NO. 13-4267
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AL FALAH CENTER, et al.,
Plaintiffs-Appellees,

v.

TOWNSHIP OF BRIDGEWATER, TOWNSHIP OF BRIDGEWATER PLANNING BOARD, TOWNSHIP COUNCIL OF BRIDGEWATER, et al.
Defendants-Appellants

Appeal from United States District Court for the District of New Jersey
Civil Action No. 11-CV-2397 (Honorable Michael A. Shipp)

DEFENDANTS-APPELLANTS' BRIEF IN SUPPORT OF THEIR APPEAL

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The Township of Bridgewater, Township Council of Bridgewater, and Planning Board of the Township of Bridgewater (collectively "Appellants," "Defendants," or "Township") respectfully seek an order reversing and vacating the District Court's September 30, 2013 Order entering a preliminary injunction, premised on a purported "facial challenge" to a zoning ordinance, that requires the Planning Board to process Plaintiffs' conditional use and site plan application even though the ordinance at issue divests the Planning Board of jurisdiction and has not been declared invalid. (JA3).

PRELIMINARY STATEMENT

The incongruous ruling below should be reversed. After extensive discovery, the District Court entered an injunction not on the Plaintiffs' as applied challenge to the Township's zoning ordinance (hereinafter "Ordinance 11-03") but on the Plaintiffs' purported "facial challenge" to that ordinance. Indeed, the District Court specifically found the as applied challenge to Ordinance 11-03 to not yet be ripe because the Plaintiffs (collectively "Al Falah Center") had never sought a variance from the effect of the ordinance. (JA14 n.5). Thus, the District Court, by its own reasoning, was only examining Ordinance 11-03 to determine if it was facially invalid; that is, whether it was unconstitutional across all applications and all applicants. Despite the narrow examination the District Court undertook, the Court nevertheless considered substantial evidence specific to Al Falah Center and

entered a preliminary injunction order that did not find Ordinance 11-03 constitutionally infirm across all applicants and applications but which only mandated that the Planning Board consider the Al Falah Center's specific application without reference to the ordinance. (JA4). The District Court neither voided the ordinance nor declared it unconstitutional. *Id.* Rather, the District Court ordered that the ordinance not be applied to Al Falah Center. *Id.*

Thus, the District Court's decision presents this Court with an irreconcilable conundrum: the as applied challenge was correctly determined to be unripe under *Williamson County* and yet the relief provided was a limited order preventing the Township Planning Board from applying Ordinance 11-03 only to Plaintiff's conditional use and site plan application as if an as applied challenge had succeeded. This incongruous result demonstrates that the issues presented to the District Court were, in fact, not ripe for adjudication and the order entering the injunction should be reversed and vacated.

STATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION

This Court has "appellate jurisdiction to entertain interlocutory appeals from orders that grant, deny, or modify injunctions" pursuant to 28 U.S.C. § 1292(a)(1),

and thus has appellate jurisdiction to determine the propriety of the District Court's grant of a preliminary injunction. *Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.*, 562 F.3d 553, 556 (3d Cir. 2009) (citing 28 U.S.C. § 1292(a) (1)).

However, this Court, like the District Court before it, lacks subject matter jurisdiction because Al Falah Center's claims are not yet ripe for adjudication pursuant to the Supreme Court's holding in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Specifically, the nature of the harm suffered by Al Falah Center, if any, has not been and cannot be established until Al Falah Center files an application for a conditional use variance pursuant to N.J.S.A. § 40:55D-70(d)(3) and a final decision is made on that application. This argument is fully presented below. (See Pt. I, below).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in concluding it had subject matter jurisdiction over this case where, in violation of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), it considered the validity of Ordinance 11-03 even though the extent that the Ordinance limits development of Al Falah Center's property, if at all, is not known

because Al Falah Center failed to apply for the variance required by the Ordinance. (JA12, 16, 21, 26, 38-39, 41).

2. Whether the District Court abused its discretion in granting Al Falah Center's application for a preliminary injunction. (JA 38-39, 41).

STATEMENT OF THE CASE

This matter arises out the desire of the Al Falah Center to construct a house of worship within a residential zone in the Township of Bridgewater. In the Fall of 2010, the Al Falah Center entered into a contract to purchase a site contingent upon obtaining the necessary government approvals. The site, an abandoned banquet hall property (the "Property") in a residential neighborhood in the Township, could be turned into a mosque without a variance but still required other certain other land use approvals. (JA6).

In January of 2011, the Al Falah Center filed an application seeking preliminary site plan and conditional use approval from the Township Planning Board to construct a mosque and religious and community center. (JA7). On March 14, 2011, during the pendency of the Al Falah Center's application, the Township's land use laws were amended by the passage of Ordinance 11-03. (JA10). It thus became necessary for Al Falah Center to seek and obtain a

conditional use variance from the Township Zoning Board pursuant to New Jersey state municipal land use law prior to constructing the mosque. *Id.*.

Al Falah Center never sought the variance mandated by Ordinance 11-03. (JA14 n.5; JA3308 (91:8-16)).

Instead, on April 26, 2011 it brought this action. (JA57). It alleged that: its First and Fourteenth Amendment rights were violated, that its New Jersey constitutional rights were violated, and that the defendants, by passing Ordinance 11-03 and making the Al Falah Center obtain a variance, violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). (JA10-11). Finally, the Al Falah Center alleged a variety of violations of New Jersey statutory laws. (JA11).

On May 18, 2011, an Amended Complaint was filed which the defendants moved to dismiss on June 3, 2011. (JA59, 60). That motion was denied without prejudice because the District Court determined that it was "not ripe for adjudication" at that time. (JA62).

On May 24, 2011, the Al Falah Center moved for a preliminary injunction. (JA59). On November 11, 2011 that pending motion was suspended by order of

the District Court to permit settlement talks to proceed. (JA63). On February 29, 2012, the Al Falah Center's motion was terminated without prejudice. (JA64).

A Rule 16 Conference was held on May 31, 2012 and discovery was commenced. (JA65). On August 31, 2012, a Second Amended Complaint was filed. (JA67, 73).

On October 10, 2012, the Township moved for summary judgment and the Al Falah Center moved for a preliminary injunction. (JA68). The District Court held oral argument on November 13, 2012. (JA70). On September 30, 2013 the District Court issued an opinion denying the Township's motion for summary judgment in main part and granting the Al Falah Center's motion for a preliminary injunction. (JA3-4). The District Court entered an Order on the preliminary injunction requiring the Township to consider the application specific to the Al Falah Center without reference to Ordinance 11-03. *Id.* The Order neither voided nor nullified Ordinance 11-03. *Id.*

This joint appeal was timely filed from the District Court's grant of the preliminary injunction. (JA1).

STATEMENT OF THE FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

The Township is, as Plaintiff recognizes, home to over 20 houses of worship for diverse religions. (JA5266-5287; JA3274 (104:3-7)). Plaintiff's members worship and conduct other religious activities in the Township of Bridgewater. (JA3280 (17:20-18:4); JA3320 (17:20-25, 25:7-16); JA3385 (17:2-21)).

On January 6, 2011 Plaintiff, through Chughtai Foundation, filed an application for preliminary site plan and conditional use approval with the Township Planning Board. The Chughtai Foundation proposed to use the former Redwood Inn, a defunct catering establishment and prior non-conforming use under the zoning plan, as a mosque, grammar school, and religious center. (JA3303).

Among other things, Al Falah intended to use the property for:

- Daily and weekly prayers,
- Holiday services,
- Weekend religious education,
- Community services and activities,
- A daycare center, and

- A K-8th grade private grammar school.[1]

Id. Al Falah Center intended for its mosque to serve worshippers from Bridgewater and surrounding communities. Al Falah Center intended that its various services and activities would draw from a wide-range of surrounding towns. (JA3297). The center did not intend, of course, to turn away any worshippers. Id.

The zoning district in which the former Redwood Inn is located in a zoning district that is distinctly residential. The Property is surrounded by residential development and there are no non-residential uses. (JA3330 (161:20-24); JA3331 (259:19-260:9)).

When the Chughtai Foundation submitted the application, houses of worship were permitted in residential zones without the need to obtain variances. This still meant that the application required review, and preliminary site plan and conditional use approval in order to proceed.

[1] Al Falah Center subsequently dropped the school from its plans, but this did not alter the required approvals. (JA3300).

During the pendency of the Chughtai Foundation's application, the Planning Board directed the Township Planner to prepare a re-examination report of the Township's zoning laws.

The report, among other things, recommended locating houses of worship, schools, country clubs, and other assembly uses in the residential zone subject to a condition that they be located on a variety of major roadways such as County and State roads. (JA2439). This provided eighty miles of lot frontage on which such assembly uses could be located without a variance. *Id.* The recommendation would not create any per se prohibition on houses of worship or other assembly uses, but limited the locations in which houses of worship and other assembly uses would be permitted as of right without obtaining a variance. *Id.* In other locations, the effect of the recommendation would require an applicant seeking to build a house of worship, or other assembly use, to obtain a conditional use variance pursuant to N.J.S.A. § 40:55D-70(d)(3) in order to proceed. *Id.*

The Township Planner's recommendation was based upon the recognition that assembly uses, including houses of worship, can potentially draw people from a wide geographic area and that concentrating many visitors in a single location could impair the intent of the Master Plan and zoning ordinance in establishing

residential zones. (JA2438). The Township Planner recognized that such assembly uses, and houses of worship in particular, have changed over time. (JA2438-2439). Modern houses of worship "no longer serve only the small neighborhood community" but may "serve the residents of the county" or even larger regions. *Id.* Further, timeframes associated with use are no longer limited to the weekends but a "stretch throughout all days of the week, during day and evening hours." *Id.* Finally, modern houses of worship often offer child care, schools, banquets, and community centers – in addition to the more traditional worship, social, and cultural activities. *Id.*

The intent of the Planner's recommendation was to place such uses in locations with ready access to major thoroughfares and to "assure preservation and maintenance of a strong residential neighborhood character." *Id.*

This recommendation was consistent with authoritative planning sources which confirmed changes in the ways houses of worship are used and the appropriate response to such more complex uses was to place them on a major road to act as a transition between purely residential areas and non-residential areas. Specifically, the Planner identified that:

> In previous years, churches drew primarily from the neighborhood in which they were found. Today, the area they serve may be considerably larger. Care should be taken in drafting any Ordinance regulating places of worship to insure they do not become nuisances.
>
> While such uses may be desirable in residential areas, conditional use controls on lot size, parking, set backs and buffering may be appropriate to avoid adverse neighborhood impacts. Depending on a facility's size and outreach, its specific location should be controlled - for example, frontage on a major road or location as a transitional use between a residential and non-residential zone.

(JA2290-2291 (quoting Harvey S. Moskowitz & Carl G. Lindbloom, Rutgers University Center for Urban Policy Research, The Latest Illustrated Book Of Development Definitions 279 (2004)).

The Township Council adopted the Planner's recommendation and introduced it into the legislative process on February 17, 2011. The Township Council, based on the Planner's recommendation, also had an interest in driving substantial growth and large-scale uses towards the area of the Township that, together with Raritan and Somerville, is a "Designated Regional Center" under state law. (JA2447). This type of growth focuses development and protects green space and residential uses from sprawl. (JA2446-2447).

From February 2011 through March 2011, a proposed ordinance based on the Planner's recommendation went through the legislative process (including the

required public hearing) and was adopted on March 14, 2011. (JA1449). Ordinance 11-03 became effective April 6, 2011. (JA1452).

Ordinance 11-03 seeks to better regulate assemblage impact on the residential character of neighborhoods; it does not prohibit houses of worship in any zone of the Township. (JA1449). And, as Al Falah Center admits, Ordinance 11-03 does not create a per se bar prohibiting the Plaintiff from building a mosque and religious center on the Property. (JA3281 (136:16-137:10)). Rather, as applied to Al Falah Center's application, the Ordinance requires the Al Falah Center to seek a conditional use variance pursuant to N.J.S.A. 40:55D-70(d)(3) (commonly known as a "(d)(3) variance") from the Township's Zoning Board of Adjustment. (JA 14 n.5; JA3281 (136:16-137:1); JA3309 (111:3-112:21)).

Al Falah Center's attorney recognized that the effect of the Ordinance was that obtaining a "conditional use variance" would be necessary to construct the mosque and center. (JA3248; JA3308 (90:4-92:4)).

Al Falah did not apply for the variance but instead filed this lawsuit challenging Ordinance 11-03 as invalid both facially and as applied to its application. (JA3308 (90:4-91:16)).

Plaintiff has admitted that no Defendant or other representative of the Township has made any anti-Muslim or discriminatory statements. (JA3273 (54:23-55:2); JA3283-3284 (142:11-145:3); JA3292 (59:13-61:17); JA3315-3316 (72:12-74:23)).

The Zoning Board which would have decided Al Falah Center's application for a (d)(3) variance is an independent, quasi-judicial body. The Zoning Board has never been a defendant in this action and none of its members have ever been named in this action. (JA73). Further, no one who holds elective office or is employed by the municipality may serve on the Zoning Board. N.J.S.A. 40:55D-69.

STATEMENT OF RELATED PROCEEDINGS

There are no related proceedings.

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews "a district court's decision to grant a preliminary injunction under a three-part standard: findings of fact are reviewed for clear error, conclusions of law are evaluated under a plenary standard, and the ultimate decision to grant the preliminary injunction is reviewed for abuse of discretion." *N.J. Primary Care Ass'n v. State Dep't of Human Servs.*, 722 F.3d 527, 535 (3d

Cir. 2013) (citing *Rogers v. Corbett*, 468 F.3d 188, 192 (3d Cir. 2006)). Further, "'any determination that is a prerequisite to the issuance of an injunction . . . is reviewed according to the standard applicable to that particular determination.'" *Southco, Inc. v. Kanebridge Corp.*, 258 F.3d 148, 150-51 (3d Cir. 2001) (quoting *Am. Tel. & Tel. Co. v. Winback and Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir. 1994)). Thus, this Court exercises "plenary review over the District Court's conclusions of law and its application of the law to the facts.'" *Southco*, 258 F.3d at 151 (quoting *Duraco Prods., Inc. v. Joy Plastic Enters., Ltd.*, 40 F.3d 1431, 1438 (3d Cir. 1994)).

In this matter, the initial legal question of whether the district court had subject matter jurisdiction is subject to *de novo* review. *In re W.R. Grace & Co.*, 591 F.3d 164, 170 n.7 (3d Cir. 2009) (holding that "[w]hether subject matter jurisdiction exists is a question of law, and thus our standard of review is *de novo*.").

SUMMARY OF THE ARGUMENT

Federal courts only have jurisdiction over claims that are ripe. Cognizant of federalism principles, the Supreme Court of the United States has developed specific ripeness requirements for land use disputes because they are matters of

local concern that are more aptly suited for local resolution. *Williamson County,* 473 U.S. 172 (1985); *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 350 (2d Cir. 2005); *Taylor Inv., Ltd. v. Upper Darby Twp.*, 983 F.2d 1285, 1290 (3d Cir. 1993). The Court's "cases uniformly reflected an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986).

Here, it is undisputed that Al Falah Center never applied for a variance from the effects of Ordinance 11-03. (JA3308 (90:4-92:4)). Upon the passage of Ordinance 11-03, New Jersey's Municipal Land Use Law required Al Falah Center to obtain a (d)(3) conditional use variance in order to build a mosque on its property. *Id.*; N.J.S.A. §40:55D-70(d)(3). Because Al Falah Center never sought the required variance, the extent that Ordinance 11-03 limits development of Al Falah Center's property, if at all, is not known. Accordingly, the District Court lacked subject matter jurisdiction over Al Falah Center's claims, and the preliminary injunction should be vacated. Further, Al Falah Center's claims should be dismissed.

Second, even if this matter were ripe, the preliminary injunction should not have been granted because the record, which did not include an evidentiary hearing to determine the credibility of the witnesses, does not satisfy the "particularly heavy burden" necessary for the issuance of a mandatory injunction that alters the status quo. Based solely on a review of the motion record, the District Court disregarded the legitimate planning rationale underpinning Ordinance 11-03, erroneously concluded that the ordinance prevented the establishment of a mosque, and entered an injunction altering the status quo while simultaneously acknowledging the existence of disputed issues of fact regarding the Township's alleged discriminatory intent. Similarly, the District Court abused its discretion in finding that the Al Falah Center was irreparably harmed and failed to properly balance the equities in deciding to grant the preliminary injunction.

ARGUMENT

I. AL FALAH CENTER'S CLAIMS ARE NOT RIPE AND MUST BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

Al Falah Center's claims are not ripe under *Williamson County* because it did not submit an application for a (d)(3) conditional use variance and, as a result, the extent that Ordinance 11-03 limits development of Al Falah Center's property,

if at all, is not known. (JA3308 (90:4-92:4)). The District Court erred as a matter of law because it did not have subject matter jurisdiction when it entered the preliminary injunction. The order granting the injunction should be vacated, and the case should be dismissed for lack of subject matter jurisdiction.

