIS YAAKOV ELEMENTARY SCHOOL - YESHIVAS TIGERES TZVI, Plaintiff-Appellant, v. CITY OF EVANSTON, a Municipal Corporation, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Cook County. No. 09 CH 16645 Honorable Mary Anne Mason, Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed the trial court's order granting summary judgment in favor of the City of Evanston on plaintiff's claim that the City of Evanston violated the "equal terms" provision of the Religious Land Use and Institutionalized Person's Act of 2000 (RLUIPA) by denying its application to rezone a parcel of industrial property so plaintiff could use the site for a parochial elementary school. We also affirmed the trial court's judgment, after a bench trial, in favor of the City of Evanston on plaintiff's claim that the denial of its zoning application violated the "nondiscrimination" provision of the RLUIPA.

¶ 2 This case involves the decision of the city council of defendant, City of Evanston (Evanston), to deny a zoning application by plaintiff, Joan Dachs Bais Yaakov Elementary School (JDBY), to rezone a parcel of industrial property in Evanston so that JDBY could use the site for a parochial elementary school. After the denial of its application, JDBY sued Evanston,

asserting claims under the "equal terms" and "nondiscrimination" provisions of the federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq*. The trial court granted summary judgment in favor of Evanston on the equal terms claim and, following a bench trial, entered judgment in favor of Evanston on the nondiscrimination claim. On appeal, JDBY contends the trial court erred by: (1) entering summary judgment in favor of Evanston on JDBY's claim under the equal terms provision of the RLUIPA; and (2) entering judgment after a bench trial on JDBY's claim under the nondiscrimination provision of the RLUIPA. We affirm.

¶ 3 I. Background

¶ 4 JDBY was founded in 1953 to provide religious elementary school education in the orthodox Jewish tradition, including daily prayer services and religious studies. JDBY operates two facilities in Chicago, Illinois, a girls' school on Peterson Avenue, and a boys' school on California Avenue. Approximately 900 boys and girls from nursery school through 8th grade currently attend school at JDBY's two facilities.

¶ 5 Since the early 2000's, JDBY has been searching for a new property to replace its crowded and outdated boys' facility. In late 2006, JDBY contracted to purchase property on the southwest corner of Evanston Avenue and 222 Hartrey Street (the Hartrey property).

¶ 6 Evanston has a comprehensive general plan dating back to 1917, the purpose of which is to shape long-range land use planning. Evanston adopted a zoning ordinance in 1993 for the purposes of, among other things: promoting the public health, safety, comfort, morals, convenience, general welfare, and the objectives and policies of the comprehensive general plan; conserving and enhancing the taxable value of land and buildings throughout the city; and

prohibiting uses, buildings, or structures that are incompatible with the character of established zoning districts.

¶ 7 The Hartrey property is zoned I2 under the Evanston zoning ordinance, a designation that permits light industry and manufacturing, among other uses. Schools are not a permitted use in an I2 district.

¶ 8 The Hartrey property is bordered on the north by the elevated tracks of the Chicago Transit Authority (CTA) Skokie Swift rail line. The eastern boundary is Hartrey Street, which is adjacent to a residential neighborhood of single-family dwellings. To the west is another parcel, 2401 Brummel Street (the Brummel property), zoned I2, and presently occupied by a church. To the south of the property is a shopping mall containing a Jewel grocery store, a Best Buy, an Office Max, and a Target. The property containing the shopping center used to be owned by Bell & Howell Company (Bell & Howell), which operated large warehouse facilities at that location. The property was originally zoned M3, a manufacturing zoning designation that no longer exists under the current zoning ordinance. Bell & Howell left Evanston in the early 1990's and, in 1993, Evanston approved the rezoning of the former Bell & Howell property from M3, to "C1 Commercial," in connection with the redevelopment of the parcel as a shopping center.

¶ 9 There is no direct access to the Hartrey property from any main thoroughfare. The shopping center property fronts Howard Street, a busy commercial street that marks the boundary between the City of Chicago and Evanston. There is a signaled entrance at the southwest corner of the shopping center parking lot at Howard Street and Kedzie Avenue. Traffic for the Hartrey property must traverse the parking lot from south to north along the west side of the shopping center, turning right past loading docks, and then east on Shure Drive, a 20-

foot-wide private road separated from the rear of the shopping center by a concrete curb and a steel safety barrier.

¶ 10 Until 2002, the Hartrey and Brummel properties served as the corporate headquarters for Shure, Inc., an electronics manufacturer. In 2002, CenterPoint Properties (CenterPoint), an industrial real estate manager and developer, acquired the Hartrey and Brummel properties from Shure, Inc. In 2004, CenterPoint sold the Brummel property to Vineyard Christian Fellowship of Evanston (Vineyard), a religious organization. On April 26, 2004, Evanston granted Vineyard a special-use permit under its zoning ordinance. At that time, religious institutions (but not schools) were included among the categories of special uses permitted in an I2 district. Vineyard was allowed to renovate the existing industrial building on the Brummel property for use as a church.

¶ 11 JDBY subsequently signed a letter of intent to purchase the Hartrey property from CenterPoint for $4.15 million in August 2005. The parties did not come to an agreement and JDBY did not further pursue the matter.

¶ 12 In late 2006, CenterPoint contacted JDBY and advised that it was prepared to accept an offer on the Hartrey property at a substantially reduced price on the condition that the transaction close promptly. JDBY and CenterPoint executed a second letter of intent regarding the Hartrey property on December 12, 2006. The purchase price was $2.8 million. Between December 12 and December 29, JDBY's Board discussed a number of issues relating to the proposed purchase, including that the Hartrey property was not zoned for use as a school. Prior to signing the contract, JDBY was aware that it would be necessary to petition Evanston for zoning relief, that the process could take up to two years, and that a successful outcome was not guaranteed. Notwithstanding these issues, JDBY believed the reduced price justified the risk.

¶ 13 JDBY signed the contract to purchase the Hartrey property on December 28, 2006. The purchase contract contained no zoning contingency. The transaction closed on January 19, 2007.

