

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Third Church of Christ, Scientist, Washington, D.C.,)	
)	
Plaintiff,)	
)	
v.)	
)	Civil Action No. 08-01371 (JR)
District of Columbia Historic Preservation Review Board, and The District of Columbia,)	
)	
Defendants.)	
)	

**MEMORANDUM OF *AMICI CURIAE* IN SUPPORT OF
DEFENDANTS’ MOTION TO DISMISS**

INTRODUCTION

The National Trust for Historic Preservation and the Committee of 100 on the Federal City (*amici*)¹ respectfully submit this *amici curiae* brief in support of the Defendants’ Motion to Dismiss. The National Trust and the Committee of 100 respectfully urge this Court to grant the Defendants’ Motion to Dismiss the Plaintiff’s Complaint because the claims asserted do not satisfy the constitutional “ripeness” requirements for justiciability under Article III of the U.S. Constitution.

This case involves the question of whether the mere designation of a structure used for religious services as a historic landmark violates the Free Exercise Clause of the First Amendment, the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §

¹ The interests of the National Trust and Committee of 100 are described in the accompanying motion for leave to file this *amici* memorandum.

2000cc *et seq.*, or the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.* In the view of *amici*, the Defendants' lawsuit must be dismissed because the District of Columbia has not yet taken a definitive position on whether the Plaintiff may alter or demolish its house of worship, and because the Plaintiff's exercise of religion has not, and may never be, impaired or affected by the designation decision. Thus, the Plaintiff's claim of injury to free exercise rights is speculative, and lacks the necessary finality and concreteness to justify this Court's jurisdiction.

The District of Columbia, pursuant to the D.C. Historic Landmark and Historic District Preservation Act (D.C. Law 2-144), D.C. Code §§ 6-1101 to 6-1115, has established distinct procedures to consider and act upon applications to designate historic landmarks and districts, on the one hand, and procedures for applications to demolish or alter properties that have been designated as historic landmarks, on the other. Plaintiff's free exercise claims must be addressed in the context of a specific application based on specific facts, and indeed, such an application is now pending before the Mayor's Agent for the District of Columbia, which is scheduled to hold a hearing on October 28, 2008. By contrast, judicial review of these allegations in the context of the historic designation alone is premature, and would needlessly embroil this Court in an abstract and hypothetical disagreement that may ultimately become moot, because the Plaintiff's pending application before the Mayor's Agent for the District of Columbia may well provide much of the relief sought by the Plaintiff.

The District's approach is fully justified and consistent with prevailing practices throughout the country. Thirty years ago, the U.S. Supreme Court, in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), recognized that preserving landmarks and districts with special historic, architectural, or cultural significance is an entirely

permissible governmental goal. Following the *Penn Central* decision, preservation ordinances have repeatedly withstood constitutional attacks, including against “free exercise” claims. See *Rector, Wardens, & Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).

Decisions on whether to designate a property as a historic landmark are most appropriately based strictly on objective, professional determinations of the structure’s architectural, historical, or cultural significance. It is through this process that a fair and comprehensive list of properties is identified for protection. *See generally Penn Central Transportation Co. v. City of New York*, 438 U.S. at 107-12. The designation and listing of historic properties provides an invaluable planning tool and helps to ensure that significant resources are identified, researched, and recorded. The fairness and objectivity of the designation process would be undermined and subverted if historic designation could be avoided based on a property owner’s concerns about hypothetical future impacts (whether they be economic or ideological), that may never result in any actual injury or be felt in a tangible way. These unsubstantiated and speculative concerns simply cannot be meaningfully evaluated at the designation stage because of a lack of information about the ultimate impact on the owner of the property. Instead, a challenge to landmark designation must await final action on a specific application for demolition, alteration, or new construction, at which point the impact on the future use of the property can be evaluated.