A. Questions of Subject Matter Jurisdiction are Reviewed *De Novo.*

Ripeness concerns raised pursuant to *Williamson County* go to the subject matter jurisdiction of the Court. *Stern v. Halligan*, 158 F.3d 729, 734 (3d Cir. 1998). This Court reviews the question of subject matter jurisdiction *de novo*. *In re W.R. Grace & Co.*, 591 F.3d at 170 n.7.

B. Subject Matter Jurisdiction and Ripeness in the Context of Land Use Disputes

Article III of the Constitution limits federal court jurisdiction to "Cases" and "Controversies." Federal courts enforce the case-or-controversy requirement through several justiciability doctrines. *Allen v. Wright*, 468 U.S. 737, 750 (1984); *Coastal Outdoor Adver. Group, LLC v. Twp. of Union*, 676 F. Supp. 2d 337, 344 (D.N.J. 2009), *aff'd*, 402 Fed. Appx. 690 (3d Cir. 2010). One of those doctrines is ripeness. *See Toll Brothers, Inc. v. Township of Readington*, 555 F.3d 131, 137 (3d Cir. 2009). "Its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements."

Abbott Lab. v. Gardner, 387 U.S. 136, 148 (1967), *abrogated on other grounds, Califano v. Sanders,* 430 U.S. 99 (1977); *Taylor Inv., Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1290 (3d Cir.), *cert. denied,* 510 U.S. 914 (1993); *Armstrong World Inds. v. Adams*, 961 F.2d 405, 411 (3d Cir. 1992).

Williamson County's ripeness requirements are based on a consideration of the equities. *See Murphy*, 402 F.3d at 347. Determining whether a case is ripe generally requires a Court to "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *See Abbott Labs.*, 387 U.S. at 149; *Birdman v. Office of the Governor,* 677 F.3d 167, 173 (3d Cir. 2012). The "fitness of the issues for judicial decision" prong of a ripeness inquiry "recognizes the restraints Article III places on federal courts" and "requires a weighing of the sensitivity of the issues presented and whether there exists a need for further factual development." *Murphy,* 402 F.3d at 347. On the other hand, the "hardship to the parties" prong "injects prudential considerations into the mix, requiring [a court] to gauge the risk and severity of injury to a party that will result if the exercise of jurisdiction is declined." *Id.*

In addition to the issues of subject matter jurisdiction it implicates, *Williamson County* and its progeny also implicate fundamental federalism issues.

See Raines v. Byrd, 521 U.S. 811, 818 (1997) (There is "[n]o principle … more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."); *Toll Bros., 555 F.3d at 137* ("In cases involving state or local government," the case or controversy limit on federal jurisdiction also "serves to protect and preserve the principle of dual sovereignty embedded in our founding charter."). This Court has expressly noted that "[t]here is much at stake in the task of ensuring proper jurisdictional bases for each and every claim -- particularly when courts are called upon to review a state or local legislative enactment." *Storino v. Borough of Pt. Pleasant Beach*, 322 F.3d 293, 300 (3d Cir. 2003). This is because "zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities." *See Warth v. Seldin*, 422 U.S. 490, 508 n. 18 (1975); *Storino*, 322 F.3d at 300.

For these reasons, *Williamson County's* finality rule has been extended beyond Fifth Amendment takings cases to challenges to land use decisions arising under the Fourteenth Amendment, RLUIPA, and the First Amendment. *See Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 980 (9th Cir.

2011), *cert. denied*, 133 S. Ct. 423 (2012) (RLUIPA claim); *Miles Christi Religious Order v. Twp. of Northville*, 629 F.3d 533, 541-42 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 3071 (2010) (RLUIPA and First Amendment claims); *Congregation Anshei Roosevelt v. Planning & Zoning Bd. of Roosevelt*, 338 Fed. Appx. 214, 2009 U.S. App. LEXIS 16266 (3d Cir. July 29, 2009) (RLUIPA claim); *Murphy*, 402 F.3d at 350 (RLUIPA and First Amendment claims). This Court and other Circuits have also applied *Williamson County's* finality rule to Equal Protection challenges to land use decisions. *See Grace Cmty. Church v. Lenox Twp.*, 544 F.3d 609, 618 (6th Cir. 2008) (RLUIPA and Equal Protection claims); *Taylor Inv.*, 873 F.2d at 1294-95 (Equal Protection claim); *Unity Ventures v. County of Lake*, 841 F.2d 770, 774-76 (7th Cir. 1988), *cert. denied*, 488 U.S. 891 (1988) (Equal Protection claim). Thus, *Williamson County* applies to all of Al Falah Center's claims in this matter.

C. The District Court Misapplied *County Concrete*

Here, the District Court erred by issuing a preliminary injunction enjoining the enforcement of Ordinance 11-03. In doing so, the District Court, relying upon the reasoning of *Williamson County*, recognized that Al Falah Center's as-applied claims were "not ripe for judicial review since the Plaintiff has not sought a

variance." (JA14 n.5). The District's Court's holding that the as-applied claims were not ripe was correct because "where the regulatory regime offers the possibility of a variance from its facial requirements, a landowner must go beyond submitting a plan for development and actually seek such a variance to ripen his claim." *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736-37 (1997) (glossing *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981)).

Nevertheless, the District Court erroneously relied upon *County Concrete Corp. v. Twp. of Roxbury,* 442 F.3d 159 (3d Cir. 2006), for the proposition that, in a "facial challenge" to a land use ordinance, injunctive relief can be issued without a judicial determination that the ordinance is invalid across all applicants and all applications. (JA14). *County Concrete* does not stand for such a proposition. If it did, *County Concrete* would not comport with *United States v. Salerno* which held that a successful facial challenge requires the challenger to "establish that no set of circumstances exists under which the Act would be valid." 481 U.S. 739, 745 (1987); *see also, Brown v. City of Pittsburgh,* 586 F.3d 263, 269 (3d Cir. 2009).

Al Falah Center, recognizing that invalidation of Ordinance 11-03 was a necessary predicate to the relief that it sought, requested a preliminary injunction

declaring "**Ordinance 11-03 void** and enjoining Defendants from enforcing it" and requiring Al Falah Center's application to be decided by the Planning Board under the zoning law in effect at the time the application was submitted. (JA107) (emphasis added). The District Court, however, declined to invalidate Ordinance 11-03 but, in violation of precedent, nonetheless issued an injunction that mandates that the Defendants ignore Ordinance 11-03 and consider Al Falah Center's conditional use and site plan application as if Al Falah Center had won its as applied challenge. (JA4); *see Salerno,* 481 U.S. at 745; *Brown*, 586 F.3d at 269.

The District Court suggested that *County Concrete* created a standard that permitted this unique result. This is not the case. While this Court stated that the claims in *County Concrete* were ripe because there was "no question … about how the regulations at issue [applied] to the particular land in question," this Court did not grant the District Court a license to engage in speculative factual "resolutions" of hypothetical variance applications. *County Concrete*, 442 F.3d at 167; *see also*, *Suitum*, 520 U.S. at 739.

This Court's decision in *County Concrete* is a finding about futility and not about distinguishing between as applied and facial challenges to land use laws. *County Concrete* involved a radical change of zoning from industrial to low-

density residential use: County Concrete had operated a sand and gravel mining business for 20 years when its properties were rezoned from industrial to "RR Rural Residential" and "OS Open Space." *See County Concrete Corp. v. Twp. of Roxbury*, 2009 U.S. Dist. LEXIS 2578, at *3-*4 (D.N.J. March 30, 2009). As a result of rezoning, a sand and gravel mining use that had been operating for 20 years became a prohibited use, and County Concrete would have had to obtain a (d)(1) use variance to continue its operations. *See N.J.S.A.* §40:55D-70(d)(1) (setting forth criteria for obtaining a variance for "a use or principal structure in a district restricted against such use of principal structure"). If County Concrete had submitted an application for a (d)(1) use variance, the Roxbury Zoning Board of Adjustment would have been prohibited by law from granting a variance because such a decision would have improperly usurped the authority of the Roxbury Town Council. *See Feiler v. Fort Lee Bd. of Adjustment*, 240 N.J. Super. 250, 255 (App. Div. 1990), *certif. denied*, 127 N.J. 325 (1991) (reversing grant of use and bulk variances which allowed the construction of high-density residential towers in a district zoned for two-family detached homes); *see also, Kinderkamack Road Assoc. LLC v. Mayor and Council of Borough of Oradell*, 421 N.J. Super. 8, 12

(App. Div. 2011) ("use variances may be granted only in exceptional circumstances").

Thus, in light of the unusual circumstances of *County Concrete,* the finality rule of *Williamson County* did not apply because the extent that the zoning ordinance limited development of County Concrete's properties was definitively known. *See MacDonald*, 477 U.S. at 351; *see also, Suitum,* 520 U.S. at 739 (holding that because local land use board had **no discretion** over how landowner could use her property "no occasion exists for applying *Williamson County's* [finality] requirement"). In order to obtain a (d)(1) use variance, County Concrete would have had to demonstrate "special reasons" and also would have been obliged to satisfy an "enhanced quality of proof" by securing "clear and specific findings by the board of adjustment that the variance sought [was] not inconsistent with the intent and purpose of the master plan and zoning ordinance." *See Medici v. BPR Co.,* 107 N.J. 1, 21-22 (1987); *Kinderkamack,* 421 N.J. Super. at 12-13. Quite logically, the Roxbury Board of Adjustment could not have made a factual finding that a sand and gravel mining operation would not substantially impair Roxbury's Master Plan and zoning ordinance when the properties had just been rezoned from industrial to low density residential. *See Price v. Himeji, LLC,* 214

N.J. 263, 285 (2013) (a zoning board of adjustment "may not, in the guise of a variance proceeding, usurp the legislative power reserved to the governing body of the municipality to amend or revise the [zoning] plan").

The unique facts surrounding futility that gave rise to *County Concrete* are not found in this case and thus *County Concrete* was inapplicable.

D. The Appropriate Application of *Williamson County* to the Type of Variance at Issue Here Requires Dismissal

Unlike the ordinance in *County Concrete*, the nature and extent that Ordinance 11-03 limits development on Al Falah Center's property, if at all, is not known because an application for a (d)(3) conditional use variance for Al Falah Center's mosque, which as a matter of law is an inherently beneficial use, has never been submitted. (JA3248; JA3308 (90:4-92:4)); *House of Fire Christian Church v. Zoning Bd. of Adjustment of Clifton*, 379 N.J. Super. 526, 535 (App. Div. 2005).

Further, as recognized by Plaintiff's land use attoney, a (d)(3) variance is a very different type of variance than was at issue in *County Concrete*. (JA3309 (112:16-21)). "[T]he proofs required for a (d)(3) conditional use variance are notably less stringent" than the proofs required for a (d)(1) use variance because a

conditional use by definition is not a prohibited use. *See CBS Outdoor, Inc. v. Borough of Lebanon*, 414 N.J. Super. 563, 580 (App. Div. 2010); *see also, Coventry Square*, 138 N.J. at 287; *Grubbs v. Slothower*, 389 N.J. Super. 377, 386 (App. Div. 2007).

Thus, an automatic denial of an application for a (d)(3) conditional use variance would not and could not have been a *fait accompli* as the District Court erroneously concluded in a mere footnote. (JA47 n.10). If Al Falah Center had filed an application for the (d)(3) variance required by Ordinance 11-03, the stringent special reason standards for obtaining a (d)(1) use variance (as was applicable in *County Concrete*) would not have been relevant. (JA3309 (112:16-21)); *TSI East Brunswick, LLC v. Zoning Bd. of Adjustment of E. Brunswick*, 215 N.J. 26, 43 (2013) (holding that enhanced quality of proofs standard required under *Medici* for evaluation of the negative criteria in consideration of a (d)(1) use variance has no application to an application for a (d)(3) variance); *Coventry Square, Inc. v. Westwood Zoning Bd. of Adjustment*, 138 N.J. 285, 287 (1994) (holding that proof of special reasons for a (d)(3) variance must only be "sufficient to satisfy the board of adjustment that the site proposed for the conditional use …

continues to be an appropriate site for the conditional use notwithstanding the deviations from one or more conditions imposed by the ordinance.").

Further, the review of any application submitted by Al Falah Center would have been circumscribed by the standards established by *Sica v. Bd. of Adjustment of Wall,* 127 N.J. 152 (1992), which would have required the Board of Adjustment to, among other things, treat the mosque proposed by Al Falah Center as an "inherently beneficial use" and consider whether any potential detrimental effects resulting from the use of the property could have been mitigated through the imposition of reasonable conditions. *See Medical Center at Princeton v. Twp. of Princeton Zoning Bd.,* 343 N.J. Super. 177, 200 (App. Div. 2001); *Omnipoint Comm., Inc. v. Bd. of Adjustment of Twp. of Bedminster,* 337 N.J. Super. 398, 415 (App. Div.), *certif. denied,* 169 N.J. 607 (2001).

The District Court's determination that applying for a (d)(3) variance would have been futile was based on an incorrect standard and pure conjecture. (JA47 n.10). To get there, the District Court erroneously concluded that the enhanced quality of proofs standard required under *Medici* would have been applicable to a (d)(3) variance application submitted by Al Falah Center. *Id.* (stating that Plaintiff "would have to establish that the proposed use would not impair the intent of the

zoning ordinance" and "would likely be unable to establish that its proposed mosque would not upset the purpose of the Ordinance."). New Jersey law, however, is clear that "the enhanced quality of proofs standard has no application in the evaluation of an application for a conditional use variance." *TSI*, 215 N.J. at 43. Further, a use that is deemed " inherently beneficial" as a matter of state law -- like the mosque proposed by Al Falah Center -- "presumptively satisfies the positive criteria[,] and the negative criterion that the use will not substantially impair the intent and the purpose of the zone plan and zoning ordinance[.]" *Salt & Light Co. v. Willingboro Twp. Zoning Bd. of Adjustment*, 423 N.J. Super. 282, 287 (App. Div. 2011), *certif. denied*, 210 N.J. 108 (2012) (internal quotations omitted).

Failing to recognize the standards governing "inherently beneficial uses" and (d)(3) conditional use variances, the District Court then went on to determine that filing a variance application by Al Falah Center would have been futile because the grant of any variance could have been appealed to the allegedly discriminatory Township Council pursuant to N.J.S.A. § 40:55D-70(d). (JA47). This, however, is not the legal standard. *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 990-91 (7th Cir. 2006), *cert. denied*, 522 U.S. 940 (2007) (rejecting argument that church need not have to apply for a special use permit on basis that Board's

discretion was unbridled where "Board's discretion [was] narrowly circumscribed by … the various factors to be considered … in addressing an application for a special use permit."); *see also, Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) ("In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases.").

The District Court thus implicitly reasoned that any grant of a (d)(3) variance would have inevitably been reversed because the Township Council had already concluded, through the enactment of Ordinance 11-03, that a mosque should not be permitted at the site. (JA18 (wrongly stating that Ordinance 11-03 "prevented the establishment of Al Falah Center's mosque"); JA47 n.10 (stating that Plaintiff's application was "fatally undermined by the enactment of Ordinance 11-03" which "inferentially supports the assertion that Al Falah Center's application was the 'target' of Ordinance 11-03")).

The District Court's reasoning has no support in New Jersey land use law and improperly premises federal subject matter jurisdiction upon conjecture. *See Thomas v. Union Carbide Agr. Prods., Co.,* 473 U.S. 568, 580-81 (1985) (explaining that a case is not ripe where contingent future events may not occur as

anticipated or may not occur at all); *see also, TSI,* 215 N.J. at 40; *Coventry Square,* 138 N.J. at 297-98, *Sica*, 127 N.J. at 154-55. The case should be dismissed for lack of subject matter jurisdiction.

E. Al Falah Center's RLUIPA Claims are not Ripe

To sidestep *Williamson County's* finality rule, Al Falah Center argued to the District Court that its RLUIPA claims presented a facial challenge to Ordinance 11-03. If Al Falah Center were truly asserting a facial challenge to Ordinance 11-03, it would have attempted to show that the Ordinance could not be applied lawfully under any set of circumstances. *See Salerno,* 481 U.S. at 745. It would have sought "to vindicate not only [its] own rights but those of others who may also be adversely impacted by [Ordinance 11-03]." *See City of Chi. v. Morales,* 527 U.S. 41, 55 n. 22 (1999).

Nowhere in its RLUIPA Substantial Burdens claim does Al Falah Center seek to vindicate the rights of others. Al Falah Center's RLUIPA Substantial Burdens claim could not have made this point any clearer:

> Defendants have deprived and continue to deprive Plaintiffs of their rights to free exercise of religion, as secured by RLUIPA, by imposing and implementing a land use regulation that places a substantial burden on their religious exercise without a compelling

> governmental interest and without using the least restrictive means of achieving any result.

(JA99 (¶ 107)). As such, Al Falah Center's RLUIPA Substantial Burdens claim is clearly an as-applied challenge to Ordinance 11-03.