¶ 14 Following its acquisition of the Hartrey property, JDBY applied for a special-use permit on November 30, 2007. JDBY sought to classify itself as a "religious institution," a special use then allowed in the I2 zoning district. William Dunkley, who at that time was Evanston's zoning administrator, rejected the special use application based on the determination that JDBY was properly classified as an "educational institution, private" under the zoning ordinance, a use not permitted in an I2 district.

¶ 15 Following the rejection of the special-use permit, JDBY raised with Mr. Dunkley the possibility of filing for a "unique use" permit. The unique use zoning category was developed to allow for unusual or one-of-a-kind uses that might not fall within permitted or special uses within a zoning district, but that would be of substantial economic benefit to Evanston.

¶ 16 On February 18, 2008, Mr. Dunkley sent an email to Ann Rainey, an Evanston alderwoman in whose ward the Hartrey property was located. Mr. Dunkley advised Alderwoman Rainey that JDBY was taking the position that the use proposed for the property was unique. Mr. Dunkley wrote:

> "Even though I am unconvinced by this rather un-kosher logic, the zoning ordinance makes it clear that it is the Council that determines a unique use, on recommendation from the Plan Commission. As Zoning Administrator, I am limited to reviewing the application for completeness and assessing if the applicant has standing. I have been advised by the Law Department to accept a complete application (still waiting for this), and schedule it for a public hearing. We will, of course, submit a Staff report regarding the merits of the application versus the requirements and standards of the

Zoning [Ordinance] (parting the Red Sea would be easier, I would say right now), but it looks like it will be up to you and your colleagues to make the determination."

¶ 17 Alderwoman Rainey expressed concern that, as a school, JDBY was exempt from paying property taxes, and that if the application for a unique use was allowed, Evanston would potentially lose hundreds of thousands of tax dollars.

¶ 18 Sometime between February and August 2008, JDBY submitted its application for a unique-use permit. Applications for unique-use permits are first presented to a Site Plan and Appearance Review Committee (SPAARC), which is made up of representatives of various city departments that review building permits for compliance. SPAARC reviews applications and makes a recommendation to the Evanston Plan Commission. The Evanston Plan Commission then holds hearings and makes a recommendation to the Evanston City Council.

¶ 19 JDBY's application was considered at an August 13, 2008, SPAARC meeting. At the conclusion of the meeting, SPAARC voted unanimously to recommend denial of the application to the Evanston Plan Commission.

¶ 20 The Evanston Plan Commission was scheduled to consider the unique-use application at a September 10, 2008, meeting. On August 19, 2008, JDBY submitted a third application for zoning relief, this time seeking a map amendment to change the zoning of the Hartrey property from I2 to C1. The C1 zoning classification would permit use of the Hartrey property as a school.

¶ 21 Mr. Dunkley advised JDBY that it would have to elect which application to pursue because both could not be processed simultaneously. On September 19, 2008, JDBY advised Evanston that it would withdraw its unique-use application and proceed only with the application for a map amendment.

¶ 22 JDBY's application for a map amendment was considered at a SPAARC meeting held on November 12, 2008. On a motion to recommend against the zoning change from I2 to C1, the vote was tied with three votes in favor and three votes against, resulting in the motion not passing. SPAARC sent the application to the Evanston Plan Commission with no recommendation.

¶ 23 The Evanston Plan Commission held a public hearing that same evening. JDBY presented testimony from a number of witnesses, including a real estate developer, a rabbi, an architect, a traffic engineer, and an urban planner. Although several plan commission members commented favorably on the plans for the property, concerns were expressed regarding the effect of the proposed rezoning on Evanston's tax base, and potential traffic safety issues. The Evanston Plan Commission ultimately recommended, by a 4 to 3 vote, that JDBY's application for a map amendment be denied.

¶ 24 The Evanston Plan Commission's recommended denial of the map amendment was considered at a meeting of the planning and development committee of the Evanston City Council held on February 9, 2009. The planning and development committee is a "committee of the whole" in that all Evanston City Council members are also members of the Committee. JDBY made a presentation at the meeting acknowledging that the primary impediment to approval of the requested zoning relief appeared to be the loss of tax revenues due to JDBY's tax-exempt status. JDBY proposed to address the problem by offering to make a payment in lieu of taxes (a PILOT payment) that would cover Evanston's share of property taxes on the parcel.

¶ 25 Evanston's share of property tax revenues comprises roughly 20% of the total tax levy; approximately 80% of the remaining tax revenue is split between two Evanston public school districts. JDBY's proposal did not cover the school districts' share of the tax revenues.

¶ 26 Although one alderman proposed postponing the vote to further explore the possibility of a payment in lieu of taxes, Alderwoman Rainey objected to any delay. In opposing JDBY's application for a map amendment, Alderwoman Rainey noted that the two public school districts would lose substantial revenue if the map amendment was granted. She further stated her belief that changing the zoning from I2 to C1 was an "absolute negative" given the permanent loss of potential industrial employers for the site. The planning and development committee voted 7-1 to deny the map amendment. The Evanston City Council also later voted to deny the map amendment.

¶ 27 Although JDBY's application for a map amendment changing the zoning of the Hartrey property from I2 to C1 was denied, Evanston has approved four other applications for map amendments to rezone I2 properties to other zoning designations since 2006:

(1) On February 13, 2006, Evanston approved a map amendment for 2100 Greenwood Street, a property originally zoned I2. The amendment rezoned the property to "MU Transitional Manufacturing District," which was intended under the zoning ordinance to "address those distinctive areas in Evanston where manufacturing and industrial uses have coexisted with residential uses in a manner in which neither have been affected adversely." The rezoning was approved for a project to build live-work condominiums.

(2) On April 11, 2006, Evanston approved a map amendment for 1613 Church Street, the location of a former Hines Lumber yard. The property was rezoned from I2 to R4 to permit the construction of residential townhomes.

(3) In December 2006, Evanston granted a map amendment to rezone a portion of the property at 2424 Oakton Street. The portion of the property that fronted Oakton

Street was rezoned from I2 to C1 to permit construction of a gas station. The rear portion of the property remained I2.

