No. 13-4267

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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

v.

TOWNSHIP 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)

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 13-4267

Al Falah Center, et.al.

v.

Township of Bridgewater, et.al.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. An original and three copies must be filed. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Al Falah Center makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations: Not applicable

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

Not applicable

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

Not applicable

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable

(Signature of Counsel or Party)

Dated: 12/2/13

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT 1

JURISDICTIONAL STATEMENT 5

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 5

STATEMENT OF RELATED CASES 5

STATEMENT OF FACTS 6

The Factual Record Before the District Court 6

1. When Al Falah filed its Planning Board application it was entitled to approval as of right without a zoning variance 8

2. When Al Falah's application became public, it engendered virulent and vocal anti-Muslim animus 10

3. Bridgewater understood that the Planning Board would have to approve Al Falah's application 11

4. Once Bridgewater's officials realized that the existing zoning law would require the Planning Board to approve an Application from a Muslim religious group, they decided to change that law 13

5. Bridgewater enacted Ordinance 11-03 with extraordinary speed so that the change would preclude Planning Board approval of Al Falah's application 17

6. Bridgewater's purported "good zoning" justifications for Ordinance 11-03 are pretextual 24

7. The lack of a permanent mosque significantly impairs Plaintiffs' ability to practice their religion 34

8. There is no feasible alternative site available for Al Falah's mosque 37

The District Court's Conclusions 38

STATEMENT OF THE STANDARD OF REVIEW 41

ARGUMENT 42

I. The District Court Correctly Found Al Falah's To Be a Facial Claim Ripe For Adjudication 42

A. Under *County Concrete* a facial claim based on the enactment of a zoning ordinance is ripe for adjudication 42

B. *County Concrete* controls this case because Al Falah asserts a facial claim under RLUIPA based on the substantial burden imposed by the enactment of Ordinance 11-03 which targeted Al Falah's Application 46

II. Al Falah's Claim That Ordinance 11-03 Violates RLUIPA's "Substantial Burden" Provision Is Likely To Succeed on the Merits 62

III. The District Court Did Not Abuse Its Discretion 68

CONCLUSION 72

TABLE OF AUTHORITIES

Page(s)

CASES:

Albanian Associated Fund v. Twp. of Wayne,
2007 WL 2904194 (D. N.J. Oct. 1, 2007) 65, 66

Brown v. City of Pittsburgh,
586 F.3d 263 (3d Cir. 2009) 60

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520, 540 (1993) 38

Civil Liberties for Urban Believers v. City of Chi.,
342 F.3d 752 (7th Cir. 2003) ("CLUB") 65, 66

CMR D.N. Corp. v. City of Phila.,
829 F. Supp. 2d 290 (E.D. Pa. 2011) 42

Comm. for a Rickel Alternative v. City of Linden,
111 N.J. 192, 543 A.2d 943 (1988) 56, 57

Cornell Co. v. Borough of New Morgan,
512 F. Supp. 2d 238 (E.D. Pa. 2007) 43

Cottonwood Christian Ctr. v. Cypress Redevelopment Agency,
218 F. Supp. 2d 1203,1226 (C.D. Cal. 2002) 66

County Concrete Corp. v. Twp. of Roxbury,
442 F.3d 159 (3d Cir. 2006) ..... passim

Evesham Twp. Zoning Bd. of Adjustment v.
Evesham Twp. Council,
86 N.J. 295, 430 A.2d 922 (1981) 56, 57

Exxon Co., U.S.A. v. Livingston Twp. in Essex Cty.,
199 N.J. Super. 470 (N.J. App. Div. 1985) 49

House of Fire Christian Church v.
Zoning Bd. of Adjustment of Clifton,
379 N.J. Super. 526 (App. Div. 2005) 61

Int'l Church of the Foursquare Gospel v. City of San Leandro,
673 F.3d 1059,1069 (9th Cir. 2011) 65

Lapid Ventures, LLC v. Twp. of Piscataway,
2011 WL 2429314 (D.N.J. June 13, 2011) 42

Lighthouse Institute for Evangelism Inc. v.
City of Long Branch,
100 F. App'x 70 (3d Cir. 2004) 63, 65

Medici v. BPR Co.,
107 N.J. 1, 526 A.2d 109 (1987) 54, 55

Midrash Sephardi, Inc. v. Town of Surfside,
366 F.3d 1214 (11th Cir. 2004) 63, 64

N.J. Primary Care Ass'n v. State Dep't of Human Services,
722 F.3d 527 (3d Cir. 2013) 41

New Horizon Inv. Corp. v.
Mayor & Mun. Council of Twp. of Belleville,
2008 WL 4601899 (D.N.J. Oct. 15, 2008) 43

Ohad Assocs., LLC v. Twp. of Marlboro,
2011 WL 310708 (D.N.J. Jan. 28, 2011) 42

Reich v. Mashantucket Sand & Gravel,
95 F.3d 174 (2d Cir. 1996) 67, 68

RHJ Med. Ctr., Inc. v. City of DuBois,
754 F. Supp. 2d 723 (W.D. Pa. 2010) 42

RLR Invs., LLC v. Town of Kearny,
2009 WL 1873587 (D.N.J. June 29, 2009) 43

Salt & Light Co. v.
Willingboro Twp. Zoning Bd. of Adjustment,
423 N.J. Super. 282 (App. Div. 2011) 53, 54, 55, 56