Even though it had determined that the as-applied claims were not ripe, the District Court determined that Al Falah Center was likely to succeed on the merits of its RLUIPA Substantial Burdens claim and issued a preliminary injunction. (JA14 n.5; JA45-48). This incongruence in the District Court's ruling demonstrates that there was never subject matter jurisdiction and denial of the injunction and dismissal of the case were required.

F. Conclusion

The extent that Ordinance 11-03 limits development on Al Falah Center's property, if at all, is not presently known. *See Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 348 (2d Cir. 2005) ("only if a property owner has exhausted the variance process will a court know precisely how a regulation will be applied to a particular parcel."). Until the extent, if at all, that Ordinance 11-03 limits development on Al Falah Center's property is known, this Court and the District Court lack subject matter jurisdiction over this matter. *See Suitum*, 520

U.S. at 736-37, *Hodel,* 452 U.S. at 297; *see also Nuveen Municipal Trust v. Withumsmith Brown, P.C.,* 692 F.3d 283, 293 (3d Cir. 2012) (court should hold that it lacks jurisdiction when there are doubts regarding jurisdiction).

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN ISSUING THE PRELIMINARY INJUNCTION.

This Court examines the following factors in determining whether a preliminary injunction should be issued: "(1) the likelihood that the moving party will succeed on the merits; (2) the extent to which the moving party will suffer irreparable harm without injunctive relief; (3) the extent to which the nonmoving party will suffer irreparable harm if the injunction is issued; and (4) the public interest." *McNeil Nutritionals, LLC v. Heartland Sweeteners, LLC*, 511 F.3d 350, 356-357 (3d Cir. 2007). In this case, even if one assumes that the District Court had subject matter jurisdiction, the issuance of the preliminary injunction was an abuse of discretion.

A. The District Court's Decision is Reviewed for Abuse of Discretion

This Court reviews the District Court's grant of the preliminary injunction for abuse of discretion. *Dam Things from Denmark, a/k/a Troll Company ApS v. Russ Berrie & Company, Inc.*, 290 F.3d 548, 556 (3d Cir. 2002). Here, the district court abused that discretion, and the preliminary injunction should be vacated.

B. The District Court Abused its Discretion in Failing to Hold an Evidentiary Hearing and in Speculating that the Defendants Would Have Denied a Variance and Appeal

A district court must set forth the basis for its grant of a preliminary injunction. F.R.Civ.Pro. 52(a). Such a statement informs the parties of the rationale for the order, "defin[es] for future cases the precise limitations of the issues and the determination thereon," and is "an important factor in the proper application of the doctrines of res judicata and estoppel by judgment." Fed. R. Civ. P. 52(a) advisory committee note. Furthermore, it "assist[s] the appellate courts in fulfilling [their] our review function." *Danny Kresky Enterprises Corp. v. Magid*, 716 F.2d 206, 215 (3d Cir. 1983).

Here the District Court twice abused its discretion in its fact-finding that any application for a variance pursuant to Ordinance 11-03 or any appeal from a denial of the variance would have been futile. (JA47 n.10). First, the District Court failed to hold an evidentiary hearing even though the credibility of the witnesses was at issue. Second, the District Court's fact-finding, predicated upon assumptions about how individuals in municipal government would act, was improperly speculative. *Id.*

1. An Evidentiary Hearing was Required

This Court has explained that "a preliminary injunction may issue on the basis of affidavits and other written evidence, without a hearing, if the evidence submitted by both sides does not leave unresolved any relevant factual issue." *Williams v. Curtiss-Wright Corp.*, 681 F.2d 161, 163 (3d Cir. 1982) (citing *Drywall Tapers, Local 1974 v. Operative Plasterers*, 537 F.2d 669 (2d Cir. 1976); *International Electronics Corp. v. Cline*, 330 F.2d 480 (3d Cir. 1964); 11 C. Wright & A. Miller, Federal Practice and Procedure § 2949 (1973 & Supp. 1982)). In contrast, where the relevant facts are in dispute, a "district court cannot issue a preliminary injunction that depends upon the resolution of disputed issues of fact **unless the court first holds an evidentiary hearing**." *Elliott v. Kiesewetter*, 98 F.3d 47, 53 (3d Cir. 1996) (emphasis added).

In this matter, the District Court itself recognized that there were disputed facts, including a full section of such facts in the opinion. (JA11-14). Many of these disputed facts went to the heart of the preliminary injunction. For example, the District Court recognized that the Township submitted evidence confirming that Al Falah Center's application for a variance would not be futile. Further, even if the (d)(3) conditional use variance were denied by the Planning Board it would

be subject to a good faith *de novo* review by the Township Council. (JA12). Al Falah Center disputed this position, arguing that both the application for the required variance and any subsequent appeal would be futile. *Id.*

The District Court accepted that "Al Falah [Center] has not sought a variance because the ultimate decision makers on appeal are the council against whom allegations of discrimination are the subject of this action." (JA47). Further, the District Court specifically stated that "it agreed" with Al Falah Center's surmise that it "would likely be unable to establish that its proposed mosque would not upset the purpose of the Ordinance." (JA47 n.10).

Nevertheless on a motion for preliminary injunction in which the motivations of the actors are subject to credibility assessments, the District Court disregarded the Township's assertions that the evidence showed the process would be fairly and even-handedly applied. (JA331 (120:3-20)) (setting out that Plaintiff was in possession of no evidence of any kind showing that the Defendants had prejudged the possible variance application). The District Court was required to read the facts favorably to Al Falah Center when considering the Township's Motion for Summary Judgment, but on Al Falah Center's affirmative Motion for a Preliminary Injunction the District Court abused its discretion when it assumed that

if it had undertaken the requisite fact-finding, that fact-finding would have supported Al Falah Center's assertions that the elected officials of the Township would have been arrayed against it.

2. The District Court's Determination was Speculative

The District Court's decision to agree with Al Falah Center's guess that it would not have been given a fair hearing at either a variance hearing or at a subsequent appeal was not appropriate fact-finding. (JA47 n.10). This Court has stated that "findings of fact, of course, turn on evidence, not on one's speculations about the issue." *Pryor v. NCAA*, 288 F.3d 548, 566 (3d Cir. 2002). Here, there was no factual evidence presented that the variance process (with its legal right to appeal a denial) would have been futile. Rather, Al Falah Center argued that futility could be presumed because some of the same natural persons who voted in favor of the passage of Ordinance 11-03 would be involved in the variance process. (JA47; JA47 n.10). This, however, is exactly the sort of speculation about future motivations of litigants that is not permitted to take the place of fact-finding.

The preliminary injunction entered below should be vacated.

C. The District Court Abused its Discretion in Finding that Al Falah Center was Likely to Succeed on the Merits of its Claims

In the proceedings below, Al Falah Center sought a mandatory injunction altering the status quo and, therefore, bore a particularly heavy burden in demonstrating its necessity. *See Bennington Foods LLC v. St. Croix Renaissance, Group LLP*, 528 F.3d 176, 179 (3d Cir. 2008); *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994).

In doing so, the District Court failed to give appropriate consideration to the Township's position that Ordinance 11-03 was grounded on a sound planning rationale that was intended to locate houses of worship and other assemblages on roads which are better suited to the regional character of these assemblages. *See Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) ("a quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs.").

Before Al Falah Center submitted its site plan and conditional use application, Annual Reports from the Zoning Board of Adjustment ("ZBA") to the Township Council and Planning Board documented incompatible uses which were

otherwise permitted in residential zones. Specifically, the 2008 Annual Report advised:

> A house of worship is no longer just a church or temple with a clergy's residence. Their role in the community has expanded considerably and the services which they offer the community [has] expanded ….

(JA4879).

Notably, the ZBA is not alone in making such observations. This Court has observed "we do not believe land use planners can assume any more that religious uses are inherently compatible with family and residential uses" and "'[c]hurches may be incompatible with residential zones, as they bring congestion; they generate traffic and create parking problems; they can cause a deterioration of property values in a residential zone.'" *Congregation Kol Ami v. Abington Twp. Bd. of Commr's,* 309 F.3d 120, 143-44 (3d Cir. 2002) (citation omitted); *see also,* Joshua Engel-Yan & Brian Hollingsworth, P.Eng., *Updating Parking Requirements to Address Evolving Place of Worship Trends,* ITE Journal, Feb. 2013, at 33 ("Over the past several decades, there has been significant growth in new religious groups combined with trends toward larger places of worship that have a range of uses and serve more dispersed congregations."); IBI Group,

Review of the City of Toronto Zoning Parking Standards for Places of Worship, City of Toronto, Ontario, Canada, 2009 (available at http://www.toronto.ca/zoning/pdf/parking_worship.pdf) (over the past 15 to 20 years, "[t]he average size of [places of worship] is increasing and there has been the emergence of mega-churches, or very large facilities that serve a larger, more regional population and combine a variety of uses[.]")

Similarly, in a report dated March 2, 2011, the Township Planner advised the Township Council that the planning rationale underpinning Ordinance 11-03 was consistent with authoritative planning sources:

> In previous years, churches drew primarily from the neighborhood in which they were found. Today, the area they serve may be considerably larger. Care should be taken in drafting any Ordinance regulating places of worship to insure they do not become nuisances.
>
> While such uses may be desirable in residential areas, conditional use controls on lot size, parking, set backs and buffering may be appropriate to avoid adverse neighborhood impacts. Depending on a facility's size and outreach, its specific location should be controlled - for example, frontage on a major road or location as a transitional use between a residential and non-residential zone.

(JA2290-2291 (quoting Harvey S. Moskowitz & Carl G. Lindbloom, Rutgers University Center for Urban Policy Research, The Latest Illustrated Book Of Development Definitions 279 (2004)).

In issuing the preliminary injunction, the District Court disregarded the legitimate planning rationale underpinning Ordinance 11-03 and erroneously concluded that it "prevented the establishment of Al Falah Center's mosque[.]" (JA14). To the contrary, Ordinance 11-03 only required Al Falah Center to make an application for a conditional use variance before the Zoning Board of Adjustment pursuant to *N.J.S.A.* §40:55D-70(d)(3). (JA3308 (90:4-92:4)); *TSI*, 215 N.J. at 40 (conditional use is not a prohibited use); *Grubbs v. Slothower*, 389 N.J. Super. 377, 386 (App. Div. 2007) (same).

While the District Court apparently took issue with the enactment of Ordinance 11-03 during the pendency of Al Falah Center's conditional use and site plan application, Al Falah Center had no constitutional or legal right to a particular procedure in order to obtain the appropriate approvals to construct its mosque. *See Crane v. Hahlo*, 258 U.S. 142, 147 (1928) ("No one has a vested right in any given mode of procedure; and so long as a substantial and efficient remedy remains or is provided due process of law is not denied by a legislative change.").

Further, when Al Falah Center submitted its application to the Planning Board, New Jersey law permitted a municipality to change its zoning ordinance, even if the ordinance was amended in response to a particular application. *See*

Manalapan Realty L.P. v. Tp. Comm. Of Tp. of Manalapan, 140 N.J. 366, 378-79 (1995); *Burns v. Hoboken Rent Leveling & Stabilization Bd.,* 429 N.J. Super. 435, 447 n.5 (App. Div. 2013); *House of Fire,* 379 N.J. Super. at 541. Al Falah Center's land use attorney also recognized that the timing of the adoption of Ordinance 11-03 did not create any infirmity under New Jersey law and was procedurally appropriate. (JA3307 (76:9-24)).

The record does not satisfy the "particularly heavy burden" necessary for the issuance of a mandatory injunction that alters the status quo. *See Acierno,* 40 F.3d at 653; *Punnett v. Carter,* 621 F.2d 578, 582 (3d Cir. 1980). Based solely on a review of the motion record, the district court abused its discretion in disregarding the legitimate planning rationale underpinning Ordinance 11-03, erroneously concluded that the ordinance prevented the establishment of a mosque, and entered an injunction altering the status quo while simultaneously acknowledging the existence of disputed issues of fact on the Township's alleged discriminatory intent, and the alleged futility of Plaintiff making the required (d)(3) conditional use variance application.

D. The District Court Improperly Determined Al Falah Center Would be Irreparably Harmed

The district court abused its discretion in finding that Al Falah Center was irreparably harmed based on its putative First Amendment injury. (JA42-45). Neither Ordinance 11-03 nor any other action by the Defendants prevents Al Falah Center from exercising its religious rights today in the exact manner that it exercised them prior to the submittal of its application for development for conditional use and preliminary site plan on January 6, 2011.

The District Court relied upon *Opulent Life v. City of Holly Springs*, 697 F.3d 279 (5th Cir. 2012), for the proposition that any violation of RLUIPA constitutes irreparable harm to the religious applicant such that the applicant would have a substantial equity in an immediate injunction. The better reasoned case for purposes of this matter is the Seventh Circuit's decision in *River of Life Kingdom Ministries v. Vill. Of Hazel Crest*, 585 F.3d 364 (7th Cir. 2009), *vacated and aff'd on reh'g on other grounds*, 611 F.3d 367 (7th Cir. 2010) (en banc). There, what was "[a]t stake . . . [was] the Church's ability to move forward with its plans to relocate to Hazel Crest, and to carry out its neighborhood redevelopment plans in the interim, while the case is pending in the district court." *River of Life*, 585 F.3d

at 374-75. *River of Life* is thus identical to this matter in that in both cases the plaintiff sought a preliminary injunction that would permit it to move forward with plans to build a church building at a specific location. *Id.*

In *River of Life*, the Seventh Circuit assumed that the religious applicant would succeed on the merits of its claims and accepted its proofs on irreparable harm based on a showing that the its ministry of helping the poor was tied to constructing a building in a specific location. But the Court still held that the balance of the equities favored denying the preliminary injunction. *Id.* at 376-77. The Seventh Circuit reasoned that the balance of equities favored denying the preliminary injunction because the municipality had a very strong interest in its zoning scheme and the Church's consideration of other properties suggested that its interest in the particular real property was not absolute,

The Seventh Circuit appropriately rejected the church's absolutist position that courts "should presume irreparable harm because [the Church] alleged a violation of RLUIPA, which protects the constitutional right of religious exercise in the land use context." *Id.* While violations of the First Amendment are typically understood to constitute irreparable harm, the court reasoned that "the intersection between RLUIPA and the First Amendment is only partial." *Id.* Thus,

River of Life instructs that a court "cannot presume that RLUIPA and First Amendment violations are one and the same." *Id.* Rather, "a plaintiff alleging irreparable harm as a result of a RLUIPA violation must explain how the challenged law or regulation affects his religious exercise." *Id.*

Here, Al Falah Center's arguments vis-à-vis RLUIPA are much weaker than those posed by the applicant in *River of Life*. Al Falah Center's alleged injuries are completely divorced from the location in question; there is nothing about this particular property that makes it of special religious value to Al Falah Center. For example, Al Falah Center's concerns about being unable to hire a permanent Imam because they have no permanent mosque have nothing to do with this specific location -- rather, they are relevant to any location. Indeed, Al Falah Center has admitted that this specific property had no religious significance to it. (JA3285 (171:7-23)).

Further, the harm that Al Falah Center did identify and upon which the District Court relied -- the delay in seeking a variance -- is illusory. Before Ordinance 11-03 was enacted Al Falah Center could not use the Property as a mosque because they had neither the necessary site plan and condition use approvals nor had they reconstructed the building and constructed the site

improvements. After Ordinance 11-03 was enacted Al Falah Center could not use the Property as a mosque because they had neither the necessary variance, conditional use and site plan approval nor had they reconstructed the building and constructed the site improvements.

In the end, Al Falah Center's claims of injury are apparently predicated on an objection to being required to file an application for a (d)(3) conditional use variance. Al Falah Center, however, has no constitutional or legal right to a particular procedure in order to obtain the appropriate approvals to construct its mosque. *Crane*, 258 U.S. at 147. Having to file an application for a (d)(3) conditional use variance is not tantamount to a denial of First Amendment rights. *See Crane*, 258 U.S. at 147; *see also House of Fire*, 379 N.J. Super. at 547 ("it is not possible, at this stage of the proceedings, to conclude that requiring the Church to comply with the conditional use ordinance (or to successfully seek variance relief therefrom) is anything more than an inconvenience to the Church."). To the extent that Al Falah Center has refused to follow the procedure established by the Municipal Land Use Law for obtaining a (d)(3) conditional use variance, any injury that it has or will incur is of its own making.

Given that Al Falah Center has no connection to the specific location at issue and that Ordinance 11-03 only required Al Falah Center to seek a (d)(3) conditional use variance, Al Falah Center was not irreparably harmed by Ordinance 11-03 and the injunction should be vacated.

E. The Equities Require Vacating the Injunction

"Zoning is the process whereby a community defines its essential character. Whether driven by a concern for health and safety, esthetics, or other public values, zoning provides the mechanism by which the polity ensures that neighboring uses of land are not mutually -- or more often unilaterally -- destructive." *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989). Zoning laws are designed to protect the public as a whole and to ensure development that is in the interests not only of the applicant but also of the applicant's neighbors and other property owners who will be impacted by the development and use of the property.