(4) In February 2009, Evanston granted a map amendment to rezone 912-924 Pitner Avenue from I2 to "MXE Mixed Use Employment District," a zoning designation that allows manufacturing, industrial and residential uses. The project for which the map amendment was approved incorporated residences into existing business uses.

¶ 28 The minutes of the various Evanston City Council meetings at which the foregoing map amendments were approved do not reflect any concern expressed by Council members over the loss of property zoned for industrial use. However, unlike the present case, none of the foregoing map amendments entailed taking property off the tax rolls and, in the case of three of the applications, the subject property (or a portion of it) remained available for manufacturing and industrial uses.

¶ 29 II. JDBY's Second-Amended Complaint

¶ 30 On October 31, 2011, JDBY filed a second amended complaint alleging, in pertinent part, that Evanston's denial of its request for a map amendment violated the "equal terms" and "nondiscrimination" provisions of RLUIPA, which provide that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution" (42 U.S.C. § 2000cc(b)(1)), and that "[n]o government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." 42 U.S.C. § 2000cc(b)(2).

¶ 31 The RLUIPA further provides that "[t]his 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).

¶ 32 III. JDBY's Equal-Terms Claim

¶ 33 JDBY alleged that by denying its request for a map amendment, Evanston had violated section (b)(1) of the RLUIPA by treating JDBY on less than equal terms relative to other applicants, "including in connection with 2424 Oakton Street, 1613 Church Street, 2100 Greenwood Street, 912-924 Pitner Avenue, Vineyard Church, and the Evanston Shopping Center."

¶ 34 In connection with plaintiff's equal terms claim, several discovery depositions were taken, excerpts of which are contained in the record on appeal.

¶ 35 Ari Shulman, JDBY's President at the time JDBY entered into the contract to purchase the Hartrey property, testified that the first time he spoke with Alderwoman Rainey about the possibility of rezoning was in January 2007, after JDBY had purchased the property. Alderwoman Rainey expressed frustration that JDBY had purchased the Hartrey property without first consulting with her, and she told him, "You are not getting the zoning. Keep your Jewish school where it is on California Avenue."

¶ 36 Alderwoman Rainey testified she would have been "totally against an Amish school going up on that site or a public school going up on that site or a Catholic school going up on that site or a school of any kind going up on that site because it's not zoned for schools." Alderwoman Rainey noted that the Hartrey property is "zoned for light industrial" and that the presence of a school on that site would be "totally incompatible with the location, the site, the tax code."

¶ 37 Elizabeth Tisdahl, the mayor of Evanston, testified she was an alderman at the time Evanston was considering JDBY's proposed map amendment. Mayor Tisdahl testified that Alderwoman Rainey had informed the aldermen, in connection with JDBY's application for a map amendment, that the Hartrey property had previously generated as much as $200,000 annually in property tax revenue. Alderwoman Rainey told them that "it flies in the face of our problems with our tax base to take this property off the tax rolls, to change the zoning codes so that a property tax-exempt institution may come in and wipe out our tax base."

¶ 38 Mayor Tisdahl testified she voted against the proposed map amendment because she agreed with Alderwoman Rainey that "it made no sense *** to take an industrial property and put in a tax-exempt user. Cities do need a tax base." Mayor Tisdahl further testified she voted against the map amendment because "[i]f we got rid of the industrial zoning, that would preclude the possibility of the kind of jobs that this community, parts of this community need being here. Students' safety was another concern."

¶ 39 Judge Lionel Jean-Baptiste was an alderman in Evanston from 2001 to 2011. Judge Jean-Baptiste testified he voted against JDBY's proposed map amendment because he was concerned about the Hartrey property being taken off the tax rolls. Judge Jean-Baptiste further testified: "I was looking at the issue of industrial use, that option, job generation, looking at the loss of taxes. *** [A]s more and more of our [industrial] property is being taken off the list of available uses, there are a number of concerns. There's taxes. There's continued economic growth for the city in terms of employment. There's also concerns about where do we site different institutions? A school in that location didn't seem to be appropriate."

¶ 40 Judge Jean-Baptiste acknowledged that the Evanston City Council had voted to rezone other I2 properties. Specifically, with respect to the decision to rezone 1613 Church Street from

I2 to R4 to construct residential townhomes, Judge Jean-Baptiste testified he supported the rezoning because the construction of the residential townhomes would create new jobs, provide some workforce housing, and would assist in the development of that particular neighborhood.

¶ 41 With respect to the decision to rezone 2100 Greenwood Street from I2 to MU Transitional Manufacturing District in support of a proposal to build live-work condominiums, Judge Jean-Baptiste explained that he supported the rezoning because it was consistent with the industrial uses to the immediate east and west, and because it would provide jobs for high school graduates in the area.

¶ 42 Melissa Wynne, an Evanston alderman, testified she voted no to JDBY's proposed map amendment. Ms. Wynne explained:

> "I was very concerned that we were removing a parcel from industrial uses. *** I was concerned about the issue of having the school in this location behind an extraordinarily busy shopping center. I didn't think that was a very good place for a school at all. And I was concerned about removing this parcel from the tax rolls."

¶ 43 Cheryl Wollin, an Evanston alderman, testified that 45% of Evanston's land is already off the tax rolls (due primarily to the presence of Northwestern University). She voted no to JDBY's proposed map amendment because Evanston has "such a small amount of land that has the potential of being industrial or an I2 district that we felt it needed to be preserved. We don't have a lot of extra land in Evanston. *** We had to have some space that if we found a business that was willing to come to town, that we could locate it there." Ms. Wollin further testified she voted no to JDBY's proposed map amendment because the Hartrey property was an industrial area near a Target store and near various shipping and delivery trucks and was not "conducive to a school for small children."

¶ 44 Anjana Hansen, a former Evanston alderman, testified she voted against JDBY's proposed map amendment because she was hoping Evanston would be able to find an industrial user for the Hartrey property, and because she "wasn't interested in seeing the property taken off the tax rolls."