The importance of avoiding premature judicial review of constitutional claims, based on landmark designation alone, has been specifically upheld in the District of Columbia, *see, e.g., Metropolitan Baptist Church v. District of Columbia Dept. of Consumer & Reg. Affairs*, 718 A.2d 119 (D.C. App. 1998), and *Weinberg v. Barry*, 634 F. Supp. 86, 93 (D.D.C. 1986), as well

as in other jurisdictions. *See, e.g., Estate of Tippett v. City of Miami*, 645 So. 2d 533 (Fla. App. 1994), and *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 496 N.E.2d 183, 505 N.Y.S.2d 24 (1986), *cert denied*, 479 U.S. 985 (1986) (discussed below). Accordingly, the District of Columbia's motion to dismiss is well-founded and should be granted.

STATEMENT OF THE CASE

I. Statutory Framework

The District of Columbia Historic Landmark and Historic District Preservation Act (D.C. Law 2-144), D.C. Code §§ 6-1101 to 6-1115, was enacted in 1979 to provide for the "protection, enhancement and perpetuation of properties of historical, cultural and aesthetic merit." D.C. Code § 6-1001(a). To this end, it established the D.C. Historic Preservation Review Board (Review Board), whose functions include the responsibility to "[d]esignate and maintain a current inventory of historic landmarks and historic districts in the District of Columbia," *id.* § 6-1003(c)(3), and to review applications for demolition, alteration, or subdivisions affecting designated properties and advise the Mayor on whether such work is compatible with the purposes of D.C. Law 2-144. *Id.* § 6-1103(c)(1); 10A D.C.M.R. § 2002(1) .

Members of the Review Board must "meet the requirements of a State Review Board under regulations issued by the Secretary of the Interior." D.C. Code § 6-1103(a). These regulations require that a majority of its members be recognized professionals in the area of history, archeology, architectural history, architecture, or historic architecture, and meet the standards and qualifications for professionals in these area developed by the U.S. Department of the Interior. 36 C.F.R. Part 61, App. A; 48 Fed. Reg. 44,716 (Sept. 29, 1983).

Criteria for landmark designation are set forth at Section 201 of DCMR Title 10A:

201.1 Historic and prehistoric buildings, building interiors, structures, monuments, works of art or other similar objects, areas, places, sites, neighborhoods, and cultural

landscapes are eligible for designation as historic landmarks or historic districts if they possess one or more of the following values or qualities:

- (a) *Events*: They are the site of events that contributed significantly to the heritage, culture or development of the District of Columbia or the nation;
- (b) *History*: They are associated with historical periods, social movements, groups, institutions, achievements, or patterns of growth and change that contributed significantly to the heritage, culture or development of the District of Columbia or the nation;
- (c) *Individuals*: They are associated with the lives of persons significant to the history of the District of Columbia or the nation;
- (d) *Architecture and Urbanism*: They embody the distinguishing characteristics of architectural styles, building types, or methods of construction, or are expressions of landscape architecture, engineering, or urban planning, siting, or design significant to the appearance and development of the District of Columbia or the nation;
- (e) *Artistry*: They possess high artistic or aesthetic values that contribute significantly to the heritage and appearance of the District of Columbia or the nation;
- (f) *Creative Masters*: They have been identified as notable works of craftsmen, artists, sculptors, architects, landscape architects, urban planners, engineers, builders, or developers whose works have influenced the evolution of their fields of endeavor, or are significant to the development of the District of Columbia or the nation; or
- (g) *Archaeology*: They have yielded or may be likely to yield information significant to an understanding of historic or prehistoric events, cultures, and standards of living, building, and design.

A landmark designation by the Review Board constitutes legislative rulemaking; judicial review of such a decision may be had in the D.C. Superior Court. *Donnelly Associates v. D.C. Historic Preservation Review Board*, 520 A.2d 270, 280 (D.C. 1987).