Furthermore, when a court invalidates the work of a legislative body on constitutional grounds a "cautious review" is appropriate because such decisions are momentous. *Doe v. Gonzales*, 546 U.S. 1301, 1309 (2005) (Ginsburg, J., in chambers) (affirming Second Circuit's entry of a stay of District Court's

preliminary injunction which declared an Act of Congress unconstitutional and mandated the executive to take certain actions).

Finally, an even more cautious approach is warranted when an injunction forces the enjoined party to take action. This Court has explained that "when the preliminary injunction provides for mandatory relief, it is particularly appropriate to weigh the possible harm to other interested parties." *Punnett* , 621 F.2d at 588-89. This is because the "injudicious issuance of an injunction might well result in unnecessary damage to other parties, perhaps as irreparable and more grave than the harm that might ensue from the denial of the injunction." *Id.*

Courts have long recognized the importance of local land-use laws like Ordinance 11-03. *See e.g., Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1106 (3d Cir. 1996) (citing *Village of Belle Terre*, 416 U.S. at 7-8); *Doe v. City of Butler, Pa.*, 892 F.2d 315, 318 (3d Cir. 1989) (acknowledging that states have "a substantial interest in enforcing [their] zoning code and that, under appropriate circumstances, local zoning codes are entitled to considerable amounts of deference"). For the District Court to rule Ordinance 11-03 unenforceable in this case, without the benefit of an evidentiary hearing and on a set of disputed facts, was a momentous decision and due care should have been taken to ensure that the

citizens of the Township were themselves given due process. The District Court's decision, however, eliminated an Ordinance created by the democratically elected representatives of the citizens not to prevent some cognizable and irreparable harm, but so that Al Falah Center would not have to make an application for a variance as is routinely done. The District Court misweighed the equities and reversal is required.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court enter an Order vacating the September 30, 2013 Order granting Al Falah Center's preliminary injunction and remand this matter for dismissal for lack of subject matter jurisdiction.

Dated: January 21, 2014

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

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CERTIFICATION OF COMPLIANCE
OF BRIEF AND JOINT APPENDIX

I certify that the text of the electronic Brief and Joint Appendix are identical to the paper copies.

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Dated: January 21, 2014

CERTIFICATION OF WORD COUNT

I certify that the Brief contains less than the maximum 14,000 word limit, specifically there are 11,513, inclusive of tables and certifications.

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CERTIFICATION OF VIRUS CHECK

I certify that Trend Micro Anti-Virus was used to run a virus-check on the filed electronic brief and that no virus was detected.

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CERTIFICATE OF SERVICE

I certify that on this 21st day of January, 2014, I filed this Brief and the Joint Appendix via CM/ECF in accordance with Local Rule of Appellate Procedure Misc. 113, and served the same via electronic means on counsel for Plaintiffs as follows:

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In addition, I certify that I sent one original and nine paper copies of this brief and the accompanying documents to the Clerk of the Court and one paper copy to the abovementioned counsel.

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Dated: January 21, 2014

NO. 13-4267
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AL FALAH CENTER, et al.,
Plaintiffs-Appellees,

v.

TOWNSHIP OF BRIDGEWATER, TOWNSHIP OF BRIDGEWATER PLANNING BOARD, TOWNSHIP COUNCIL OF BRIDGEWATER, et al.
Defendants-Appellants

Appeal from United States District Court for the District of New Jersey
Civil Action No. 11-CV-2397 (Honorable Michael A. Shipp)

JOINT APPENDIX
VOLUME 1
JA1 - JA50

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

AL FALAH CENTER, TAREK ABDELKADER, YASSER ABDELKADER, ZAHID CHUGHTAI, BABR FAROOQI, NABEELA FAROOQI, AYESHA KHAN, OMAR MOHAMMEDI, AMINA MOHAMMEDI, and SARA WALLIS, Plaintiffs, v. TOWNSHIP OF BRIDGEWATER, TOWNSHIP OF BRIDGEWATER PLANNING BOARD; PATRICIA FLANNERY, in her capacity as MAYOR of the TOWNSHIP OF BRIDGEWATER; ALAN FROSS, STEPHEN RODZINAK, BARBARA KANE, N. JANINE DICKEY, ROBERT ALBANO, and GLENN PETILLO, in their capacity as member of the TOWNSHIP OF BRIDGEWATER PLANNING BOARD; the TOWN COUNCIL OF THE TOWNSHIP OF BRIDGEWATER; and HOWARD NORGALIS, DAN HAYES, ALLEN KURDYLA, MATTHEW MOENCH, and CHRISTINE HENDERSON ROSE, in their capacity as members of the TOWN COUNCIL OF THE TOWNSHIP OF BRIDGEWATER, Defendants.	Civil Action No. 3:11-cv-2397-MAS-LHG **JOINT NOTICE OF APPEAL** *Electronically Filed*

Notice is hereby given that Township of Bridgewater and Township Council of Bridgewater jointly with the Township of Bridgewater Planning Board, defendants in the above named case, hereby appeal, pursuant to 28 U.S.C. § 1292(a)(1), to the United States Court of Appeals for the Third Circuit from the District Court's opinion and order entered in

this action on September 30, 2013 granting the plaintiff's Motion for a Preliminary Injunction.

By: /s/ Marc D. Haefner
Marc D. Haefner

Dated: October 28, 2013

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

AL FALAH CENTER, *et al.*, Plaintiffs, v. TOWNSHIP OF BRIDGEWATER, *et al.*, Defendants.	Civil Action No. 11-2397 (MAS) (LHG) **ORDER**

This matter comes before the Court upon Defendant[1] Township of Bridgewater's ("Township" or "Defendant") Motion for Summary Judgment. (Def.'s S.J. Mot., ECF No. 77.) Plaintiff[2] Al Falah Center ("Plaintiff" or "Al Falah") filed Opposition. (Pl.'s Opp'n., ECF No. 82.) Defendant filed a Reply. (Def.'s Reply, ECF No. 86-1.) This matter also comes before the Court upon Plaintiff's Motion for a Preliminary Injunction. (Pl.'s Br., ECF No. 79-1.) Defendant opposed Plaintiff's Motion. (Def.'s Opp'n, ECF No. 80.) Plaintiff filed a Reply. (Pl.'s Reply, ECF No. 85.) The Court heard oral argument on Plaintiff's Motion for a Preliminary Injunction. (ECF No. 93.) For the reasons stated in the Opinion issued today, and other good cause shown,

IT IS, on this 30th day of September, 2013, **ORDERED** that:

1) Defendant's Motion for Summary Judgment is denied in part and granted in part.

[1] The Defendants in the instant matter include the Township of Bridgewater, the Township of Bridgewater Planning Board, the Township Council of the Township of Bridgewater, and a number of individual defendants named in their official capacities. (Compl.)

[2] Plaintiffs also include Tarek Abdelkader, Yasser Abdelkader, Zahid Chughtai, Babar Farooqi, Nabeela Farooqi, Ayesha Khan, Omar Mohammedi, Amina Mohammedi, and Sara Wallis, all of whom engage in the practices of the Islamic faith. (Compl. ¶ 21.)

2) The individual Defendants named in their official capacities are dismissed from this matter.

3) Plaintiff's Motion for a Preliminary Injunction is granted, and:

   a. Pending the final disposition of this action, Defendant is hereby enjoined, restrained and prohibited from enforcing Ordinance 11-03 against Plaintiff.

   b. Pending the final disposition of this action, Defendant is hereby directed to resume consideration of Plaintiff's January 6, 2011 Site Plan Application (as amended) without consideration of Ordinance 11-03.

   c. Plaintiff is not required to post a bond pursuant to Rule 65(c) because this suit involves the enforcement of important federal rights and Defendant will not be harmed by the entry of this preliminary injunction.

Mashipp

MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

AL FALAH CENTER, *et al.*, Plaintiffs, v. TOWNSHIP OF BRIDGEWATER, *et al.*, Defendants.	Civil Action No. 11-2397 (MAS) (LHG) **MEMORANDUM OPINION**

SHIPP, District Judge

This matter comes before the Court upon Defendant[1] Township of Bridgewater's ("Township" or "Defendant") Motion for Summary Judgment. (Def.'s S.J. Mot., ECF No. 77.) Plaintiff[2] Al Falah Center ("Plaintiff" or "Al Falah") filed Opposition. (Pl.'s Opp'n., ECF No. 82.) Defendant filed a Reply. (Def.'s Reply, ECF No. 86-1.) This matter also comes before the Court upon Plaintiff's Motion for a Preliminary Injunction. (Pl.'s Br., ECF No. 79-1.) Defendant opposed Plaintiff's Motion. (Def.'s Opp'n, ECF No. 80.) Plaintiff filed a Reply. (Pl.'s Reply, ECF No. 85.) The Court heard oral argument on Plaintiff's Motion for a Preliminary Injunction. (ECF No. 93.) After careful consideration and for good cause shown, Defendant's Motion for

[1] The Defendants in the instant matter include the Township of Bridgewater, the Township of Bridgewater Planning Board, the Township Council of the Township of Bridgewater, and a number of individual defendants named in their official capacities. (Compl.)

[2] Plaintiffs also include Tarek Abdelkader, Yasser Abdelkader, Zahid Chughtai, Babar Farooqi, Nabeela Farooqi, Ayesha Khan, Omar Mohammedi, Amina Mohammedi, and Sara Wallis, all of whom engage in the practices of the Islamic faith. (Compl. ¶ 21.)

Summary Judgment is DENIED in part and GRANTED in part. In addition, Plaintiff's Motion for a Preliminary Injunction is GRANTED.

I. Background

In accordance with the mandate that the Court construe the facts in the light most favorable to the non-movant, Al Falah, the Court sets forth the facts as follows for purposes of the summary judgment motion.

For over a decade, Plaintiff sought a property upon which to build a permanent mosque. (Compl. ¶ 1, ECF No. 72.) Plaintiff's extended search concluded when it identified the site of a former hotel, the Redwood Inn, on Mountain Top Road in Bridgewater, New Jersey (the "Property"), as ideal for the purpose of its facility. (Compl. ¶ 2.) Plaintiff alleges that it found the Property attractive because it would not be required to seek a zoning variance under the then-existing law. (Pl.'s Br. 5.) Thus, in October 2010, the Chughtai Foundation (the "Foundation"), established by individual plaintiff Zahid Chughtai, signed a contract to purchase the Property. Plaintiff spent $1,685,000 in acquisition fees for the Property. (Pl.'s SUMF ¶ 2.5, ECF No. 82-1; Compl. ¶ 28.) The Foundation assigned its rights under the contract to Al Falah, which acquired title in April 2012. (Pl.'s Opp'n 17.)

Thereafter, Plaintiff applied for a permit to construct a mosque on the Property. Al Falah alleges that following its application to the Planning Board, the Township rushed to enact Ordinance 11-03 in an effort to preclude its free exercise of religion. In essence, Plaintiff alleges that the accelerated timeline within which the Township enacted Ordinance 11-03,[3] the zoning

[3] With regard to houses of worship, Ordinance 11-03 provides that: "Houses of worship shall be permitted in all zones, except that houses of worship located within any residential zone shall comply with the requirements of Section 126-131(B)." Section 126-131(B) provides that: "The following public streets are identified for uses as set forth elsewhere in the Township Land Use

law which precluded the existence of a mosque at the Property, is strong circumstantial evidence of its intent to discriminate against Plaintiff.

A. Timeline

For purposes of simplicity, the Court finds the following alleged timeline relevant regarding the enactment of Ordinance 11-03. As previously mentioned, the Property was purchased in fall 2010. On January 6, 2011, Plaintiff applied to the Bridgewater Planning Board to use the Property as a mosque. (Pl.'s SUMF ¶ 1.1.) Plaintiff included with its application a traffic impact analysis that demonstrated that the proposed mosque would generate only a modest addition to traffic. (*Id.* ¶ 1.2.) The Township's traffic consultant analyzed and ultimately agreed with Al Falah's traffic expert. (*Id.* ¶ 1.3.)

On January 17, 2011, the Property was the subject of a news article titled "Mosque propose[d] at former Redwood Inn property in Bridgewater." (*Id.* ¶ 1.8.) The community's response to the article was, at a minimum, hostile. By way of example, reader comments included: "Just another place for terrorists to assemble under the guise of freedom of religion." (*Id.* ¶ 1.9.)

Ordinance, and the lots upon which the uses are located thereon shall have principal access on a State Highway or County roadway or on one of the following:

1. Garretson Road from Country Club Road to the US Route 202-206 Overpass;
2. Country Road from New Jersey State Highway Route 28 to Garretson Road;
3. Milltown Road from US Route 22 to US Route 202
4. Prince Rodgers Avenue from County Route 629 (North Bridge Street) to Interstate Route 287 Overpass

For those uses which are required to have principal access on the above referenced streets, the use shall not be permitted if principal access is not on the above referenced streets.

On January 18, 2011, members of Al Falah met with the Township Planner, the Township Engineer, and the Planning Board's traffic consultant. (Compl. ¶ 35.) The Township's representatives did not identify any traffic related issues during this meeting. (*Id.* ¶ 35.)

On January 20, 2011, the Township's Administrator, Engineer, Planner, Board Attorney and the Chair of the Planning Board attended a private meeting. At the conclusion of the meeting, the Township Planner drafted a document named "houseworshipamendment.docx." (Pl.'s SUMF ¶ 1.17; Def.'s Resp. ¶ 1.17, ECF No. 86.) Plaintiff alleges that the aforementioned document was a drafted ordinance that would have the effect of precluding approval of Al Falah's application. (Pl.'s SUMF ¶ 1.18; Def.'s Resp. ¶ 1.18.)

A public Planning Board meeting was scheduled for January 24, 2011. Mayor Flannery called a "pre-meeting" scheduled for two hours prior to the public Planning Board Meeting. (Pl.'s SUMF ¶ 1.24; Def.'s Resp. ¶ 1.24.) On January 23, 2011, the Township Administrator sent an e-mail message in anticipation of the pre-meeting that stated: "Will one of you please bring eight (8) copies of the possible ordinance. Thanks." (Pl.'s SUMF ¶ 1.27; Def.'s Resp. ¶ 1.27.) This process, allegedly due to its quickened pace, was described by Council President Norgalis as a "ping-pong game." (Def.'s Resp. ¶ 1.34.)

The attendees at the January 24, 2011 pre-meeting developed a plan for a report to be drafted recommending a new condition on houses of worship which would undermine Al Falah's pending application. (Pl.'s SUMF ¶¶ 1.35-1.38.) This report would be adopted and Ordinance 11-03 would eventually be enacted.

The January 24, 2011 public meeting regarding the application followed the private pre-meeting. At this time, the Al Falah application was met with anti-Muslim prejudice within the community, including internet postings and e-mail correspondence. This alleged hostility

permeated the January 24, 2011 meeting. Residents and members of the general public gathered in the hundreds to voice their objection to Al Falah's application. By way of declaration, individual Plaintiff Sarah Wallis estimated that 400-500 people attended the January 24, 2011 public meeting, of which only 15-20 were members of the Al Falah community. (ECF No. 7-3 ¶¶ 7-9.) Her declaration describes the crowd as agitated and hostile. (*Id.* at ¶ 10.) When the crowd was informed that the meeting would be postponed, a woman was overheard stating that the postponement could be considered a victory since it "gives us more time to plan a strategy to stop this thing." (*Id.* at ¶ 11.) Once the crowd dissipated, however, the Planning Board continued the meeting in regard to Plaintiff's application and authorized the development of a Reexamination Report regarding houses of worship. (Pl.'s SUMF ¶¶ 1.46-1.49.)

Thereafter, Plaintiff asserts that the Township Planner, allegedly without the benefit of an expert report, produced drafted findings (within *two* days) that houses of worship in residential zones could potentially cause traffic issues. (*Id.* ¶ 1.53-1.56.) Specifically, the Planner drafted the Reexamination Report on January 25 and January 26, 2011. (Def.'s Resp. ¶ 1.53.) The Township Planner herself described the report as a "*quickie.*" (Pl.'s SUMF ¶ 1.54.) Plaintiff further asserts that these findings were a mere pretext and that the Township's Engineer produced a report finding that the Property would not cause traffic problems.

On February 8, 2011, the Planning Board adopted the Reexamination Report. (*Id.* ¶ 1.82.) Nine days later, on February 17, 2011, the Township Council proposed a zoning ordinance which had the effect of denying conditional use status for a house of worship at the Property. (Compl. ¶ 6.) (Def.'s SUMF ¶ 8, ECF No. 83.)

On February 28, 2011, the Planning Board ultimately approved a resolution recommending adoption of Ordinance 11-03. At the Planning Board meeting on February 28,

members of the audience shouted, booed, and made statements including "[g]et out of Bridgewater." (Pl.'s SUMF ¶ 1.92-1.95.)

On March 14, 2011, the Township Council adopted Ordinance 11-03. The Planning Board then relied on Ordinance 11-03 to dismiss Plaintiff's application to build a mosque on the Property. Plaintiff asserts that Defendant expeditiously enacted Ordinance 11-03 to avoid the time of application law, which provided that zoning ordinances enacted after May 5, 2011, would be considered under the legal framework as it existed at the time of application.