¶ 45 William Dunkley was the zoning administrator for Evanston from 2007 until 2010. His job responsibilities included processing applications for various forms of zoning relief, including variances, special-use permits, and map amendments. Mr. Dunkley acknowledged that the language he used in his email to Alderwoman Rainey regarding JDBY's application for a unique-use permit (in which he called JDBY's logic "unkosher" and stated that "parting the Red Sea would be easier" than submitting a Staff report regarding the merits of the application) was "not appropriate."

¶ 46 Mr. Dunkley stated that the Evanston city council's decision to deny JDBY's application for a map amendment was made because it did not want to lose the Hartrey property for potential industrial users, and because it did not want to take the property off the tax rolls. Mr. Dunkley noted that "[a] third of the City of Evanston's land is [already] off the tax rolls, so property taxes are extremely high. It's a big issue. And it's an issue in almost every decision that's made."

¶ 47 IV. Summary Judgment on JDBY's Equal-Terms Claim

¶ 48 The parties filed cross-motions for summary judgment on JDBY's equal terms claim under section (b)(1) of the RLUIPA. In ruling on the motions, the trial court noted that, to assert an equal terms claim, JDBY must demonstrate that the denial of its proposed map amendment was on less than equal terms with a comparative "nonreligious assembly or institution." As comparative nonreligious assemblies or institutions, JDBY cited to the applicants in connection with 2424 Oakton Street, 1613 Church Street, 2100 Greenwood Street, 912-924 Pitner Avenue,

and the Evanston Shopping Center, all of whom were granted map amendments changing their zoning from I2 to other zoning designations. The trial court found that none of those nonreligious comparators were assemblies or institutions within the meaning of the RLUIPA, and, thus, that JDBY had failed as a matter of law to state an equal terms claim. Accordingly, the trial court granted summary judgment in favor of Evanston on JDBY's equal terms claim.

¶ 49 V. JDBY's Nondiscrimination Claim

¶ 50 A bench trial was held on JDBY's nondiscrimination claim under section (b)(2) of the RLUIPA.

¶ 51 Ari Shulman, JDBY's former President, testified that its current boys' facility on California Avenue is antiquated and too small for their needs. JDBY searched for a new location and determined that the Hartrey property would be a "perfect fit." JDBY officials knew that the zoning would have to be changed to accommodate a school, but they thought it would be a "simple process." After buying the Hartrey property, Mr. Shulman spoke with Alderwoman Rainey, who told him to "Keep your Jewish school on California Avenue." Alderwoman Rainey also told him that JDBY would not be getting a zoning change.

¶ 52 Alderwoman Rainey testified she never told anyone at JDBY to "keep your Jewish school in Chicago" and that it did not matter to her that the school in question was Jewish; Alderwoman Rainey testified she "didn't want any school there, Catholic, Protestant, whatever kind of school" because schools were tax-exempt. Alderwoman Rainey explained that over 40% of the property in Evanston is already off the tax rolls due to the presence of Northwestern University, and that "every [future] penny that is taken off the tax roll is a burden on me and my constituents and the rest of the taxpayers in the City of Evanston." Alderwoman Rainey noted that as an industrial property, the Hartrey property is taxed at a "much higher rate" than non-industrial properties, that

the Hartrey property is generating about $100,000 annually in taxes under the current I2 zoning, and that "as long as it's generating taxes, even vacant it's better than a not-for-profit [school] that's off the tax rolls." Accordingly, Alderwoman Rainey voted to deny JDBY's proposed map amendment.

¶ 53 Dennis Marino, Evanston's manager of planning and zoning, testified that the Hartrey property is one of the two largest industrial properties in Evanston, that it generated about $200,000 annually in property taxes when it was occupied by Shure, Inc. and that even when vacant, it annually generates $140,000 to $150,000 in property taxes. Property taxes are an important source of financing for Evanston and the two local school districts.

¶ 54 Alderwoman Rainey testified that prior to voting no to JDBY's proposed map amendment, she had talked with a JDBY official about making a PILOT payment, but that such a payment would only have covered 20% of the tax bill. Accordingly, the proposed PILOT payment was not enough to cause her to change her vote. Mr. Marino testified that the proposed PILOT payment, which would only have reimbursed Evanston and not the school districts, "would not offset the loss of taxes. It also would not offset the long-term tax stream if there were a subsequent entity that weren't bound by it."

¶ 55 With respect to Mr. Dunkley's email references to "unkosher" logic and the parting of the Red Sea in connection with JDBY's application for an exclusive use permit, Alderwoman Rainey testified she though Mr. Dunkley had "lost his mind." Alderwoman Rainey called the email "inappropriate and unprofessional." Alderwoman Rainey noted, though, that Mr. Dunkley had "no role in rezoning property."

¶ 56 Mr. Dunkley testified that the "unkosher" and "parting the Red Sea" comments in his email to Alderwoman Rainey were inappropriate and that he made those comments in an attempt

to be funny. Mr. Dunkley testified that the Evanston city council (of which he was not a member) voted against JDBY's proposed map amendment because it wanted the Hartrey property to remain available for an industrial user and because it did not want to have the property taken off the tax rolls.

¶ 57 Alderwoman Rainey testified that in response to Mr. Dunkley's email, she had written that JDBY's request for an exclusive use permit to use the Hartrey property as a school would be "devastating." Alderwoman Rainey explained she meant that it would be devastating to take the Hartrey property off the tax rolls, especially because Evanston owes "over $140 million in our pension funds, and we contribute a third of our general fund to pensions. Every penny of taxes are important."

¶ 58 Alderwoman Rainey was questioned as to why she had supported Vineyard's request for a special-use permit to use the Brummel property as a church, but had not supported JDBY's request for a map amendment to use the Hartrey property for a school. Alderwoman Rainey testified that Vineyard "met the standards" for a special-use permit and "[t]here is a difference" between a church and a school; Alderwoman Rainey was not asked to elaborate on the differences.