Once a historic landmark is designated under D.C. Law 2-144, the D.C. government may not issue a permit to demolish, undertake exterior alterations, subdivide, or construct a new building on the site until the Review Board has had an opportunity to review the project and make recommendations to the Mayor. D.C. Code §§ 6-1004 to 1007; 10A DCMR Ch. 3. If the

Review Board finds that issuance of the demolition permit is not consistent with the purposes of the Preservation Act, the owner is entitled to request a contested case hearing before the Mayor's Agent. D.C. Code §§ 6-1104(c), 6-1105(e), 6-1107(e). At this hearing, the owner may present evidence and witnesses to demonstrate that a permit must be issued because: (1) issuance of the permit is necessary in the public interest, or that (2) failure to issue a permit will result in unreasonable economic hardship. *Id.* §§ 6-1004(e), 6-1005(f).

A permit will be found to be "necessary in the public interest" where its issuance is determined to be (a) consistent with the purposes of D.C. Law 2-144,² or (b) necessary to allow the construction of a project of "special merit." *Id.* § 6-1002(10). A special merit project must provide "significant benefits to the District of Columbia or to the community by virtue of exemplary architecture, specific features of land planning, or social or other benefits having a high priority for community services." *Id.* § 6-1102(a)(11). A permit may also be issued to prevent "unreasonable economic hardship," if "failure to issue a permit would amount to a taking of the owner's property without just compensation or, in the case of a low-income owner(s) as determined by the Mayor, failure to issue a permit would place an onerous and excessive financial burden upon such owner(s)." *Id.* 6-1102(a)(14).

The Mayor's Agent is required by law to render a decision on any application that is the subject of a hearing within 120 days after the hearing record is closed. *Id.* § 6-1112(a). Mayor's Agent's approval or rejection of a building permit following a contested case proceeding under the Act is further reviewable in the D.C. Court of Appeals. *Id.* § 2-510.

² The purpose of the law is to "retain and enhance historic landmarks in the District of Columbia and to encourage their adaptation for current use" and to "encourage the restoration of historic landmarks." D.C. Code § 6-1001(b)(2); 10A DCMR § 2002.3.

II. Factual Background

In 1971, Plaintiff commissioned Araldo A. Cossuta, an architect in I.M. Pei's firm, to construct a house of worship. The building, designed in the architectural style of brutalism, which is identifiable by its "celebration" of concrete and its geometric form. *See* Complaint ¶¶ 14, 15. In recognition of the building's architectural importance in the District of Columbia, the Committee of 100 on the Federal City applied to have the church declared a historic landmark by the Review Board. *Id.* ¶ 30. The Review Board, acting pursuant to its authority under D.C. Code § 6-1003(c)(3), designated the structure as a historic landmark in December 2007. *Id.* ¶ 32.

Plaintiff commenced this action on August 7, 2008. Although the Review Board had issued a decision recommending denial of the Plaintiff's application to raze its house of worship, *id.* ¶ 53, the Plaintiff did not seek a final determination from the Mayor until August 12, 2008. A hearing before the Mayor has now been scheduled for October 28, 2008. *See* http://planning.dc.gov/planning/cwp/view,a,1284,q,570741,planningNav_GID,1706,planningNav,%7C33515%7C.asp. The Plaintiff's claims before the Mayor are "that the raze of the landmark building is consistent with the purposes of the Act and necessary to construct a project of special merit, and that the failure to issue the permit will result in unreasonable economic hardship to the owner." *Id.*

ARGUMENT

I. Article III of the U.S. Constitution Bars Federal Courts from Reviewing Plaintiff's First Amendment and Statutory Challenges to the Designation Decision Because These Claims Are Not Presently "Ripe" for Judicial Review.

A. General Principles of the Ripeness Doctrine.

Plaintiff's lawsuit under the First Amendment, RLUIPA, and RFRA, which challenges the landmark designation of the Third Church of Christ, Scientist, must be dismissed because

these challenges do not satisfy the constitutional “ripeness” requirements for justiciability under Article III of the Constitution.