Plaintiff seeks a preliminary injunction enjoining Defendant from enforcing the Ordinance and directing the Planning Board to consider Plaintiff's application for use of the Property under the legal framework that existed at the time of its application and without consideration of Ordinance 11-03.

B. Summary of the Complaint

Count I alleges a violation of 42 U.S.C. § 1983, more specifically the United States Constitution's right to Free Exercise of Religion under the First and Fourteenth Amendments. (Compl. ¶¶ 77-84.) Count II alleges a violation of the New Jersey Constitution's right to Free Exercise of Religion, Article 1, Paragraph 3. (*Id.* ¶¶ 85-89.) Therein, Plaintiff alleges that the Township has imposed a substantial burden on Plaintiff's religious exercise. (*Id.* ¶¶ 85-89.) Count III asserts a Fourteenth Amendment claim that Ordinance 11-03 treats similarly situated persons differently based on religious beliefs. (*Id.* ¶¶ 90-97.) Count IV alleges an Equal Protection violation under the New Jersey Constitution, Article I, Paragraphs 1 and 5. (*Id.* ¶¶ 98-103.)

Counts V, VI, VII, and VIII allege violations under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). Count V alleges that Defendant has imposed

a substantial burden on Plaintiff's religious exercise and has failed to demonstrate that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling interest. (*Id.* ¶¶ 104-10.) Count VI alleges that Defendant has violated the anti-discrimination provision of RLUIPA, 42 U.S.C. § 2000cc(b)(2). (*Id.* ¶¶ 111-17.) Count VII alleges that Defendant's actions unreasonably limit religious assemblies, institutions or structures within the jurisdiction. (*Id.* ¶¶ 118-24.) Count VIII alleges that Defendant violated RLUIPA by implementing a land use regulation that treats religious assemblies or institutions on less than equal terms with non-religious assemblies. (*Id.* ¶¶ 125-31.)

Count IX alleges that Ordinance 11-03 is arbitrary, capricious and unreasonable. (*Id.* ¶¶ 132-35.) Count X seeks relief under the Municipal Land Use Law ("MLUL"), N.J. Stat. Ann. § 40:55D-62(a). (*Id.* ¶¶ 136-42.) Specifically, Plaintiff asserts that Defendant has violated the "uniformity" requirement of the MLUL because "houses of worship may be located without access to a State highway or County roadway in some areas of residential districts while access to a State highway or County roadway is required in other areas within the same districts . . . ." (*Id.* ¶¶ 139-40.) Count XI alleges violations of the New Jersey Law Against Discrimination ("NJLAD"), N.J. Stat. Ann. §§ 10:5-12.5. (*Id.* ¶¶ 143-47.)

C. Disputed Material Facts

The following disputed material facts are relevant to the instant motions.[4] Defendant provided the following. Ordinance 11-03 does not prohibit houses of worship in any zone and does not prohibit Plaintiff from building a mosque on the Property. (Def.'s SUMF ¶ 12). Rather,

[4] Defendant did not originally submit a Local Civil Rule 56.1 Statement. Nevertheless, Defendant's Motion for Summary Judgment does not evade resolution. Plaintiff's Statement of Undisputed Material Facts, and Defendant's response, in conjunction with Defendant's later filed Statement of Undisputed Material Facts, and Plaintiff's Response, provide ample factual recitation from which the Court can resolve the instant Motions.

Ordinance 11-03 merely requires Plaintiff to seek a conditional use variance pursuant to N.J. Stat. Ann. § 40:55D-70(d)(3). Plaintiff has not sought a conditional use variance. (*Id.* ¶ 13, 15.) The application for a variance would be reviewed by the Zoning Board, a quasi-judicial body that operates independently. (*Id.* ¶ 22.) Furthermore, the Township has a long-standing planning policy to protect and preserve residential character and neighborhoods in the R-50 district, where the Property is located. (*Id.* ¶ 32.) Plaintiff disputes each of these asserted facts. (Pl.'s Resp., ECF No. 85-1.) In addition, Plaintiff's Statement of Facts, and Defendant's Response, brought the following additional disputed material facts to the fore.

1. Disputed Material Facts Regarding Substantial Burden on Religious Exercise

Plaintiff states that establishing a religious home is the most important activity for any Islamic community. (Pl.'s SUMF ¶ 2.6.) Plaintiff currently rents space but the landlord has informed Al Falah not to publicly identify the location of the rental space. (*Id.* ¶ 2.10.) Al Falah sets forth that this rental arrangement is inadequate since it does not permit for any of the communal prayers prescribed by the Qu'ran. (*Id.* ¶ 2.11.) Al Falah also states that burial of the deceased must occur as quickly as possible. As a result, Al Falah's congregants must find a mosque, often at great distances from Bridgewater and friends and family of the deceased. (*Id.* ¶ 2.13.) Al Falah also rents space to provide for the religious education of Al Falah's members' children. (*Id.* ¶ 2.14.)

Defendant asserts it has no knowledge regarding same, and that the Township has identified three sites in the Township for a house of worship compliant with Ordinance 11-03 and informed Al Falah that rental space was available from the Bridgewater-Raritan Board of Education in Bridgewater. (Def.'s Resp. ¶¶ 2.13, 2.14.) Plaintiff states that the proposed alternative properties are cost prohibitive. (Pl.'s SUMF ¶ 2.23.)

2. Disputed Material Facts Related to Futility of a Variance Application

Plaintiff's Statement of Undisputed Material Facts cites fourteen (14) facts which allegedly support its contention that applying before the Zoning Board would be futile. (Pl.'s SUMF ¶¶ 3, 3.1-3.14.) Defendant disagrees with the contention that a variance application would be futile and with all but one of the underlying, supporting factual assertions. (Def.'s Resp. ¶¶ 3, 3.1-3.14.) Plaintiff asserts that a variance application would be subject to appeal before the Council, which would make a determination of denial *de novo*. (Pl.'s SUMF ¶ 3.12.) Defendant states, in essence, that Plaintiff's statement of the outcome of such proceedings is speculative. (Def.'s Resp. ¶ 3.12.)

3. Disputed Material Facts Alleged as to whether Ordinance 11-03 is Arbitrary and Capricious

Plaintiff raises the following, among other, disputed facts: (1) that the Ordinance was passed to preclude Al Falah's application; (2) that traffic studies revealed no traffic problems arising from the proposed mosque; (3) that there was no study of the volume or time of traffic peaks on any roadway in preparation of the 2011 Reexamination Report; and (4) that the roads which were permitted by Ordinance 11-03 exhibited the same characteristics of winding, steep slopes and limited visibility as the local roads excluded by Ordinance 11-03. (Pl.'s SUMF ¶¶ 4.1, 4.5, 4.15; Def.'s Resp. ¶¶ 4.1, 4.5, 4.15.)

4. Disputed Material Facts Regarding Ordinance 11-03 Treating Religious Uses on Less Than Equal Terms

Plaintiff asserts that Ordinance 11-03 imposes an additional condition on houses of worship because it requires principal access to certain roads. Defendant disputes same, stating that Ordinance 11-03 applies to four secular and non-secular classes of land subject to regulation under N.J. Stat. Ann. § 40:55D-62. (Pl.'s SUMF ¶ 5.1; Def.'s Resp. ¶ 5.1.)

Against this factual backdrop, the Court will first examine Defendant's Motion for Summary Judgment. Plaintiff's Application for an Injunction will be discussed later.

II. Analysis

A. Relevant Procedural History

Prior to the instant matter being transferred to the Undersigned, the Hon. Joel A. Pisano, U.S.D.J., denied a Motion to Dismiss filed by the Defendant.[5] Defendant argued that Plaintiff's claims were not ripe because Plaintiff has failed to apply for a variance. Judge Pisano stated:

> I conclude as a matter of law that the *County Concrete* case does control the circumstances presented . . . this does present a challenge based on a theory that the law as a whole, the ordinance as a whole is arbitrary, capricious, and unreasonable, I conclude that the . . . complaint . . . does present a facial challenge to Ordinance 11-03 and accordingly and for those reasons, the motion to dismiss on ripeness grounds is denied without prejudice.

(Third Supp. Decl. of Yue Han Chow, Ex. M., 49-50; Pisano Oral Op. 6-29-11, ECF No. 82-5.)

In *County Concrete Corporation v. Town of Roxbury*, the Third Circuit found that a final decision is not required prior to bringing a court challenge when a landowner makes a facial challenge to an ordinance. 442 F.3d 159, 164 (3d Cir. 2006). Therein, the plaintiffs alleged that *the enactment* of an ordinance was discriminatory, arbitrary, capricious, unreasonable, malicious and sought to deprive the plaintiffs of the use of their property, whereas similarly situated properties were not rezoned in the same manner in violation of Equal Protection. *Id.* at 167. The Third Circuit determined that these allegations constituted a facial challenge and were ripe. To the extent Defendant's reliance upon *Brown v. City of Pittsburgh*, 586 F.3d 263 (3d Cir. 2009),

[5] To the extent Plaintiff alleges as-applied claims, these are not ripe for judicial review since the Plaintiff has not sought a variance. *See Congregation Anshei Roosevelt v. Planning and Zoning Bd. of Borough of Roosevelt*, 338 F. App'x 214, 218-19 (3d Cir. 2009).

urges otherwise, the Court is not persuaded and adheres to the decision rendered by Judge Pisano regarding ripeness.[6]

B. Summary Judgment Standard

Summary judgment is appropriate if the record shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A district court considers the facts drawn from the "materials in the record, including depositions, documents, electronically stored information, affidavits . . . or other materials" and must "view the inferences to be drawn from the underlying facts in the light most favorable to the party opposing the motion." Fed. R. Civ. P. 56(c)(1)(A); *Curley v. Klem*, 298 F.3d 271, 276-77 (3d Cir. 2002) (internal quotations omitted). The Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

[6] The law of the case doctrine recognizes that "as a matter of comity a successor judge should not lightly overturn decisions of his predecessors in a given case." *Fagan v. City of Vineland*, 22 F.3d 1283, 1290 (3d Cir. 1994). "The law of the case operates only to limit reconsideration of the same issue." *Id.* However, "there may be exceptional circumstances under which the rule is not to be applied." *TCF Film Corp.v. Gourley*, 240 F.2d 711, 714 (3d Cir. 1957). "Under the law of the case doctrine, once an issue is decided, it will not be relitigated in the same case, except in unusual circumstances." *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 165 (3d Cir. 1982). "The purpose of this rule is to preserve the orderly functioning of the judicial process." *Id.* at 168 (internal quotation and citation omitted).

Regarding Defendant's exhaustion argument, Plaintiff's SUMF references the manner in which the Hindu Temple in Bridgewater suffered a five year delay before its variance was approved. (Pl.'s SUMF ¶ 3.14.) This fact may, on its face, indicate Plaintiff's application would not be futile. Plaintiff's SUMF, however, notes that the pendency of the Hindu Temple's application included "many hearings before [the zoning board], lawsuits in both state and federal court, and investigation by the Department of Justice." (*Id.*) Construing the inferences from the Hindu Temple's arduous application process in the light most favorable to Plaintiff, and also taking note of the alleged public consternation regarding Al Falah's Application, it is reasonable to conclude that any further application to the planning board or the council would be futile. As such, the Court concludes no extraordinary circumstances exist supporting a reversal of Judge Pisano's previous holding regarding exhaustion of administrative remedies.

251-52 (1986). More precisely, summary judgment should only be granted if the evidence available would not support a jury verdict in favor of the nonmoving party. *Id.* at 248-49. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* at 247-48.

C. Plaintiff's Constitutional & RLUIPA Claims

1. Count I: Violation of the First and Fourteenth Amendments in Violation of 42 U.S.C. § 1983

a. Standard

Count I of Plaintiff's Complaint alleges a violation of the Free Exercise Clause. Pursuant to the Free Exercise Clause of the First Amendment of the United States Constitution, made applicable to local government by the Fourteenth Amendment, no law may prohibit the free exercise of religion. *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 273 (3d Cir. 2007).

b. Parties' Positions

Defendant argues that "[Plaintiff] cannot prove that [Ordinance] 11-03 imposes a substantial burden on [its] religious exercise [because it has] failed and refused to avail [itself] of [its] right to prosecute an application for a variance before the Zoning Board." (Def.'s S.J. Mot. 26.) Plaintiff argues that "[t]he evidence demonstrates that Bridgewater enacted the Ordinance in response to anti-Muslim animus; it imposes a substantial burden on the exercise of Plaintiff's religion; it is arbitrary and capricious; and it cannot survive strict scrutiny." (Pl.'s Opp'n 44.)

c. Discussion

The relevant analytical framework is set forth in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). In *Lukumi*, the Court examined an ordinance that

allegedly impacted religious exercise. *Id.* As an initial matter, the Court evaluates the text in order to determine the object of a law. *Id.* The Court notes that facial neutrality is *not* determinative. *Id.* Rather, the Court may rely on supporting evidence whether direct or circumstantial. *Id.* Notably, *Lukumi* requires that the Court evaluate "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Lukumi*, 508 U.S. at 540 (internal citations omitted).

"[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral[.]" *Id.* at 533. "The Free Exercise Clause . . . extends beyond facial discrimination. The Clause forbids 'subtle departures from neutrality[.]'" *Id.* at 534 (internal citation omitted). *Lukumi* requires that "the Court . . . survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Id.*

Furthermore, a legislature must not "defer[ ] to the [discriminatory] wishes or objections of some fraction of the body politic." *City of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). Thus, the Court examines whether a reasonable jury could infer from this record that private citizens' "hostility motivated the City in initiating . . . its . . . efforts." *Tsombanidis v. West Haven Fire Dep't.*, 352 F.3d 565, 580 (2d Cir. 2003).

As it relates to Ordinance 11-03, the Court will not grant Defendant's Motion for Summary Judgment on Plaintiff's federal Free Exercise claim. In light of the standard for summary judgment, which calls the facts to be viewed in Plaintiff's favor, and giving Plaintiff the benefit of all reasonable inferences, "it cannot be said, as a matter of law, that the Mosque

was not being singled out for discriminatory treatment." *Albanian Associated Fund v. Twp. of Wayne*, No. 06-3217 (PGS), 2007 WL 2904194, at *13 (D.N.J. Oct. 1, 2007).

Here, the Court is faced with disputed material facts as it relates to the alleged discriminatory intent of Defendant. The Supreme Court has noted that "the effect of a law in its real operation is strong evidence of its object." *Lukumi*, 508 U.S. at 535. Here, the effect of Ordinance 11-03, which prevented the establishment of Al Falah's mosque, is evidence of Defendant's objective. In *Lukumi*, the Supreme Court noted that the record "evidence[d] significant hostility exhibited by residents." 508 U.S. at 541.

Similarly here, Plaintiff alleges that the residents exhibited such hostility. (*See* Pl.'s SUMF, ¶ 1.95, stating that when Al Falah's supporters spoke during the meeting, many in the audience could be heard saying things like "Get out of here," "Get out of Bridgewater," and "Go somewhere else.") Furthermore, although disputed, a Defendant council member's alleged statement reflecting that Al Falah's existence at the Property would be very difficult supports a reasonable inference that the animus of the residents was a motivating factor in the ultimate, rather expeditious, enactment of the Ordinance. (Pl.'s SUMF ¶ 1.111.) Specifically, Council member Christine Henderson-Rose allegedly: 1) urged Al Falah to build its Mosque on different property, and 2) stated that, even if its Application was approved, any future applications to make any modifications to the Property would be heavily scrutinized. (*Id.* ¶ 1.111) (ECF No. 29-2 ¶¶ 6-7.) These disputed facts directly speak to Defendant's alleged discriminatory intent. Accordingly, summary judgment as to Count I is denied.

2. Count II: Free Exercise of Religion Pursuant to the New Jersey Constitution

a. Standard

Count II alleges a violation of the New Jersey Constitution, which provides in relevant part, that "[n]o person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience[.]" N.J. Const. art. I, ¶ 3.

For purposes of an alleged violation of the free exercise clause under New Jersey's Constitution, "[the Court] must determine whether the ordinance imposes a significant burden on religious practice." *Jehovah's Witnesses Assembly Hall of S. New Jersey v. Woolwich Twp. of New Jersey*, 223 N.J. Super. 55, 60 (App. Div. 1988).

b. Discussion

For the reasons set forth in relation to Plaintiff's Substantial Burden challenge under RLUIPA, and as discussed in regard to Plaintiff's federal Free Exercise claim, the Court finds that there are genuine issues of material fact that preclude summary judgment on Count II. Specifically, Plaintiff has set forth that the Property is uniquely situated to advance its religious purposes and that the Defendant's actions have caused a substantial burden to the exercise of religion. As such, disputed material facts preclude summary judgment as to Count II of Plaintiff's Complaint.