¶ 59 Mayor Tisdahl testified she voted no to the proposed map amendment due to concerns over student safety, as well as because she wanted to keep the property on the tax rolls and available for industrial use. Mayor Tisdahl noted that industrially zoned property has the potential for job creation, "particularly for the 18 to 25 year olds who are graduating from high school and not going on to college and who need jobs." Mayor Tisdahl testified that when voting no to JDBY's proposed map amendment, JDBY's religious makeup was not a factor in her vote.

¶ 60 Judge Jean-Baptiste testified he voted no to JDBY's proposed map amendment because the Hartrey property was not a "safe environment for a school," and he wanted to maintain the property for industrial purposes. The religious nature of the school did not influence his vote.

¶ 61 Judge Jean-Baptiste testified he had voted to rezone other properties from I2 to other zoning classifications. Specifically, he voted to rezone 1613 Church Street from I2 to R4 general residential, because he thought the rezoning would bring in revenue "to regenerate this particular neighborhood." He voted to rezone 2100 Greenwood Street from I2 to MU to allow development of 26 live-work loft condominiums. Judge Jean-Baptiste explained that the "neighborhood *** had the coexistence of industry, Spartech, which was immediately to the east of that property" and the rezoning of 2100 Greenwood Street was consistent with that use. He voted to rezone 912 to 924 Pitner Avenue from I2 to MXE to allow live-work condominiums. Judge Jean-Baptiste explained that there were a "whole enclave of other industries" nearby, and that the rezoning was consistent with those industries. He voted to rezone 2424 Oakton Street from I2 to C1 because it would enhance economic activity in that area.

¶ 62 Alderman Holmes testified she voted no to JDBY's proposed map amendment because she did not think the Hartrey property was a good location for a school, she wanted to keep the property on the tax rolls, and she believed that revitalization of that area would more likely occur if the property remained zoned for industrial use. Holmes testified that the religious nature of the school did not play any role in her vote. Holmes testified she approved rezoning from I2 to a different zoning classification for other properties (such as the rezoning at 1613 Church Street, 2100 Greenwood Street, and 912 to 924 Pitner Avenue), but that none of those rezonings took property off the tax rolls. Holmes also testified she voted to rezone those other properties

because, unlike the Hartrey property at issue here, the rezoning of the other properties would bring in more revenue and create jobs.

¶ 63 Anjana Hansen, a former Evanston alderwoman from 2005 to 2009, testified she voted no to JDBY's proposed map amendment because she "did not want to get rid of an industrial zoned site in the City of Evanston in the sense that there aren't that many left" and because she did not want the Hartrey property to come off the tax rolls. Alderwoman Hansen testified that the religious nature of the school did not play any role in her vote.

¶ 64 Allen Kracower, a planning, zoning, and real estate consultant, testified for Evanston as an expert in land planning and zoning. Mr. Kracower testified that the Hartrey property was an unsafe area for a school, given its close proximity to a loading dock and truck traffic.

¶ 65 Following all the testimony, the trial court ruled in favor of Evanston on JDPY's nondiscrimination claim. This appeal followed[1]. The Council on American-Islamic Relations, Chicago Office, and Agudath Israel of America each filed an *amicus curiae* brief in support of JDPY. As the *amici* briefs largely restate the arguments in JDPY's appellate brief, we do not separately address them in the body of this order.

¶ 66 VI. JDBY's Appeal

¶ 67 First, we address JDBY's appeal from the order granting summary judgment for Evanston on JDBY's equal terms claim under section (b)(1) of the RLUIPA. "Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate there is

[1] In the interim, JDBY has sold the Hartrey property to a third party (who is using the property consistently with the I2 zoning) and no longer seeks to situate a school there. JDBY's claims under the RLUIPA are not mooted by the sale, as JDBY seeks monetary damages and attorneys fees for Evanston's failure to grant the map amendment, in violation of the RLUIPA, prior to the sale.

no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *County of Cook v. Village of Bridgeview*, 2014 IL App (1st) 122164, ¶ 10. "As in this case, where the parties file cross-motions for summary judgment, they invite the court to decide the issues presented as a matter of law." *Id.* "Our review of the trial court's order granting summary judgment is *de novo*." *Id.*

¶ 68 As stated, section (b)(1) of the RLUIPA provides that no government shall implement a land use regulation in a manner treating a religious assembly or institution "on less than equal terms" with a nonregligious assembly or institution. 42 U.S.C. § 2000cc(b)(1). "The Seventh Circuit recognizes three distinct kinds of Equal Terms statutory violations: (1) a statute that facially differentiates between religious and nonreligious assemblies or institutions; (2) a facially neutral statute that is nevertheless gerrymandered to place a burden solely on religious, as opposed to nonreligious, assemblies or institutions; or (3) a truly neutral statute that is selectively enforced against religious, as opposed to nonreligious assemblies or institutions." (Internal quotation marks omitted.) *Irshad Learning Center v. County of DuPage*, 937 F. Supp. 2d 910, 932 (N.D. Ill. 2013).

¶ 69 JDBY does not present a facial challenge to the ordinance zoning the Hartrey property for industrial use, nor does it allege that the ordinance has been gerrymandered to burden religious uses. Instead, JDBY alleges that Evanston has selectively enforced its zoning ordinance against JDBY, a religious assembly or institution, by denying it a map amendment that Evanston has granted to other nonreligious assemblies or institutions. In other words, JDBY brings an "as-applied" equal terms claim.

¶ 70 In bringing an as-applied, equal terms challenge under section (b)(1) of the RLUIPA, JDBY has the initial burden of proving that, in denying its proposed map amendment, Evanston

treated JDBY on less than equal terms with a comparative nonreligious assembly or institution. *Id*. at 933; 42 U.S.C. § 2000cc(b)(1). We note that the RLUIPA does not define "assembly or institution."

¶ 71 As comparative nonreligious assemblies or institutions, JDBY cited to the applicants in connection with 2424 Oakton Street, 1613 Church Street, 2100 Greenwood Street, 912-924 Pitner Avenue, and the Evanston Shopping Center, all of whom were granted map amendments changing their zoning from I2 to other zoning designations[2]. In granting summary judgment for Evanston, the trial court found that none of those non-religious comparators were assemblies or institutions within the meaning of the RLUIPA, and, thus, that JDPY had failed as a matter of law to state an equal terms claim.