The ripeness doctrine limits the power of federal courts to adjudicate disputes. Its roots are found in Article III’s “case or controversy” requirement and prudential limitations on the exercise of judicial authority. *See State Farm Mutual Auto. Ins. Co. v. Dole*, 802 F.2d 474, 479 (D.C. Cir. 1986). The basic rationale behind the ripeness doctrine “is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” *Abbott Laboratories v. Gardner*, 387 U. S. 136, 148-49 (1967). *See also Village of Bensenville v. FAA*, 376 F.3d 1114, 1119 (D.C. Cir. 2004) (quoting *Abbott Labs.*, 387 U.S. at 149); *National Ass’n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1281 (D.C. Cir 2005). Whether a claim is ripe for judicial determination is a question of law which the Court reviews *de novo*. *Metropolitan Baptist Church*, 718 A.2d at 130.

Determining whether an issue is ripe for judicial review is best viewed in a “twofold aspect,” which requires an evaluation of both the fitness of the issues for judicial resolution and the hardship to the parties of withholding court consideration. *Abbott Labs. v. Gardner*, 387 U.S. at 149. The first factor – fitness – evaluates two criteria: (1) “existence of a specific, concrete, and important right; and (2) finality in the administrative decision.” *Metropolitan Baptist Church*, 718 A.2d at 123. The second factor – hardship – looks to whether the case at bar presents a scenario that warrants equitable intervention by the court. *See id.* at 124.

B. Plaintiff’s Claims Must Be Dismissed as Unripe.

It is clear under the foregoing principles that the claims asserted by Plaintiff are not fit for

judicial review because designation of Plaintiff's house of worship as a historic landmark, alone, does not satisfy the justiciability requirements of Article III. Plaintiff will suffer no hardship if judicial review at this point is withheld. The effect of landmark designation on Plaintiff's rights under the Constitution and the federal religious protection statutes cannot be determined until the Mayor's Agent definitively acts upon Plaintiff's already pending application for permission to demolish or alter its building, pursuant to the District of Columbia's administrative procedures. Unless and until those proceedings are completed and result in a denial of the requested demolition permit, there has been no action that has inflicted any actual injury on Plaintiff. Moreover, Plaintiff does not suffer any hardship as a result of deferring judicial review, because the District of Columbia has not inflicted any harm sufficient to create a current, cognizable injury. Accordingly, Plaintiff's claims are not now judicable and this action must be dismissed.

1. Plaintiff's Claims Are Not Fit For Review.

Virtually every court that has addressed a constitutional challenge alleging that the mere designation of a historic religious property will adversely affect the free exercise of religion has found that such challenges are not fit for judicial review. These courts have concluded that the impact of historic designation on free exercise rights enjoyed under the U.S. Constitution or conferred by religious protection laws such as RLUIPA and RFRA cannot be evaluated in the abstract, but only in the context of a specific proposal for demolition or alteration of a historic building that has been considered and denied by the Mayor. Simply put, "an issue is ripe for adjudication only when the parties' rights may be immediately affected by it." *Allen v. United States*, 603 A.2d 1219, 1229 n.20 (D.C. App. 1992). Indeed, this is why the Review Board and historic preservation boards in other jurisdictions are careful to confine their designation determination strictly to the merits of whether a structure or site qualifies for designation. *See*,

e.g. Casey v. City of Rockville, 929 A.2d 74 (Md. 2007) (upholding the City of Rockville’s refusal to consider the economic feasibility of preservation when deciding whether to designate the property as historic).

This principle of judicial restraint was applied by the D.C. Court of Appeals in *Metropolitan Baptist Church v. District of Columbia Dept. of Consumer & Reg. Affairs*, 718 A.2d 119 (D.C. App. 1998), and by the New York Court of Appeals in *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510 (1986), both cases involving free exercise challenges to the landmark designation of historic properties, and both courts dismissing such challenges as premature. In each of these cases, as in this case, the churches challenged the designation decisions *before* filing or receiving a final decision on an application for a permit to alter or demolish their historic properties.