3. Count III: Fourteenth Amendment Equal Protection

a. Standard

The Fourteenth Amendment provides that "No state . . . shall deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Court's analysis of Plaintiff's equal protection claim under the federal constitution is governed by "the well-established principle that, in the federal Constitutional universe, federal courts accord substantial

deference to local government in setting land use policy . . . ." *Congregation of Kol Ami v. Abington Twp.*, 309 F.3d 120, 125 (3d Cir. 2002). This deference, however, is not boundless. Where the government creates distinctions between similarly situated uses that are not rationally related to a legitimate state goal, then the Court is free to "upset" the land use policy. *Id.*

By way of example, "bare animus towards a group or 'fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding'" may constitute sufficient evidence for a zoning ordinance to fail under an equal protection challenge. *Id.* at 135. (quoting *Cleburne*, 473 U.S. at 448). Plaintiff's equal protection challenge of Ordinance 11-03 calls for a "two-step inquiry." *Id.* at 137. First, the Court must determine if the uses are "similarly situated" and, second, whether there is a rational basis for distinguishing between them. *Id.* at 137.

b. Parties' Positions

Defendant argues that summary judgment is appropriate on Plaintiff's Fourteenth Amendment Equal Protection claim because Plaintiff has not received a final determination from the Zoning Board, thus Plaintiff is merely required to apply for a variance. Defendant also argues that Plaintiff has failed to identify any entity that is similarly situated in relation to the Township's purpose. (Def.'s S.J. Mot. 33.) Defendant argues that even assuming that Plaintiff identified a similarly situated entity, Ordinance 11-03 passes rational basis. (*Id.*) According to Defendant, Ordinance 11-03 protects and preserves the "residential character and neighborhoods, rooted in planning policies dating back to 1976." (*Id.*) Defendant alleges it has a legitimate interest in preserving and protecting the integrity of quiet enjoyment in residential neighborhoods, which is rationally related to the road access condition enumerated in Ordinance 11-03.

Plaintiff cites to its RLUIPA Equal Terms argument, in which Plaintiff argues that municipal buildings are entities that are similarly situated, but Plaintiff is treated in a disparate manner. (Pl.'s Opp'n 38-43, 45.) Further, although Plaintiff concedes that the "Ordinance is subject to review under the 'rational basis' test" it argues, in sum, that the record reflects that Defendant has produced no evidence that the Ordinance "would achieve any legitimate objective." (*Id.* at 45.)

c. Discussion

Four months prior to Al Falah submitting its application to develop a mosque, the Township developed a Reexamination Report. (ECF No. 79-17, PX 58.) This report did not identify any issues concerning traffic related to houses of worship. (Pl.'s SUMF ¶¶ 1.62-1.65.)

Al Falah's application to develop a mosque included numerous expert reports and studies, including a traffic impact analysis. (Pl.'s SUMF ¶ 1.1; ECF No. 72-12, PX 39, at 79.) Al Falah's traffic impact analysis concluded that "[t]he site development for a worship center that includes a day care and elementary school is anticipated to generate only modest levels of new traffic activity." (ECF No. 72-12, PX 39, at 90.) Moreover, "[a]ll worship and prayer services will take place outside of the typical commuter hours. Only the daycare and elementary school will contribute traffic principally when the morning commuter peaks occur, however sufficient roadway and intersection capacity is available during all times." (*Id.*)

After the submission of Plaintiff's application, the Township hired a Special Planning Board Traffic Consultant, Gordon Meth. (Pl.'s SUMF ¶ 1.3.) According to Plaintiff, the Special Planning Board Traffic Consultant's Traffic Impact Analysis "concluded that the proposed mosque at the Redwood Inn site would not create any significant increase in traffic in the surrounding area." (ECF No. 7-8; Pl.'s SUMF ¶ 1.3.)

Township Planner Scarlett Doyle's January 13, 2011 Memorandum advised that Plaintiff sought the facility to accommodate: 500 people for special services held twice a year; 250 people on Fridays; daily worship services of 5-20 people; religious classes of 120 students on Saturdays; a daycare center for approximately 40 children; and an elementary school for approximately 235 students. (ECF No. 79-12 at 10.)

Ms. Doyle drafted an additional Memorandum to the Bridgewater Township Council on March 2, 2011. (ECF No. 79-11 at 92.) That Memorandum provided that:

> [H]ouses of worship have expanded their traditional role, now supporting such activities as self-help meetings, day care, homeless shelters, schools, recreation and social events. Like the school located in a residential setting, the result is that these sites create increased traffic demands on the otherwise low-traffic volumes of the residential neighborhood.

Furthermore, the Memorandum stated that "the impact on the neighborhood can be disruptive to the residential community in which it is located." (ECF No. 79-11 at 93.) The Memorandum also cited external sources for the proposition that "[i]n previous years, churches drew primarily from the neighborhood in which they were located. Today, the area they serve may be considerably larger. Care should be taken in drafting any ordinance regulating places of worship to ensure that the accessory uses do not become nuisances." (ECF No. 79-11 at 93.)

Plaintiff asserts that the Township Planner did not conduct any traffic related studies in developing her memoranda. (Pl.'s SUMF 1.67.)

The Third Circuit's decision in *Rogin v. Bensalem Township* merits discussion. 616 F.2d 680 (3d Cir. 1980). In *Rogin*, the Third Circuit analyzed an equal protection challenge where it was alleged that zoning amendments were passed with the purpose of discrimination. *Id.* at 687. The Third Circuit relied on Supreme Court authority for the proposition that "we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated

to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Id.* (internal quotation and citation omitted).

> In equal protection cases, [the court] may determine the city council's object from both direct and circumstantial evidence. Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision making body. These objective factors bear on the question of discriminatory object.

Lukumi, 508 U.S. 520, 540 (1993) (internal citations omitted).

In analyzing the circumstantial evidence, the animus held by the residents of the Defendant's community, in addition to the expedited nature of the implementation of the Ordinance, at a minimum, creates a genuine issue of material fact such that summary judgment would be inappropriate at this juncture. Specifically, Council President Norgalis testified by way of his deposition that he has *never* known the process of adopting an ordinance after a reexamination report to operate as quickly as was the case of Ordinance 11-03. (Norgalis Tr. at 232:17-20, ECF No. 79-10, at 100.) Furthermore, as discussed below in connection with Plaintiff's Equal Terms claim, there remain genuine issues of material fact regarding the adequacy of municipal buildings as a comparator subject to more favorable treatment under Ordinance 11-03. The Court cannot conclude, based on the disputed factual record currently before it, that Ordinance 11-03 passes rational basis as a matter of law. Accordingly, the Defendant's motion for summary judgment as it relates to Count III is denied.

4. Count IV: Equal Protection under New Jersey State Constitution

The New Jersey Constitution provides: "No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right,

nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin." N.J. Const. art. I, ¶ 5.

In evaluating an Equal Protection claim under the New Jersey Constitution, the Court employs a balancing test. "In striking the balance, [the Supreme Court of New Jersey] ha[s] considered the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." *Brown v. City of Newark*, 113 N.J. 565, 573-74 (1989) (internal quotation and citation omitted). In essence, the New Jersey Constitution protects against the unequal treatment of those who should be treated alike. *Lewis v. Harris*, 188 N.J. 415, 442 (2006). The Ordinance will satisfy the State constitution, on balance, if it does not unduly restrict the right of the Plaintiff to free exercise of religion. "Although stated differently, an equal protection analysis of rights under article I, paragraph 1 of the New Jersey Constitution, like an analysis of equal protection and due process under the Fourteenth Amendment of the United States Constitution, may lead to the same results." *Brown*, 113 N.J. at 573-74. For the reasons set forth above with regard to Plaintiff's claims regarding federal equal protection, Defendant's motion for summary judgment as it relates to Plaintiff's state equal protection claim is similarly denied.

5. Count V: RLUIPA Substantial Burden Provision

a. Standard

Plaintiff alleges that Ordinance 11-03 violates RLUIPA's provision that requires land use regulations that substantially burden religious exercise to be the least restrictive means to advance a compelling governmental interest. 42 U.S.C. § 2000cc(a). In order to prevail, Plaintiff must establish that Ordinance 11-03 imposes a substantial burden on religious exercise. Religious exercise is defined as including "any exercise of religion, whether or not compelled by,

or central to, a system of religious belief" which further includes "the use, building, or conversion of real property for the purpose of religious exercise . . . ." 42 U.S.C. § 2000cc-5. "[A] land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise-including the use of real property for the purpose thereof within the regulated jurisdiction generally-effectively impracticable." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) ("*CLUB*").

In *CLUB*, the Court held that the challenged land use ordinance did not render impracticable the use of real property for religious exercise. *Id.* According to the *CLUB* court, the expenditure of considerable time and money does not amount to a substantial burden under RLUIPA. The Third Circuit has cited *CLUB* favorably for the proposition that where a plaintiff operated a rented facility within the district, the opportunity for religious exercise was not curtailed (and a likelihood of success on the merits could not be established). *See Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 100 F. App'x 70, 77 (3d Cir. 2004).

b. Parties' Positions

Defendant argues that Plaintiff cannot establish a substantial burden because it has failed to apply for a variance before the Zoning Board. (Def.'s S.J. Mot. 26.) Defendant further argues that houses of worship are not zoned out of the Township, but remain permissible in all zoning districts. (*Id.* at 26.) Defendant states that Ordinance 11-03 merely adds an access road condition for uses in residential zoning districts. (*Id.*) Defendant further states that, even if Plaintiff were to establish a substantial burden, Ordinance 11-03 advances a compelling governmental interest. (*Id.* at 27.) Specifically, Defendant argues that Ordinance 11-03 "is grounded in sound planning and is intended to locate houses of worship and other assemblages on roads that are better suited

to the regional or potential regional character of these assemblages." (*Id.*) According to Defendant, Ordinance 11-03 furthers the compelling governmental interest of preserving and protecting residential neighborhoods by the least restrictive means.

Plaintiff asserts that it is without a suitable site for a mosque and is therefore "religiously homeless." (Pl.'s Opp'n 16-17.) Plaintiff further states that the Mosque is a spiritual home and that "[e]stablishing a mosque is therefore the most important activity for any community in Islam." (*Id.* at 17-18.) In absence of a mosque, Plaintiff contends it is "next to impossible . . . to follow [the] fundamental tenets of Islam." (*Id.* at 18.) Plaintiff alleges that "travel to and from the nearest established mosque is simply too burdensome." (*Id.*) Plaintiff utilizes a rental facility, which it alleges is not suitable both because of its limited availability and cost. (*Id.* at 18-19.) Al Falah also has to rent facilities for important religious holidays. (*Id.* at 19.) As an example of the inadequacy of its rental facilities, Al Falah contends that a hall rented in a neighboring town rendered "it necessary for women to pray in closets or near bathrooms, which is degrading and unacceptable for Islamic religious practices." (*Id.* at 20.) Plaintiff also alleges that its rental of classroom facilities to educate its youth community causes a financial burden. (*Id.* at 21.) Plaintiff further asserts that the lack of a permanent religious facility prevents the "finding [of] a dedicated Imam, or spiritual leader." (*Id.* at 22.) Plaintiff asserts that this places a burden on Al Falah in arranging for volunteers to speak during prayer and holiday celebrations and on the volunteers themselves to provide sound religious guidance. (*Id.*) Plaintiff further alleges that in absence of a mosque, rather than a ritual prayer taking place within a mosque, Plaintiff (on at least one occasion) was required to make accommodations for funeral services at a "distant and unfamiliar mosque." (*Id.* at 23.)

c. Discussion

Plaintiff's legal argument regarding its "substantial burden" arises in two forms. First, Plaintiff alleges that seeking a variance would amount to a burden. (*Id.* at 23-29.) Second, Plaintiff states that there are no alternative properties available to Al Falah. (*Id.* at 29.) As an initial matter, the Court adheres to the obligation to construe all inferences in favor of Plaintiff and recognizes that it is outside its province to question religious practice and Plaintiff's religious beliefs. For the reasons discussed below, summary judgment will be denied as the Court cannot conclude as a matter of law that there has not been a substantial burden.

In the context of facial challenges, case law generally reveals that a plaintiff's claims have failed to demonstrate substantial burden when they cannot establish the unavailability of alternative sites. The Third Circuit has held that a plaintiff "did not establish a likelihood of success on its 'substantial burdens' RLUIPA claim . . . because it had operated for years at the rented location in the district and thus its opportunity for religious exercise was not curtailed by the Ordinance." *Lighthouse Inst. for Evangelism Inc. v. City of Long Branch*, 100 F. App'x 70, 76-77 (3d Cir. 2004). The Third Circuit followed the reasoning set forth in *CLUB*.

In *CLUB*, the Seventh Circuit held that a Chicago Zoning Ordinance did not facially impose a substantial burden. 342 F.3d at 761. In reaching this conclusion, *CLUB* rebuffed the plaintiff's assertions that the scarcity of affordable property, the expense involved in securing property, and the procedural requirements and the necessary approvals amounted to a substantial burden. Rather, the Seventh Circuit held that these conditions did "not render impracticable the use of real property . . . for religious exercise, much less discourage churches from locating or attempting to locate in Chicago." *Id.* at 761.

The Ninth Circuit similarly followed *CLUB*. In *San Jose Christian College v. City of Morgan Hill*, the court set forth the plain language definition of substantial burden as follows:

> A "burden" is "something that is oppressive." Black's Law Dictionary 190 (7th ed. 1999). "Substantial," in turn, is defined as "considerable in quantity" or "significantly great." Merriam–Webster's Collegiate Dictionary 1170 (10th ed. 2002). Thus, for a land use regulation to impose a "substantial burden," it must be "oppressive" to a "significantly great" extent. That is, a "substantial burden" on "religious exercise" must impose a significantly great restriction or onus upon such exercise.

360 F.3d 1024, 1034 (9th Cir. 2004).

The plaintiff in *Morgan Hill* set forth its substantial burden as an inability to carry on its missions of "Christian education" and "transmitting [] religious beliefs." *Id.* at 1035. The court found that the challenged ordinance did not restrict religious exercise, but merely required submission of a completed application. *Id.* The court determined that the City's regulations did "not render religious exercise effectively impracticable" and that there was no evidence demonstrating that the plaintiff "was precluded from using other sites within the city." *Id.*

While employed in the inmate context, the Third Circuit's "substantial burden" standard, as enunciated in *Washington v. Klem*, stated that "a substantial burden exists when a follower is forced to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." 497 F.3d 272, 278 (3d Cir. 2007) (internal quotations omitted, citation omitted); *see also Church of Universal Love and Music v. Fayette Cnty.* No. 06-872, 2008 WL 4006690 (W.D. Pa. Aug. 26, 2008).

Here, as it relates to Defendant's argument regarding the absence of a substantial burden, there "are disputed facts as to whether alternative sites are available or are affordable." *Albanian Associated Fund*, 2007 WL 2904194, at *9-*10 (denying defendant's summary judgment motion

and holding that "fact finder could reasonably determine that the Township's actions have created a substantial burden on the Mosque."). Plaintiff alleges that its religious practices are burdened due to the inadequacy of rental facilities. Furthermore, Plaintiff argues at length that no alternative properties are available to Al Falah. (Pl.'s Opp'n 29) ("Defendants have identified only three sites that they contend would be permitted locations for a mosque under Ordinance 11-03 . . . [and] only two of these sites are on the market . . . [t]he land acquisition costs alone for these sites—$2,850,000 and $21,000,000, respectively—make them economically infeasible[.]").[7]

Relying on *Washington* for the proposition that an allegedly palatable alternative does not cure a substantial burden, this district has previously held that "just because plaintiffs in this case can practice some aspects of their religion in [an alternative] facility does not mean there is no substantial burden on their religious exercise." *Albanian Associated Fund,* 2007 WL 2904194, at *9-*10. With this set of facts, construed in favor of Plaintiff, summary judgment cannot be granted. The Defendant cannot demonstrate as a matter of law that Plaintiff has failed to establish that it is suffering a substantial burden.[8] Accordingly, Defendant's Motion for summary judgment as to Count V is denied.

6. Count VI: RLUIPA Non-Discrimination Provision

a. Standard & Parties' Positions

Defendant argues that in order to establish this RLUIPA claim the Plaintiff must demonstrate "(1) that it was treated differently from other similarly situated religious assemblies or institutions, and (2) that the [Township] unequally applied a facially neutral ordinance for the

[7] Plaintiff asserts it would also have to first recoup the $1,685,000 it has spent in acquisition fees for the Property. (Pl.'s SUMF, ¶ 2.23.)

[8] *See* preliminary injunction discussion for an analysis of the Defendant's assertions of application of the least restrictive means in furtherance of a compelling governmental interest.

purpose of discriminating against [the plaintiff.]" *Church of Scientology of Georgia, Inc. v. City of Sandy Springs, Ga.*, 843 F. Supp. 2d 1328, 1361 (N.D. Ga. 2012.) Defendant further contends that Plaintiff does not identify a similarly situated religious assembly or institution. Rather, according to Defendant, Plaintiff alleges that it is treated differently and is subject to different standards than those applied in the past. (Def.'s S.J. Mot. 36.) Defendant argues that Ordinance 11-03 merely establishes a road access requirement, or in the alternative, the requirement to seek a conditional use variance. Defendant argues that no evidence exists that these conditions were put in place to discriminate against the Plaintiff based on religion or religious denomination.