¶ 72 On appeal, JDBY contends the trial court erred in finding, as a matter of law, that the nonreligious comparators it cited were not assemblies or institutions within the meaning of the RLUIPA. In support, JDBY cites *River of Life Kingdom Ministries v. Village of Hazel Crest, Illinois*, 611 F. 3d 367 (7th Cir. 2010).

¶ 73 River of Life Kingdom Ministries (River of Life) was a small church operating out of a cramped warehouse in Chicago Heights that wanted to relocate to a building in the Village of Hazel Crest (Village). *Id*. at 368. However, the building was a part of the Village designated by the zoning ordinance as a commercial district, which excluded non-commercial uses such as churches, community centers, schools, and art galleries. *Id*. River of Life sued the Village under the equal terms provision and moved for a preliminary injunction against the enforcement of the zoning ordinance. *Id*. The district judge denied the motion and a panel of the Seventh Circuit

[2] JDBY also cited to the Vineyard Church; however, JDBY's citation to the Vineyard Church is irrelevant for purposes of the equal terms provision of the RLUIPA, as the comparison is between religious and *nonreligious* assemblies or institutions. See 42 U.S.C. §2000cc(b)(1).

Court of Appeals (Seventh Circuit) affirmed, primarily on the ground that the church was unlikely to prevail when the case was fully litigated. *Id*. However, the existence of an intercircuit conflict with respect to the proper test for applying the equal terms provision persuaded the full court to hear the case en banc to decide on a test. *Id*.

¶ 74 The Seventh Circuit noted that two sister courts of appeals have proposed tests. *Id*. In *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), the Eleventh Circuit held that under the equal-terms provision, a zoning ordinance that permits *any* "assembly," as defined by dictionaries, to locate in a district must permit a church to locate there as well. The Seventh Circuit stated it was "troubled by the Eleventh Circuit's rule that mere 'differential treatment' between a church and some other 'company of persons collected together in one place *** usually for some common purpose' (the court's preferred dictionary definition of 'assembly') violates the equal-terms provision." *River of Life Kingdom Ministries*, 611 F. 3d at 370. The Seventh Circuit stated:

> " 'Assembly' so understood would include most secular land uses—factories, nightclubs, zoos, parks, malls, soup kitchens, and bowling alleys, to name but a few (visitors to each of these institutions have a 'common purpose' in visiting)—even though most of them have different effects on the municipality and its residents from a church." *Id*.

¶ 75 The Seventh Circuit noted that an alternative test was proposed by the Third Circuit. In *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F. 3d 253 (3d Cir. 2007), the Third Circuit ruled that "a regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose*." (Emphasis in the original.) However, the Seventh Circuit was troubled by the Third Circuit's test, noting that "the use of 'regulatory

purpose' as a guide to interpretation invites speculation concerning the reason behind exclusion of churches; invites self-serving testimony by zoning officials and hired expert witnesses; facilitates zoning classifications thinly disguised as neutral but actually systematically unfavorable to churches ***; and makes the meaning of 'equal terms' in a federal statute depend on the intentions of local government officials." *Id*. at 371.

¶ 76 The Seventh Circuit ultimately adopted a modified version of the Third Circuit's test, by shifting the focus from whether religious assemblies or institutions and secular assemblies or institutions are similarly situated as to the regulatory purpose. *Id*. Instead, the Seventh Circuit's test considers whether religious assemblies or institutions and similar nonreligious assemblies or institutions are treated the same from the standpoint of an accepted zoning criterion, *regardless* of the regulatory purpose underlying the zoning criterion. *Id*. at 371-73. Applying the test to the case before it, the Seventh Circuit noted that the Village of Hazel Crest "created a commercial district that excludes churches *along with* community centers, meeting halls, and libraries because these secular assemblies, like churches, do not generate significant taxable revenue or offer shopping opportunities. [Citation.] Similar assemblies are being treated the same." (Emphasis in the original.) *Id*. at 373. The Seventh Circuit further noted since the noncommercial religious and secular land uses in the zoning district that River of Life wanted to have its church in was being treated the same from the standpoint of an accepted "commercial district" zoning criterion, the equal terms claim had been rebutted. *Id*.

¶ 77 In a dissenting opinion (which the trial court in the present case ultimately found to be "informative"), Judge Sykes opined in pertinent part that the term "assembly" requires a "degree of group affinity, organization, and unity around a common purpose. This more nuanced understanding of the term narrows the range of establishments that qualify as secular 'assemblies'

under the equal-terms provision. Moreover, the focus should be on the property's primary use. Incidental uses should be disregarded; an establishment that only occasionally serves as an 'assembly' will not qualify." *Id.* at 390 (Sykes, J., dissenting). By way of example, Judge Sykes stated that "salons, hotels and motels, and restaurants and taverns likely do not qualify as 'assemblies.' Patrons of these establishments share a common purpose only in the loosest sense and are not usually organized or united to the degree required for an assembly." *Id.*

¶ 78 In the present case, at the hearing on the parties' cross-motions for summary judgment, the trial court stated its belief that in adopting a modified version of the Third Circuit's test, the Seventh Circuit rejected the Eleventh Circuit's broad dictionary-definition of "assembly" as including most secular land uses such as factories, nightclubs, zoos, parks, malls, soup kitchens and bowling alleys. The trial court found Judge Sykes's dissenting opinion in *River of Life Kingdom Ministries* to be "informative" with regard to the proper definition of "assembly," and subsequently granted Evanston's motion for summary judgment and denied JDBY's motion for summary judgment on the equal terms claim, finding that the non-religious comparators cited by JDBY (*i.e.*, townhomes, work-live condos, a gas station and shopping center) were not "assemblies" or "institutions" and therefore that JDBY's equal terms claim failed as a matter of law. The trial court did not specifically state the definition of "assemblies" or "institutions" it was using when ruling on the cross-motions for summary judgment.