In *Metropolitan Baptist Church*, the D.C. Court of Appeals ruled that a church’s First Amendment challenge to a decision by the Historic Preservation Review Board to include church-owned properties in the Greater Fourteenth Street Historic District was not ripe for adjudication. 718 A.2d at 130. Applying the two-part test for evaluating ripeness in the context of rulemaking cases, the court found that Metropolitan Baptist Church’s free exercise claim was not “fit for judicial decision” and the church had not shown that any hardship resulting from historic designation was sufficient to overcome the lack of ripeness. *Id.* at 130 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

In reaching its decision under the *Abbott Labs.* fitness prong, the D.C. Court of Appeals concluded that the church’s free exercise claim was not fit for judicial review because questions remained that were not “purely legal,” and because the court could not say that historic designation *alone* “inflicts a ‘concrete injury’ on the church at this time.” *Metropolitan Baptist*

Church, 718 A.2d at 131. The court explained, for example, that “the specific requirements of any particular application, or the time and expense necessary to prepare it, cannot be determined as a legal matter but depend on the development of facts which are absent from the record.” *Id.* The court further observed that it was not clear from the record that the church’s building plans “had advanced to such a stage that the church had developed an immediate concrete plan for renovating the properties.” *Id.* Moreover, the court stated, “even if [the plan] has since evolved into a more definite plan for renovating the properties, we cannot say that there is a concrete dispute between the parties in the absence of a decision on a permit application or at least some preliminary steps toward that end” *Id.*

Similarly, in *Church of St. Paul & St. Andrew*, the New York Court of Appeals held that an as-applied free exercise challenge to the landmark designation of a church’s house of worship under New York City’s Landmarks Ordinance was not ripe for review. Also applying the *Abbott Labs.* two-prong inquiry, the court found that the church’s free exercise claim was not fit for judicial review, and the church had failed to show that the challenged administrative action had caused direct and immediate harm because there had not been any interference with its plans. 67 N.Y.2d at 522-23. The court explained that finality was lacking because the effect on the church of being subject to the New York City Landmarks Ordinance could not be determined until an application to alter or demolish the property had been applied for and granted or denied. *Id.* The city had not yet taken a definitive position. *Id.* Moreover, “ultimate resolution” of the church’s free exercise claim required the examination of facts not yet developed, such as those pertaining to the financial situation and the preservation commission’s reaction to the church’s proposal to partially demolish its house of worship and construct a high rise condominium building. *Id.*

Courts have also refrained from reviewing challenges to landmark designations based on

other types of constitutional claims for similar lack of final action with concrete and immediate impacts on free exercise rights. In particular, this Court has recognized that a claim that landmark designation results in an unconstitutional “taking” of private property is not ripe for judicial review until a permit application or variance is sought. *See Weinberg v. Barry*, 634 F. Supp. 86, 93 (D.D.C. 1986) (noting that “as applied” takings challenge to interior designation decision was not ripe for review, and rejecting facial takings challenge to the designation decision). *See also Casey v. City of Rockville*, 929 A.2d 74, 97-8 (Md. 2007) (finding takings challenge to landmark designation of historic house was premature where there had been no final determination of the permitted use of the property), and *Estate of Tippett v. City of Miami*, 645 So. 2d 533 (Fla. App. 1994) (facial constitutional challenge to designation of a local historic district was premature where no permits had been sought from the city to demolish or alter the plaintiff’s property within the district).