Plaintiff alleges that Defendant has violated the non-discrimination provision of RLUIPA, which provides "No 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).

b. Discussion

In order to demonstrate a claim under RLUIPA's non-discrimination Provision, Plaintiff must establish that (1) it is an assembly or institution, (2) subject to a land use regulation, (3) which has been imposed or implemented in a manner that discriminates on the basis of religion. 42 U.S.C. § 2000cc(b)(2).

There are a number of genuine issues of material fact that preclude resolution of Plaintiff's claim under the non-discrimination provision at the summary judgment stage. For the reasons stated regarding the Court's determination to deny summary judgment as to Plaintiff's Free Exercise Claim, the RLUIPA non-discrimination claim must similarly be denied. In essence, construing the inferences from the facts in favor of Plaintiff, the Court cannot determine as a matter of law that Plaintiff has not been subjected to discrimination. As set forth above in

the factual background as it relates to discrimination, the Parties disagree as to whether there was any discrimination in the imposition or implementation of Ordinance 11-03. Specifically, Plaintiff plausibly alleges that, based on circumstantial evidence, they will be able to demonstrate that they were subject to discrimination. Summary judgment as to Count VI of Plaintiff's Complaint is denied.

7. Count VII: RLUIPA Unreasonable Limitations

a. Standard

Count VII alleges violation of RLUIPA's provision that no government shall impose or implement a land use regulation that unreasonably limits religious assemblies, institutions, or structures within a jurisdiction. 42 U.S.C. § 2000cc(b)(3).

b. Parties' Positions

Defendant argues that it did not violate RLUIPA's unreasonable limitations prohibition. 42 U.S.C. § 2000cc(b)(3)(B). (Def.'s S.J. Mot. 37.) Plaintiff argues that whether Defendant violated RLUIPA's unreasonable limitation provision must be determined in light of all of the facts and that Ordinance 11-03 arbitrarily prohibits houses of worship from over 75% of the previously available roadway frontage in Bridgewater. (Pl.'s Opp'n 44.)

c. Analysis

RLUIPA calls for broad construction and "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).

Both Parties rely primarily on *Vision Church v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006). The plaintiff in *Vision Church*, a religious corporation, purchased a vacant plot intending to build a church. *Id.* at 981. The plaintiff was required to obtain a special use permit

to build and operate its church in a residential district. *Id.* at 990. Plaintiff brought a claim under RLUIPA alleging that the requirement to obtain a special use permit "unreasonably limits religious assemblies . . . within a jurisdiction." 42 U.S.C. § 2000cc(b)(3).

Relying upon the legislative history of RLUIPA, the court stated "what is reasonable must be determined in light of all the facts, including the actual availability of land and the economics of religious organizations." *Vision Church*, 468 F.3d at 990 (internal citation and quotation omitted). The court found that requiring a special use permit was "neutral on its face and [was] justified by legitimate, non-discriminatory municipal planning goals." *Id.* at 991. The court recognized the municipality's goals as "limiting development, traffic, and noise." *Id.* Further, the court noted that the Village required secular institutions to be "approved as a special use." *Id.* Finally the court concluded, that "religious assemblies [had] a reasonable opportunity to build within the Village." *Id.*

As it relates to unreasonable limitations, the Eastern District of Pennsylvania has described RLUIPA as follows: "[f]rom the plain language of the statute it is clear that the purpose of this subsection is not to examine the restrictions placed on individual landowners, but to prevent municipalities from broadly limiting where religious entities can locate." *Adhi Parasakthi Charitable, Med., Educ., & Cultural Soc'y of N. Am. v. Twp. of W. Pikeland*, 721 F. Supp. 2d 361, 387 (E.D. Pa. 2010).

In accord with *Vision Church*, what is "reasonable" under the circumstances cannot be determined at the summary judgment stage in light of the aforementioned disputed issues of material fact. In alignment with RLUIPA's broad construction to protect religious exercise to the maximum extent allowed by the Constitution, the land use regulation here may unreasonably limit efforts to secure a religious home. In light of all the facts presented, there are questions

regarding the availability of land in Bridgewater for religious institutions in general as a result of the Ordinance. Plaintiff argues that the Ordinance now restricts houses of worship from over 75% of the previously available land. This assertion supports the existence of a disputed issue of material fact. For the reasons set forth above, the Defendant's motion for summary judgment as it relates to Count VII is denied.

8. Count VIII: RLUIPA Equal Terms

a. Standard

Count VIII alleges that Defendant violated RLUIPA's Equal Terms provision, which provides: "No 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). In order to establish a violation of RLUIPA's Equal Terms provision, Plaintiff must demonstrate "a secular comparator that is similarly situated as to the regulatory purpose of the regulation in question-similar to First Amendment Free Exercise jurisprudence." *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 264 (3d Cir. 2007).

> [A] plaintiff asserting a claim under the RLUIPA Equal Terms provision must show (1) it is a religious assembly or institution, (2) subject to a land use regulation, which regulation (3) treats the religious assembly on less than equal terms with (4) a nonreligious assembly or institution (5) that causes no lesser harm to the interests the regulation seeks to advance.

Id. at 270. "RLUIPA's Equal Terms provision operates on a strict liability standard . . . ." *Id.* at 269. Moreover, controlling precedent provides that RLUIPA's Equal Terms provision does not include a strict scrutiny or substantial burden requirement. *Id.* at 270.

b. Parties' Positions

Plaintiff alleges that for purposes of the Equal Terms analysis, municipal facilities are comparable yet Plaintiff's facility is treated on less than equal terms. (Pl.'s Opp'n 40.) Defendant

argues that governmental uses "are not similarly situated to houses of worship, both because of the different manner in which they are regulated under New Jersey law, and because the regulatory purposes underlying [Ordinance] 11-03 are not similarly applicable to governmental uses." (Def.'s S.J. Mot. 42-43.)

c. Discussion

In *Lighthouse*, the Third Circuit analyzed an Equal Terms challenge. 510 F.3d at 272. The Third Circuit found that the religious entity therein was entitled to summary judgment as it related to the challenged ordinance. *Id.* at 273. In reaching this conclusion, the court examined the aims of the ordinance and determined that these aims were "not well documented." *Id.* at 272. The court recognized that the ordinance permitted "a range of different uses," including: "a restaurant, variety store and other retail store, educational service and college, [a]ssembly hall, bowling alley, and motion picture theater, governmental service, municipal building, new automobile and boat showroom, and High Technology-Light Industrial." *Id.* (internal quotations omitted). Ultimately, the court held that it was "not apparent from the allowed uses why a church would cause greater harm to regulatory objectives than an 'assembly hall' that could be used for unspecified meetings." *Id.* Accordingly, the Third Circuit remanded to the district court for entry of summary judgment in favor of the religious entity. *Id.* at 272-73.

In the same case, the Third Circuit separately analyzed the defendant municipality's Redevelopment Plan which "strictly limited the use of properties" within the "Broadway Corridor" of the town. *Id.* at 258. The Redevelopment Plan intended to create a retail-focused main street and a "vibrant" and "vital" downtown community. *Id.* at 270. The Third Circuit held that a New Jersey statute precluded the issuance of liquor licenses in close proximity to houses of worship. *Id.* Thus, the court stated that "[a]lthough there may be room for disagreement over

Long Branch's prioritizing of the availability of alcohol consumption over the ability to seek spiritual enlightenment, it is clear that [the town] could not create a downtown area . . . if [it] could not issue liquor licenses throughout that area." *Id.* at 272. Thus, the Third Circuit determined that the municipality was entitled to summary judgment as it related to the Redevelopment Plan because the religious entity "placed no evidence in the record that the [regulatory plan] treats a religious assembly on less than equal terms with a secular assembly that would cause an equivalent negative impact on Long Branch's regulatory goals." *Id.*

In the instant matter, Defendant advances that the aim of Ordinance 11-03 is to preserve the residential character of its various neighborhoods. (Def.'s S.J. Mot. 45.) Defendant states that the Township's governmental uses are not similarly situated to houses of worship as it relates to the purpose of Ordinance 11-03. (*Id.*) In support of this, Defendant asserts that "its active recreational sites not in or adjoining the Regional Center are unlighted, protecting the quiet night time character of adjoining residential neighborhoods . . . and those that have lighted fields are confined to the Regional Center." (*Id.* at 46 n.5.) Defendant Township further argues that governmental uses are not valid comparators because their immunity from local zoning renders governmental assemblage dissimilar for purposes of Equal Terms analysis. (*Id.* at 45.)

The Court recognizes Defendant's objective as a need "to maintain and improve residential neighborhoods without undue intrusion from traffic, noise, light and degraded air quality." (ECF No. 7-10, 7.) With this objective at the heart of the Court's analysis, the Court notes that in R-50, where the Property is located, "municipal buildings, parks, playgrounds or other municipal facilities as are deemed necessary and appropriate by the governing body" are permitted uses. (Pl.'s Opp'n 42.) Houses of worship, however, are subject to a principal access requirement and are conditional uses. (*Id.*) Plaintiff argues that municipalities operate facilities

including public libraries and town meeting halls. (*Id.* at 39.) As it relates to traffic generation, Plaintiff submits that "many municipal facilities generate substantially greater traffic volume than houses of worship." (*Id.* at 40.) Thus, giving Plaintiff the benefit of all reasonable inferences, summary judgment is inappropriate. The Court cannot rule as a matter of law that the Ordinance treats religious assemblies on equal terms with non-religious assemblies as it relates to the purpose of Ordinance 11-03.

D. Plaintiff's State Law Claims

1. Exhaustion of Administrative Remedies

Defendant alleges that the "doctrine of exhaustion requires dismissal of Counts II [alleged violation of the New Jersey Constitution's right to free exercise of religion], IV [alleged violation of the right to equal protection under the New Jersey Constitution], and IX [alleging that Ordinance 11-03 is arbitrary, capricious and unreasonable]" of the second amended complaint based on Plaintiff's failure "to exhaust administrative remedies by seeking a conditional use variance from the Zoning Board." This procedural argument is not persuasive in light of Judge Pisano's ruling regarding the nature of Plaintiff's claims. As noted earlier, Plaintiff has filed facial challenges to Ordinance 11-03. Exhaustion of administrative remedies—in this case, seeking a conditional use variance—is not required before challenging Ordinance 11-03, as Plaintiff does in Counts II, IV and IX. *See County Concrete, supra.*

2. Merits of Plaintiff's Claim that Ordinance 11-03 is Arbitrary, Capricious and Unreasonable

In addition to alleging that Count IX of the Complaint should be dismissed for failure to exhaust administrative remedies, Defendant contends that it is entitled to summary judgment regarding the alleged arbitrary, capricious and unreasonable nature of Ordinance 11-03. Specifically, Defendant alleges that Ordinance 11-03 comports with the criteria in *Riggs v. Long*

Beach Twp., 109 N.J. 601, 611 (1988). The Court does not find Defendant's argument persuasive.

As noted earlier, Plaintiff alleges the following disputed facts regarding this issue: (1) that the Ordinance was passed to preclude Al Falah's application; (2) that traffic studies did not reveal any traffic problems arising from the proposed mosque; (3) that there was no study of the volume or time of traffic peaks on any roadway in preparation of the 2011 Reexamination Report; and (4) that the roads which were permitted by Ordinance 11-03 exhibited the same characteristics of winding, steep slopes and limited visibility as the local roads excluded by the Ordinance. (Pl.'s SUMF ¶¶ 4.1, 4.5, 4.15; Def.'s Resp. ¶¶ 4.1, 4.5, 4.15.) Plaintiff further relies upon the New Jersey Supreme Court's Decision in *Riya Finnegan LLC v. Township Council of Township of S. Brunswick*, as directly illuminating whether the actions of Defendant were arbitrary, capricious or unreasonable. 197 N.J. 184, 187 (2008) (Pl.'s Opp'n 46-48.) Defendant contends that *Riya Finnegan* is factually inapposite. (Def.'s Reply 24.)

Riggs held that "[a] zoning ordinance is insulated from attack by a presumption of validity," which may be overcome by a showing that the ordinance is "clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the [zoning] statute." *Riggs*, 109 N.J. at 610-11 (alteration in *Riggs*) (quoting *Bow & Arrow Manor v. Town of W. Orange*, 63 N.J. 335, 343 (1973)). "The party attacking the ordinance bears the burden of overcoming the presumption . . . ." *Riggs*, 109 N.J. at 611. The *Riggs* court outlined four criteria to consider when determining the validity of an ordinance.

"First, the ordinance must advance one of the purposes of the Municipal Land Use Law as set forth in [N.J. Stat. Ann. §] 40:55D-2." *Id.* (citing *Taxpayers Ass'n of Weymouth Twp., Inc. v. Weymouth Twp.*, 80 N.J. 6, 21 (1976)). "Second, the ordinance must be 'substantially

consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements,' [N.J. Stat. Ann. §] 40:55D-62, unless the requirements of that statute are otherwise satisfied." *Id.* "Third, the ordinance must comport with constitutional constraints on the zoning power, including those pertaining to due process, . . . equal protection, . . . and the prohibition against confiscation . . . ." *Id.* at 611-12 (internal citations omitted). "Fourth, the ordinance must be adopted in accordance with statutory and municipal procedural requirements." *Id.* at 612 (citing P. Rohan, *Zoning & Land Use Controls* § 36.02[1] at 36-15 (1986)).

The Court has concluded that Defendant's Motion for Summary Judgment on this issue must be denied. First, the Court finds Plaintiff's reliance on *Riya Finnegan* appropriate. Defendant's argument that *Riya Finnegan* should be distinguished because, in that case, the "municipality rezoned *only the plaintiff's property*" following an earlier approval from the planning and zoning board is not persuasive. While the fact that the rezoning in *Riya Finnegan* supported the New Jersey Supreme Court's holding that the defendant had engaged in impermissible inverse spot zoning, the temporal framework stressed by Defendant was not critical to that determination. *See Riya Finnegan*, 197 N.J. at 199 (defining inverse spot zoning as instances in which the "neighboring community . . . seeks to reap a benefit by imposing its particular view, contrary to the previously generated comprehensive plan, upon the specific parcel, to the detriment of the rights of that parcel's owner").

Second, and more importantly, there are fact issues regarding whether Defendant's actions comported with the requirements outlined in *Riggs*. The fact issues proffered by Plaintiff regarding the passage of Ordinance 11-03 and issues related to the traffic analysis underpinning Defendant's decision to rezone would, if true, indicate that Defendant may have acted in an

arbitrary and capricious manner. *See Riya Finnegan*, 197 N.J. at 194 ("generic complaints" about traffic concerns, not supported by evidence in the record, are not sufficient to support rezoning). Finally, and as noted in *Riya Finnegan*, even when a "municipality complie[s] with the technical requirements of the [MLUL]," it is incumbent upon a reviewing court to investigate the basis for the rezoning, especially when "a municipality [allegedly] responds to what may be baseless demands of some of its citizens" at the expense of "the rights of the few . . . ." *Id.* at 193-94 (citing *Lewis v. Harris*, 188 N.J. 415, 441 (2006)).

3. Merits of Plaintiff's Uniformity Claim

Plaintiff has failed to file any substantive response to Defendant's argument that Count X should be dismissed.

"Even though Rule 56(e) requires a non-moving party to 'set forth specific facts showing that there is a genuine issue for trial', it is 'well-settled . . . that this does not mean that a moving party is automatically entitled to summary judgment if the opposing party does not respond.'" *Anchorage Assocs. v. V.I. Bd. of Tax Review*, 922 F.2d 168, 175 (3d Cir. 1990) (alteration in original) (citing *Jaroma v. Massey*, 873 F.2d 17, 20 (1st Cir. 1989)). In fact, "Rule 56(e) makes specific provision for this eventuality: "[i]f the adverse party does not so respond, summary judgment, *if appropriate,* shall be entered against the adverse party . . . ." *Id.* (citation and quotation marks omitted) (emphasis added). Stated differently, the Court "must first determine whether summary judgment is appropriate-that is, whether the moving party has shown itself to be entitled to judgment as a matter of law." *Anchorage Assocs.*, 922 F.2d at 175. As such:

> Where the moving party has the burden of proof on the relevant issues, this means that the district court must determine that the facts specified in or in connection with the motion entitle the moving party to judgment as a matter of law. Where the moving party does not have the burden of proof on the relevant issues, this means that the district court must determine that the deficiencies in the opponent's

> evidence designated in or in connection with the motion entitle the moving party to judgment as a matter of law.

Id. (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

Finally, and in combination with Local Civil Rule 56.1, a failure to oppose a motion for summary judgment can be "construed as [a]ffecting a waiver of the opponent's right to controvert the facts asserted by the moving party in the motion for summary judgment or the supporting material accompanying it." *Id.* at 175-76.