¶ 79 On appeal, JDBY contends the trial court's finding was erroneous, that in *River of Life Kingdom Ministries*, the Seventh Circuit adopted the Eleventh Circuit's dictionary definition of "assembly," and that the nonreligious comparators cited by JDBY fell within that definition of "assembly." Accordingly, JDBY asks us to reverse the grant of summary judgment in favor of Evanston on its equal terms claim. Evanston responds that the trial court correctly found that

JDBY's nonreligious comparators were not assemblies within the meaning of the RLUIPA, and that we should affirm the grant of summary judgment in its favor.

¶ 80 We need not decide the parties' arguments regarding whether the trial court properly defined "assembly" for purposes of an equal terms claim, as we are not bound by the trial court's reasoning when reviewing *de novo* the summary judgment order and may sustain the trial court's decision on any basis in the record. See *Carroll v. Curry*, 392 Ill. App. 3d 511, 513 (2009). Even assuming, without deciding, that JDBY's nonreligious comparators are "assemblies," they are nevertheless not suitable comparators to JDBY from the standpoint of the RLUIPA. The question in an equal terms claim is whether "[*s*]*imilar* assemblies are being treated the same" under an accepted zoning criterion, such as "commercial district," or "residential district," or "industrial district." (Emphasis added.) *River of Life Kingdom Ministries*, 611 F. 3d at 373. In *River of Life Kingdom Ministries*, the church and the nonreligious assemblies that were excluded from the commercial district were similar for purposes of the accepted zoning criterion because none of them generated significant taxable revenue or offered shopping opportunities. *Id.* By contrast, JDBY, which was denied a map amendment changing the zoning of the Hartrey property from I2 to C1, is *not* similar to its nonreligious comparators whose zoning *was* changed from I2 to other zoning designations; every one of those nonreligious comparators was a taxable use which would continue to pay property taxes under the accepted zoning criterion, whereas JDBY's proposed use of a parochial elementary school on the Hartrey property (if the map amendment was granted) would result in the removal of one of the largest industrial parcels left in Evanston from the property tax rolls. Unlike its nonreligious comparators, the removal of the Hartrey property from the property tax rolls would deprive Evanston of hundreds of thousands of dollars annually in property tax revenue at a time when approximately 40% of its land is already

off the tax rolls. The generation of tax revenues is a legitimate concern of land-use regulation (*Christian Assembly Rios de Agua Viva v. City of Burbank*, 408 Ill. App. 3d 764, 774 (2011); *River of Life Kingdom Ministries*, 611 F. 3d at 373)), and, thus, renders JDBY, which is not subject to property taxes, dissimilar to its nonreligious comparators who are subject to such taxes.

¶ 81 Further, JDBY's proposed use of a parochial school on the Hartrey property raised safety concerns for the children related to the children's proximity to a loading dock and truck traffic, making it incompatible with the shopping center to its immediate south; this is dissimilar to JDBY's nonreligious comparators, whose rezoned properties not only remained compatible with their surrounding properties, but even enhanced them by bringing in revenue and creating jobs. See *People ex rel. Klaeren v. Village of Lisle*, 316 Ill. App. 3d 770, 777 (2000) (the determination of the compatibility of land uses and their impact on public safety is also a legitimate concern of land-use regulation).

¶ 82 As JDBY has failed to offer any similar nonreligious comparators for purposes of the RLUIPA, its equal terms claim fails as a matter of law. *Irshad*, 937 F. Supp. 2d at 936. Accordingly, we affirm the order denying JDBY's motion for summary judgment, and granting Evanston's motion for summary judgment, on JDBY's equal terms claim.

¶ 83 Next, we address JDBY's appeal from the trial court's judgment, after the bench trial, in favor of Evanston on JDBY's nondiscrimination claim under section (b)(2) of the RLUIPA. As stated, section (b)(2) prohibits a government from implementing a land use regulation discriminating against any assembly or institution "on the basis of religion or religious denomination." 42 U.S.C. § 2000cc(b)(2). A party may prove discrimination through direct evidence of intentional discrimination or circumstantial evidence of discriminatory intent. See

Irshad, 937 F. Supp. 2d at 939. Unlike in its equal terms claim, JDBY need not offer a comparator to sustain its RLUIPA nondiscrimination claim. JDBY need only show that Evanston denied its proposed map amendment "on the basis of religion or religious denomination." 42 U.S.C. § 2000cc(b)(2); see also *Irshad Learning Center v. County of DuPage*, 937 F. Supp. 2d at 939.

¶ 84 " 'The standard of review in a bench trial is whether the trial court's judgment is against the manifest weight of the evidence,' which occurs 'only if the opposite conclusion is apparent or if the finding appears to be arbitrary, unreasonable, or not based on the evidence.' " *ICD Publications, Inc. v. Gittlitz*, 2014 IL App (1st) 133277, ¶ 11 (quoting *Martinez v. River Park Place, LLC*, 2012 IL App (1st) 111478, ¶ 14.)) " 'Under this standard of review, we give great deference to the circuit court's credibility determinations and we will not substitute our judgment for that of the circuit court because the fact finder is in the best position to evaluate the conduct and demeanor of the witnesses.' " (Internal quotation marks omitted.) *ICD Publications*, 2014 IL App (1st) 133277 at ¶ 52 (quoting *Staes & Scallan, P.C. v. Orlich*, 2012 IL App (1st) 112974, ¶35)).