This lack of finality has also been a factor in the dismissal of constitutional and statutory “free exercise” challenges to the application of zoning ordinances. The U.S. Court of Appeals for the Second Circuit in *Murphy v. New Milford Zoning Commission*, 402 F.3d 342 (2d Cir. 2005), ruled that that it lacked jurisdiction to entertain a Free Exercise and RLUIPA challenge to an order to cease and desist using a single family house for regularly scheduled prayer meetings in violation of a local statute. Applying the first prong of “finality” ripeness test articulated in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186 (1985), the Second Circuit found that the Murphys’ claims were not ripe for review because they had not “obtained a final, definitive position from local authorities as to how their property may be used.” *Murphy*, 402 F.3d at 352. The court explained that the plaintiffs had failed to establish that they had “experienced an immediate injury” as a result of the city’s action and that their

claims remained “ill-defined,” because, among other things, they had failed to appeal a cease and desist order to the Zoning Board of Appeals. *Id.* at 351-52.³

A number of courts have followed *Murphy* by dismissing RLUIPA and free exercise claims for lack of ripeness under *Williamson County*’s finality prong. *See, e.g., Congregation Anshei Roosevelt v. Planning & Zoning Bd. of the Borough of Roosevelt*, No. 07-4109, 2008 U.S. Dist. LEXIS 63994 (D.N.J. Aug. 21, 2008) (RLUIPA claim was not ripe for review where synagogue had not filed for a variance or received a final determination on request to operate religious school); *Grace Community Church v. Lenox Township*, No. 06-13526, 2007 U.S. Dist. LEXIS 64983 (E.D. Mich. Aug. 31, 2007) (granting summary judgment to local authority on as-applied RLUIPA challenge on ripeness grounds because the church had failed to exhaust its administrative remedies by first appealing the revocation of conditional approval for residential housing for drug and alcohol users to the zoning board of appeals).⁴

Here, Plaintiff’s constitutional and statutory claims are not ripe because they are not fit for judicial review. As in *Metropolitan Baptist Church* and *Church of St. Paul & St. Andrew*, the

³ Federal courts have required finality in other types of constitutional claims as well. *See, e.g., Insomnia Inc. v. City of Memphis*, 2008 U.S. App. LEXIS 11004 (6th Cir. 2008) (finding free speech challenge unripe where plaintiffs had failed to submit a revised plan for development as requested by the Land Use Control Board); *Taylor Inv., Ltd. v. Upper Darby Twp.*, 983 F.2d 1285, 1295 (3d Cir. 1993) (finding plaintiffs’ constitutional challenges to revocation of use permit not ripe for review where township had not reached a final determination on permit); *Unity Ventures v. Lake County*, 841 F.2d 770, 775 (7th Cir. 1988) (ruling that plaintiff’s equal protection and substantive due process claims were not ripe where it had not obtained a final decision on a permit application for a sewer connection).

⁴ *See also Christian Methodist Episcopal Church v. Montgomery*, No.:4:04-CV-22322-RBH, 2007 U.S. Dist. LEXIS 5133 (D.S.C. Jan. 18, 2007) (lawsuit challenging town’s special use permit requirement under First Amendment and RLUIPA was not ripe where church had not applied for permit under zoning ordinance); *House of Fire Christian Church v. Zoning Bd. of Adj. of City of Clifton*, 879 A.2d 1212 (N.J. App. 2005) (declining to consider RLUIPA claim until the zoning board had reached a final decision on church’s application to construct a house of worship); *Salt Lake City Mission v. Salt Lake City*, 184 P.3d 599, 603 (Utah 2008) (dismissing free exercise challenge to application of zoning ordinances for conditional use permits where “the Mission had failed to obtain a final decision on any of the five locations at issue” and had “offered no compelling reason why obtaining such a decision would be unfair or unreasonable”)

resolution of Plaintiff's free exercise claims are not "purely legal." Instead, factual issues, such as whether solutions can be developed that would accommodate Plaintiff's desire for a newly designed church or whether a demolition permit will in fact even be denied, have yet to be developed. Complaint ¶ 52. Until the Mayor's Agent issues a final, definitive determination on Plaintiff's request for a demolition permit, the effect of the landmark designation on the Plaintiff's constitutional and statutory rights cannot be ascertained, and Plaintiff's allegations of injury are entirely speculative.⁵