Here, although Plaintiff has opposed the Summary Judgment Motion in most respects, it has failed to include in that opposition any substantive response to Defendant's request for summary judgment dismissing Count X — Violation of Uniformity Requirement of the Municipal Land Use Law, N.J. Stat. Ann. § 40:55D-62(a). As such, the Court will determine if summary judgment is appropriate based upon the submissions of Defendant and a review of the Complaint.

N.J. Stat. Ann. § 40:55D-62(a) states that regulations in zoning ordinances "shall be uniform throughout each district for each class or kind of buildings or structure or use of land . . . but the regulations in one district may differ from those in other districts." Count X states that Ordinance 11-03 violates N.J. Stat. Ann. § 40:55D-62(a) because it 1) "requires that a house of worship be located on a state highway, county roadway or one of Four Road Segments . . . ," and 2) that those requirements are "not uniform within each zoning district because houses of worship may be located without access to a State highway or County roadway in some areas of residential districts while access to a State highway or County roadway is required in other areas within the same districts." (Compl. ¶¶ 138-39.)

Defendant argues that the concept of conditional uses, which "contemplates that a particular use, such as a house of worship, may meet the conditional use standards and be

permitted on some properties within a zoning district . . . [and not in] others" does not violate § 40:55D-62(a) because conditional uses are compatible with the uniformity requirement. (Def.'s Mot. 58.) This is allegedly so because Ordinance 11-03 "treats equally all *classes* of uses or structures that fall within its purview." (*Id.* at 59.) Stated differently, the "notion of uniformity [allegedly] does not prohibit classifications within a district so long as they are reasonable and so long as all similarly situated property receives the same treatment." (*Id.*)

Plaintiff's complaint seemingly argues that Ordinance 11-03 violates the uniformity principle because it will allow certain *pre-existing* houses of worship to be located at sites which do not have access to a State highway or County roadway while its application (and other houses of worship in the future) will be required to choose sites with such access or seek a variance in order to be located at a site without such access. (*See* Compl. ¶¶ 58, 139.)

"Uniformity [need not be] absolute and rational regulations based on different conditions within a zone are permissible so long as similarly situated property is treated the same. Reasonableness of classification is the key." *Rumson Estates, Inc. v. Mayor & Council of Borough of Fair Haven*, 177 N.J. 338, 359 (2003). Here, and as noted above, there are fact issues regarding whether or not Ordinance 11-03 is a reasonable expression of Defendant's zoning powers. *See also id.* at 357 (a main concern of the "uniformity requirement was, and continues to be, the constitutional guarantees of due process and equal protection that guard against the arbitrary and unreasonable exercise of the police power") (citing *Roselle v. Wright*, 21 N.J. 400, 409-10 (1956)). As such, summary judgment is inappropriate at this juncture.

4. Plaintiff's New Jersey LAD Claim Cannot Survive Defendant's Jurisdictional Challenge

Defendant contends that Plaintiff's NJLAD claim brought pursuant to N.J. Stat. Ann. § 10:5–12.5 must be dismissed for lack of jurisdiction. The Court agrees. Three District of New

Jersey cases have explored this issue and the Court here will follow those decisions. *See Kessler Inst. for Rehab., Inc. v. Mayor & Council of Borough of Essex Fells*, 876 F. Supp. 641, 664-65 (D.N.J. 1995) (dismissing a plaintiff's NJLAD claim for lack of subject matter jurisdiction because N.J. Stat. Ann. "§ 10:5–12.5, [which makes] it unlawful for a municipality to discriminate in its land use and housing policy, requires those claims to be brought in New Jersey Superior Court . . . ."); *Mount Holly Citizens In Action, Inc. v. Twp. of Mount Holly*, No. 08-2584 (NLH), 2009 WL 3584894, at *7-8 (D.N.J. Oct. 23, 2009) (same); *Lapid Ventures, LLC v. Twp. of Piscataway*, No. 10-6219 (WJM), 2011 WL 2429314, at *6 (D.N.J. June 13, 2011) (same). As such, Count XI is dismissed with prejudice.

E. Plaintiff's Motion for Preliminary Injunction

The Court considers four factors when determining the propriety of a preliminary injunction. This four factor test requires a demonstration: (1) of irreparable injury; (2) of a likelihood of success on the merits; (3) that a balance of the hardships favors the party seeking the injunction; and (4) that an injunction would serve the public interest. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

1. Irreparable Injury

a. Parties' Positions

Plaintiff argues that it has established irreparable injury in two forms: (1) that any loss of First Amendment rights, even briefly, constitutes irreparable injury, and (2) each piece of real property is inherently unique rendering money damages inadequate compensation. (Pl.'s Mot. 57, 58.)

Defendant argues, without the benefit of any supporting case law, that any alleged harm regarding the loss of Plaintiff's First Amendment rights is of the Plaintiff's own making. (Def.'s

Opp'n 42.) Specifically, Defendant argues that Plaintiff, pursuant to Ordinance 11-03, is required to make an application for a variance and that such a requirement does not constitute irreparable harm. (*Id.* at 43.) Defendant further argues that Plaintiff's assertion that money damages are inadequate as it relates to real property is undermined by Al Falah's "failure to prosecute an application for a conditional use variance." (*Id.*) Defendant also argues that *Cottonwood Christian Center v. Cypress Redevelopment Agency*, which Plaintiff relies upon for the proposition that the unique nature of real property is sufficient for a showing of irreparable harm, is distinguishable from the instant action. 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

b. Discussion

Plaintiff relies on *Elrod v. Burns* for the proposition that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." 427 U.S. 347, 373 (1976). The *Elrod* Court defined the issue before it as "whether public employees who allege that they were discharged or threatened with discharge solely because of their partisan political affiliation or nonaffiliation state a claim for deprivation of constitutional rights secured by the First and Fourteenth Amendments." *Id.* at 349. In that instance, the Supreme Court found that "the Court of Appeals might properly have held that the District Court abused its discretion in denying preliminary injunctive relief." *Id.* at 374.

The Court finds the Fifth Circuit's holding in *Opulent Life v. City of Holly Springs* instructive. 697 F.3d 279 (5th Cir. 2012). The *Opulent Life* court, after determining that a ripeness challenge provided no defense regarding a facial challenge to an ordinance, reversed the district court's denial of an injunction for failure to establish irreparable injury. *Id.* The Fifth Circuit determined that the plaintiff "satisfied the irreparable-harm requirement because it ha[d] alleged violations of its First Amendment and RLUIPA rights." *Id.* at 295. The Fifth Circuit,

relying on *Elrod*, found that an alleged deprivation of constitutional rights is tantamount to irreparable harm in the RLUIPA context "because RLUIPA enforces First Amendment freedoms" and must be construed "broadly to protect religious exercise." *Id.*

Factually, the *Opulent Life* court relied on evidence in the record that the plaintiff had to forego programs essential to its religious mission and had found its religious mission otherwise frustrated. *Id.* The court found that the record demonstrated evidence of ongoing harm to the plaintiff's religious practice. *Id.* While resolving the irreparable injury inquiry primarily on the grounds of First Amendment encroachment, the Fifth Circuit also noted that a "deprivation of an interest in real property constitutes irreparable harm." *Id.* at 297 (internal citation omitted).

The Plaintiff here has similarly demonstrated irreparable harm. By way of example, Plaintiff has alleged several injuries to religious exercise.[9] Plaintiff is without a permanent spiritual home, which has impeded its growth and its capacity to raise money for its programs. Without a permanent mosque, Plaintiff is unable to attract a permanent Imam, or spiritual leader. These combined factors, among others, have rendered it nearly impossible for Al Falah and its individual members to adhere to the tenets of their religion. (Pl.'s Mot. 48.)

Alternatively, as the Property is Plaintiff's intended place of worship, Al Falah "possesses a unique interest in its place of worship that cannot be remedied by an award of compensation or a monetary reward." *Third Church of Christ, Scientist, of New York City v. City of New York*, 617 F. Supp. 2d 201, 215 (S.D.N.Y. 2008) *aff'd,* 626 F.3d 667 (2d Cir. 2010). On a more basic level, "where interests involving real property are at stake, preliminary injunctive relief can be particularly appropriate because of the unique nature of the property interest." *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 256 (3d Cir. 2011), as amended (Mar. 7,

[9] "[C]ourts may not inquire into the truth, validity or reasonableness of claimant's religious beliefs." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 n.9 (1987).

2012) (internal citations and quotations omitted). The Court finds that Plaintiff has demonstrated irreparable injury.

2. Likelihood of Success on the Merits

Plaintiff dedicates the vast majority of its preliminary injunction motion to its RLUIPA claim. In addition, the Court recognizes that the "fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lighthouse*, 510 F.3d at 261. Therefore, the Court will limit its likelihood of success on the merits analysis to Plaintiff's substantial burden claim under RLUIPA.

a. Parties' Positions

Relying on the proposition in *Westchester Day School v. Village of Mamaroneck* that "a burden need not be found insuperable to be held substantial," Plaintiff argues that it has been substantially burdened by the Ordinance, which "has effectively paralyzed Al Falah's effort to establish a religious home." (Pl.'s Mot. 48) (citing 504 F.3d 338, 349 (2d Cir. 2007)). In this regard, Plaintiff argues that it has suffered delay, uncertainty and expense which are indicative of substantial burden. (Pl.'s Mot. 47.) Plaintiff further asserts that it is without an economically feasible alternative. (*Id.* at 49.) Defendant argues that Plaintiff cannot demonstrate that Ordinance 11-03 imposes a substantial burden on Al Falah's religious exercise since Al Falah has failed to prosecute an application for a conditional use variance. (Def.'s Opp'n 29.)

b. Discussion

i. Substantial Burden

In *Cottonwood Christian Center v. Cypress Redevelopment Agency*, Cottonwood, the plaintiff religious entity sought to build a church in the City of Cypress. 218 F. Supp. 2d at 1209.

Cottonwood, unable to obtain the proper permits, brought suit. *Id.* Cypress sought to use the property purchased by Cottonwood to develop commercial retail space. *Id.* Cottonwood moved for an injunction. *Id.* In analyzing whether Cottonwood demonstrated a substantial burden, the court reasoned that "preventing a church from building a house of worship means that numerous religious services cannot be performed. RLUIPA appears to recognize this concern by specifically defining the use[,] building or conversion of real property for the purpose of religious exercise as the type of religious exercise that cannot be substantially burdened absent a compelling interest." *Id.* at 1226 (internal citation and quotation omitted).

The *Cottonwood* court defined substantial burden as government action "prevent[ing] [an individual] from engaging in conduct or having a religious experience which the faith mandates." *Id.* at 1227. This definition is, in substance, equivalent to the definition of substantial burden applied in the Third Circuit. *See Washington v. Klem*, 497 F.3d 272, 278 (3d Cir. 2007) (a substantial burden exists where one is forced "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."). The Court in *Cottonwood* indicated that the plaintiff demonstrated that: (1) obtaining the property for the proposed church was a five year endeavor; and (2) a religious need to have a large and multi-faceted church. 218 F. Supp. 2d at 1227.

Similarly here, and as discussed in relation to the immediate and irreparable harm standard, Plaintiff has shown a substantial burden. Specifically, Plaintiff has indicated that an alternative site is unavailable and that the rented facilities used over the last decade have precluded Plaintiff from effectively exercising its religious tenets. (Compl. ¶ 1) (indicating that Plaintiff sought an appropriate property for over a decade). Accordingly, Plaintiff has

demonstrated a substantial burden. The substantial burden suffered by Plaintiff is not undermined by the fact that Al Falah has not sought a variance because the ultimate decision makers on appeal are the council against whom allegations of discrimination are the subject of this action.[10]

ii. Compelling State Interest

Under RLUIPA, once a religious institution has demonstrated that its religious exercise has been substantially burdened, the burden of proof shifts to the municipality to prove that it acted in furtherance of a compelling governmental interest and that its action is the least restrictive means of furthering that interest. *Westchester*, 504 F.3d at 353 (internal citation omitted). To qualify as a compelling state interest, the alleged interest must be among "interests of the highest order." *Lukumi*, 508 U.S. at 546.

In *Cottonwood*, the defendant asserted that its compelling state interest was its goal to alleviate blight. 218 F. Supp. 2d at 1228. The court determined that blight can constitute an aesthetic harm and trigger a substantial governmental interest. *Id.* The court, however, determined that no compelling interest was advanced where the City was not compelled to take action until after the purchase of the property. *Id.* The *Cottonwood* court noted that following the plaintiff's application, the defendant became a "bundle of activity." *See Cottonwood,* 218 F. Supp. 2d at 1225 (indicating that there was circumstantial evidence of discriminatory intent where for nearly a decade the Cottonwood Property sat vacant with no improvements made, but

[10] Plaintiff has indicated that the Zoning Board's power to grant a conditional use variance is limited. Specifically, Plaintiff would have to establish that the proposed use would not impair the intent of the zoning ordinance. N.J. Stat. Ann § 40:55D-70. Plaintiff argues that its application was pending and fatally undermined by the enactment of Ordinance 11-03. This inferentially supports the assertion that Al Falah's application was the "target" of Ordinance 11-03. Al Falah argues that it therefore would likely be unable to establish that its proposed mosque would not upset the purpose of the Ordinance. The Court agrees.

once Cottonwood purchased the land, the City became a "bundle of activity" and developed the Town Center and the Walker/Katella Retail Project for the LART Plan Area.).

Similarly here, the temporal nexus between the application and the implementation of the Ordinance undermines Defendant's claim that the Ordinance was in furtherance of a compelling governmental interest. However, even if Defendant could show that its interest in preservation of residential character in the instant matter rose to the level of a compelling interest, Defendant is not likely to demonstrate that Ordinance 11-03 is the least restrictive means of advancing that interest, as discussed below.

iii. Least Restrictive Means

Defendant bears the burden of producing evidence that it implemented the least restrictive means of advancing a compelling governmental interest. In opposition to the preliminary injunction motion, Defendant asserts that the road access condition is the least restrictive means to further its compelling governmental interest. However, Township Planner Scarlett Doyle did not consult with anyone regarding which roads should be permitted. (Pl.'s SUMF ¶ 1.68.) It is not clear what, if any, alternative means the Township considered before expeditiously passing Ordinance 11-03. Accordingly, Plaintiff has demonstrated a likelihood of success on the merits as it relates to its claim under RLUIPA of a substantial burden being imposed on religious exercise.

3. Balance of the Hardships

Plaintiff argues that a balance of the hardships weigh in favor of granting a preliminary injunction. (Pl.'s Mot. 58.) Plaintiff asserts that the injunction merely calls for the planning board to process Plaintiff's application, and if any concerns are raised, the process itself affords an opportunity for exploration of said potential concerns. (*Id.*) Defendant argues that any harm

demonstrated is a product of Plaintiff's own decision-making. (Def.'s Opp'n 44.) Specifically, Defendant argues that Plaintiff did not apply for a variance. (*Id.*)

The Court finds that the balance of the hardships favors an injunction. Plaintiff continues to suffer the harms outlined under the irreparable injury analysis. Defendant has failed to identify any specific harm that would follow from permitting Plaintiff's application to proceed.

4. Public Interest

As it relates to the public interest, Plaintiff argues that RLUIPA "identified a strong public interest in prohibiting local governments from frustrating religious land uses." (Pl.'s Mot. 58.) Plaintiff also argues that New Jersey, through its enactment of the time of application law, sought to preclude local officials from frustrating land use applications by changing the law. (*Id.* at 58-59.) Defendant argues that "while RLUIPA constitutes a governmental assist to religious land owners, the case law interpreting RLUIPA shows that it was not intended to allow religious land owners to run roughshod over municipalities or to usurp municipalities' right and obligation to zone in the public interest." (Def.'s Opp'n 44.)

The Court finds that the public interest factors weigh in favor of Plaintiff. Although both Defendant and Plaintiff assert meaningful public policy interests, Plaintiff's allegations fall squarely within the harm Congress sought to address in enacting RLUIPA. Therefore, an injunction would further the public interest.

III. Conclusion

For the reasons set forth above, Defendant's Motion for Summary Judgment[11] is GRANTED in part, and DENIED in part. Defendant's Motion is granted as it relates to

[11] Defendant's Summary Judgment Motion also seeks to dismiss from the Second Amended Complaint the individual defendants named in their official capacities. Defendant relies on *Bass v. Attardi*, 868 F.2d 45, 51 (3d Cir. 1989), for the assertion that "official capacity suits . . .

Plaintiff's NJLAD claim (Count XI). Defendant's Motion for Summary Judgment is DENIED as to all other counts. Plaintiff's Motion for Preliminary Injunction is GRANTED. An order consistent with this Opinion will be entered.

s/ Michael A. Shipp
MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

Dated: September 30, 2013

represent only another way of pleading an action against an entity" and "an official capacity suit is, in all respects other than name, to be treated as a suit against the entity." (internal citation and quotations omitted). (Def.'s S.J. Mot. 49.) Plaintiff responds that these cases do not *require* dismissal. (Pl.'s Opp'n 48-49.) The Court does not find that the public accountability concerns raised by Plaintiff require that the individual defendants remain in this action. As such, the individual defendants will be dismissed from this matter.