¶ 85 At trial, Evanston City Council members gave extensive testimony as to why they voted against JDBY's proposed map amendment that would have rezoned the Hartrey property from I2 to C1 so JDBY could use it as a site for its parochial elementary school. Alderwoman Rainey testified she voted no to the map amendment because JDBY's school was tax exempt and would cost Evanston hundreds of thousands of dollars annually in property tax revenues. Taking the Hartrey property off the tax rolls would be especially damaging because 40% of Evanston's property was already tax exempt (due to the presence of Northwestern University) and because the taxes generated by the Hartrey property was needed to help pay down the $140 million owed

in pension funds. Mayor Tisdahl testified she voted no due to concerns over student safety and because she wanted to keep the Hartrey property on the tax rolls and available for industrial use. Judge Jean-Baptiste testified he voted no because the Hartrey property was not a safe environment for the school and he wanted to maintain the property for industrial purposes. Alderman Holmes testified she voted no because she did not think the Hartrey property was a good location for a school, she wanted to keep the property on the tax rolls, and she believed revitalization of that area would more likely occur if the property remained zoned for industrial use. Former Alderman Anjana Hansen testified she voted no because she wanted the property to remain zoned for industrial use and she did not want the property to come off the tax rolls. Alderwoman Rainey, Alderman Holmes, Mayor Tisdahl, Judge Jean-Baptiste, and former Alderwoman Hansen all testified that the religious nature of the school did not influence their votes.

¶ 86 With respect to why JDBY's proposed PILOT payment did not merit a yes vote on the map amendment, Alderwoman Rainey and Dennis Marino testified that the PILOT payments would not have completely offset the loss of property taxes; the PILOT payments would only have covered the City's percentage of the property taxes (20%), not the school districts'.

¶ 87 With respect to why other properties had been rezoned from I2 to other uses, testimony from Judge Jean-Baptiste and Alderman Holmes indicated that those rezonings did not take property off the tax rolls but instead enhanced economic activity in the affected areas.

¶ 88 With respect to why Vineyard was allowed to operate a tax-exempt church on the Brummel property in the I2 district, Alderwoman Rainey testified:

> "I first checked. The zoning permitted a special use. If the Zoning Board of Appeals, if all of the bodies who reviewed these kind of things felt they met the standards and that I

then was given the standards to review based on their critiquing it, I felt that there is no choice but to approve it because it was a legal special use."

¶ 89 In other words, since Vineyard met the legal requirements for a special use as determined by the zoning board of appeals, Alderwoman Rainey felt she had no choice but to support Vineyard's application for a special-use permit. By contrast, JDBY was applying for a map amendment as opposed to a special-use permit[3], and both the Evanston Plan Commission and the planning and development committee recommended its denial. Thus, unlike with Vineyard, Alderwoman Rainey and the other Evanston City Council members were not constrained to vote in favor of the map amendment based on any prior administrative findings as to the legality of the amendment; instead they acceded to the recommendations of the Evanston Plan Commission and the planning and development committee and voted to deny the map amendment based on the safety issues and on the tax implications that would result from taking the Hartrey property off the tax rolls.

¶ 90 Further, as noted by the trial court, another distinction between the grant of the special-use permit for Vineyard and the denial of the map amendment for JDBY is that Vineyard's request for a special-use permit left the parcel's zoning designation intact, whereas JDBY's request for a map amendment "alter[ed] the character of the parcel for all purposes." Also, whereas churches were (at the time of Vineyard's request) permitted special uses in I2 districts, schools have never been allowed by right or special permit in I2 districts.

[3] We note that JDBY's prior application for a special-use permit had been denied by Dunkley; JDBY does not appeal that ruling. We further note that Mr. Dunkley subsequently informed JDBY that it could not pursue both an application for a unique-use permit and a map amendment at the same time, and therefore JDBY decided to pursue the map amendment instead of the unique-use permit; JDBY makes no argument on appeal that Mr. Dunkley's statement that JDBY could not pursue both the unique-use permit and the map amendment at the same time was false. Nor is there any evidence in the record that Mr. Dunkley's statement was false.

¶ 91 With respect to Mr. Dunkley's offensive and inappropriate email references to JDBY's "unkosher" logic and the parting of the Red Sea, Alderwoman Rainey noted Mr. Dunkley had no vote on the proposed map amendment; further, none of the Evanston City Council members indicated that their vote was affected by Mr. Dunkley's email.

¶ 92 The trial court found that the testimony of Alderwoman Rainey, Mayor Tisdahl, Judge Jean-Baptiste, Alderman Holmes, and former Alderwoman Hansen regarding the reasoning behind their votes to deny JDBY's map amendment was credible and did not indicate a discriminatory intent. As discussed, we will not substitute our judgment for the trial court's credibility determination. *Id*. The trial court's judgment in favor of Evanston on JDBY's nondiscrimination claim was not against the manifest weight of the evidence.

¶ 93 JDBY contends that in its written ruling rejecting JDBY's nondiscrimination claim, which was brought under section (b)(2) of the RLUIPA, the trial court improperly utilized analyses more appropriate for claims brought under section (a) and section (b)(1) of the RLUIPA. Review of the trial court's written ruling reveals that it provided alternative bases for its judgment in favor of Evanston on JDBY's nondiscrimination claim. One of those bases was that the testimony at trial, found to be credible by the trial court, indicated no discriminatory intent by Evanston when denying JDBY's proposed map amendment. This was a proper analysis of a section (b)(2) nondiscrimination claim; and, as discussed earlier in this order, the court's finding in favor of Evanston on this claim was not against the manifest weight of the evidence. Accordingly, we need not discuss the other bases for the trial court's judgment.

¶ 94 JDBY also argues that when ruling in favor of Evanston on its nondiscrimination claim, the trial court improperly failed to consider how the denial of JDBY's proposed map amendment differed from the four other secular property owners (*i.e.*, 2100 Greenwood Street, 1613 Church

Street, 2424 Oakton Street, and 912-924 Pitner Avenue) who were granted map amendments changing their zoning from I2 to other zoning designations. However, careful review of the trial court's written ruling reveals that it did consider the differing treatment, but found "because each of the four [secular] applications entailed re-zoning property that would continue to generate tax revenue, it is not reasonable to draw the inference that Evanston's refusal to effectively remove the Hartrey property from the tax rolls by granting [JDBY's] map amendment was the product of religious discrimination."

¶ 95 As discussed, the trial court's finding was not against the manifest weight of the evidence.

¶ 96 For the foregoing reasons, we affirm the circuit court.

¶ 97 Affirmed.