The importance of not putting the proverbial cart before the horse is especially apparent in this case, given the nature of the District of Columbia's procedures for reviewing applications to alter or demolish historic properties. As discussed above, D.C. Law 2-144 and its regulations provide that an application for a demolition permit may be approved if the Mayor's Agent finds that the permit is: consistent with the purposes of the act, D.C. Code §§ 6-1104(f); 6-1002(10); necessary in order to construct a project of "special merit," *id*; or to prevent unreasonable

⁵ In order for a free exercise-based challenge to the HPRB's landmark designation decision to be ripe for judicial review, the designation itself must have the effect of impairing the free exercise of religion, either through the imposition of fines or through intrusive procedures. Compare *Sisters of St. Francis Health Services, Inc. v. Morgan County, Ind.*, 397 F. Supp. 2d 1032, 1049 (S.D. Ind. 2005) (facial challenge to county moratorium and county approval requirement on the construction of hospitals, is ripe for review where the Sisters had alleged and presented evidence showing that the exception process imposed a substantial burden on free exercise), and *Konikov v. Orange County*, 410 F.3d 1317, 1322 (11th Cir. 2005) (finding as-applied RLUIPA claims ripe in a lawsuit challenging a code enforcement board decision that plaintiff had violated local laws by operating a religious organization in a residential zone without a special exception, because the imposition of fines indicated that a final decision had been made). Neither of these consequence attend the HPRB's landmark designation decision. In contrast to *Sisters of St. Francis*, Plaintiff here does not allege that the District's designation procedures impose a substantial burden on religious exercise; rather, their complaint is with their assumption that the Mayor's Agent will ultimately deny their pending application for a demolition permit— an assumption that is unwarranted and premature. In contrast to *Konikov*, the District has imposed no fines. Significantly, in each case, the court ultimately held that the plaintiff's free exercise rights had not been substantially burdened. *Sisters of St. Francis Health Services* at 1051. *Konikov* at 1323-24.

economic hardship, *id.* § 6-1002(14). The Mayor's Agent could determine that the developer's project is indeed consistent with D.C. Law 2-144 because it incorporates rather than completely demolishes the church structure or adapts the building into a new use.⁶ Alternatively, the Mayor's Agent could find that the project has special merit, given its exemplary architecture or special land use planning feature, or the church could establish that denial of the permit would otherwise deny it the reasonable, beneficial use of its property. However, until the Plaintiff presents its case on October 28, 2008, and the Mayor's Agent has made his or her final decision on Plaintiff's demolition application, the record is incomplete and the impact of historic designation on the Plaintiff is entirely speculative. Thus Plaintiff's claims are simply not fit for judicial review.

2. Withholding Judicial Review Would Not Create Any Hardship on Plaintiff.

Not only are the claims in Plaintiff's lawsuit not "fit for judicial review," but "the hardship of withholding court consideration is insufficient to overcome plaintiff's lack of ripeness," because the District of Columbia has not inflicted any harm sufficient to justify judicial review. *See Abbott Labs. v. Gardner*, 387 U. S. at 148-49. As the U.S. District Court for the Southern District of New York found:

[T]he designation of church buildings as landmarks does not in and of itself violate the free exercise clause. This is especially true since the landmark designation does not deprive the Church of the right to seek a certificate of appropriateness to alter its property if the nature of that property is such that it no longer can be used to carry out its religious or charitable mission.

⁶ *See, e.g.*, HPA Nos. 01-219 to 01- 224, 01-208, and 01-209 (Aug. 1, 2001), where the Mayor granted the Archdiocese of Washington and John Akridge Companies the necessary permits to consolidate lots and build a mixed-use commercial building on F Street as a project of special merit, where the project included retention of historic façades and respect for existing landmarks, adaptation of historic buildings for modern retail use, and accommodation of art-related space.

Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York, 728 F. Supp. 958, 963 (S.D.N.Y. 1989), *aff'd*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).

In their dismissals of free exercise challenges to historic designations on ripeness grounds, the courts in *Metropolitan Baptist Church* and *Church of St. Paul & St. Andrew* found that the plaintiffs had failed to show hardship sufficient to justify judicial review because the “certainty and effect” of the challenged action could not be ascertained. In *Metropolitan Baptist Church*, the D.C. Court of Appeals emphasized that, on the record, it “could not perceive the requisite ‘certainty and effect’ of any alleged hardship,” because it did not know “what would be involved in attempting to comply with the procedures,” and any hardship may not arise at all if the church did not “effectuate its [plan] in a manner in which historic designation proves an actual burden.” *Metropolitan Baptist Church*, 718 A.2d at 132 (emphasis added). Thus, the court concluded that the church had failed to show that historic designation had a “direct and immediate” effect on its plans, or that burdens resulting from the permit process had been felt in a concrete way. *Id.*

Similarly, in *Church of St. Paul & St. Andrew*, the court found no hardship where there had not been “any interference.” 67 N.Y.2d at 522. As the New York Court of Appeals explained, “[h]ow much, if any, of plaintiff’s rebuilding program will be thwarted and whether and to what extent it will suffer resultant constitutional harm cannot be known until the Commission acts on plaintiff’s request for approval of its plans”. *Id.* at 522-23.

As in those cases, the “certainty and effect” of any alleged hardship to the Plaintiff cannot be ascertained from the present record. Significantly, despite Plaintiff’s apparent disagreement with the Review Board’s decision, *see, e.g.*, Complaint ¶ 14, Plaintiff does not challenge the

merits of that decision. Rather, Plaintiff complains that the Review Board’s designation decision has had “[t]he immediate effect” of forc[ing] the Church into maintaining a religious stasis, unable to accommodate even its present religious needs.” *Id.* ¶ 33. The complaint also speculates that, if the Mayor were to grant a permit, the permit “*might* authorize only minor work,” and that obtaining a permit to raze the building is “highly unlikely.” *Id.* ¶ 52 (emphasis added). Finally, Plaintiff vaguely suggests that its inability to obtain a permit “in a timely manner as a matter of right, “has frustrated the financing mechanism under the 2007 agreement with ICG,” which otherwise would have enabled it to remain in the same location in a “newly designed structure.” *Id.* ¶ 58.

However, just as in *Metropolitan Baptist Church and Church of St. Paul & St. Andrew*, nothing in the landmark designation itself has frustrated the Plaintiff’s plans to relocate into a newly designed structure at the same location. Unless and until the Mayor’s Agent acts on the Plaintiff’s application to demolish its house of worship, which is scheduled to be heard on October 28, 2006, there is no “certainty and effect” as to any harm that would result from obtaining a final decision. Indeed, Plaintiff’s own conjectures as to the Mayor’s decisions undermines any claim of finality, and the fact that the Plaintiff waited until August 12, 2008 – eight months after the landmark designation decision – to file an application to demolish the building suggests that delay is no more than an ephemeral concern.

CONCLUSION

Plaintiff’s lawsuit is undeniably premature. The constitutional and statutory claims in this case are not fit for judicial review, and any hardship that might conceivably be caused by deferring review is insufficient to overcome the lack of ripeness, because there has not been any interference with the Plaintiff’s religious exercise. The legal consequences and practical impact

of designating its house of worship as a historic landmark cannot be ascertained until the Plaintiff's application for a permit has been considered and acted upon. For the foregoing reasons, *amici* agree with the Defendant that the complaint filed by Third Church of Christ, Scientist should be dismissed.

Dated this 6th day of October, 2008.

Respectfully submitted,

/s/
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