San Jose Christian College v. City of Morgan Hill,
360 F.3d 1024 (9th Cir. 2004) 66

Sica v. Bd. of Adjustment of Twp. of Wall,
127 N.J. 152, 603 A.2d 30 (1992) 50

Smart SMR of N.Y., Inc. v.
Borough of Fair Lawn Bd. of Adjustment,
152 N.J. 309, 704 A.2d 1271 (1998) 50

Smith v. Allen,
502 F.3d 1255 (11th Cir. 2007) 64

Stockham Interests, LLC v. Borough of Morrisville,
2008 WL 4889023 (E.D. Pa. Nov. 12, 2008) 43

Sts. Constantine & Helen Greek Orthodox Church, Inc. v.
City of New Berlin,
396 F.3d 895 (7th Cir. 2005) 66

Twp. of N. Brunswick v. Zoning Bd. of Adj. of N. Brunswick,
378 N.J. Super. 485, 876 A.2d 320 (App. Div.),
cert. denied, 185 N.J. 266 (2005) 52, 53, 58

Vill. of Arlington Heights v. Metropolitan Hous. Dev. Corp.,
429 U.S. 252 (1977) 38

Warren v. New Castle Cnty.,
2008 WL 2566947 (D. Del. June 26, 2008) 43

Washington v. Davis,
426 U.S. 229 (1976) 38

Waterfront Renaissance Assoc. v. City of Phila.,
701 F. Supp. 2d 633 (E.D. Pa. 2010) 42

Westchester Day Sch. v. Vill. of Mamaroneck,
504 F.3d 338 (2d Cir. 2007) 64

STATUTES, RULES & REGULATIONS:

Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA") 1

42 U.S.C. § 2000cc(a)(1) 63

42 U.S.C. §§ 2000cc(a)(2)(B)-(C) 67

42 U.S.C. § 2000cc-5(7)(B) 67

N.J. Stat. Ann. § 40:55D-10.5 18

N.J. Stat. Ann. 40:55D-17 56

N.J. Stat. Ann. § 40:55D-46(b) 48

N.J. Stat. Ann. § 40:55D-50 49

N.J. Stat. Ann. § 40:55D-62(a) 31

N.J. Stat. Ann. § 40:55D-70 ..... 3, 48

N.J. Stat. Ann. § 40:55D-70(d) 50

N.J. Stat. Ann. § 40:55D-89 ..... 18, 19

Bridgewater Municipal Code § 126-75 56

Bridgewater Municipal Code. Section 126-131B 7

Bridgewater Municipal Code § 126-166 12

Bridgewater Municipal Code §126-305 6

OTHER AUTHORITIES:

Black's Law Dictionary 1280 (5th ed. 1979) 63

Webster's Third New International Dictionary 2280 (1976) 63

William M. Cox & Stuart R. Koenig, *New Jersey Land Use, Zoning & Administration* § 17-3 49

William M. Cox & Stuart R. Koenig, *New Jersey Land Use, Zoning & Administration* at 190-91 50

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

Congress enacted the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA"), to protect the exercise of religious faith from precisely the kind of burdensome and discriminatory land-use action taken by Bridgewater in this case.

Plaintiff-Appellee Al Falah Center ("Al Falah") contracted in 2011 to buy a building (the defunct Redwood Inn) in Bridgewater that Al Falah could convert into a mosque where its members could practice their faith. Until then Bridgewater's zoning ordinance, for the entire 75 years of its existence, had permitted houses of worship on all roads in all residential zones—for the first 39 years without condition and for the next 35 years as long as the house of worship met conditions like set-backs and bulk restrictions. Because Township officials found that Al Falah's application to the Planning Board met all these conditions it was not necessary for Al Falah to seek a variance, and there was no lawful way its application could have been denied. Nonetheless, the application met fierce opposition, including virulent expressions of anti-Muslim animus. Having no ability to prevent the mosque under the law, Bridgewater enacted a new law, engrafting onto its zoning

ordinance a new condition that Al Falah could not meet. Under the new Ordinance 11-03, the one at issue here, it would now be a condition for houses of worship that they be located on only certain designated roads, not including the road on which the Redwood Inn is located. In order to meet a fast-approaching deadline under New Jersey law for such changes to apply to pending applications, the Defendants acted with a speed never before seen in the history of Bridgewater zoning.

Al Falah presented a voluminous record demonstrating that Bridgewater enacted Ordinance 11-03 with discriminatory intent to frustrate Al Falah's application. The District Court concluded that (1) Al Falah has been irreparably injured by enactment of Ordinance 11-03, (2) it is likely to prevail on its claim that Bridgewater violated RLUIPA by imposing a "substantial burden" on Al Falah's religious use of its property, and (3) Al Falah's facial attack on Ordinance 11-03 was ripe for review. It was not necessary for Al Falah to seek a variance, which in any case would have been futile. The District Court entered a preliminary injunction requiring Bridgewater to proceed with Al Falah's application without reference to Ordinance 11-03, as it would have done when the application was first filed. Further proceedings

finally adjudicating the merits of Al Falah's claims under RLUIPA and the federal and state constitutions have yet to occur.

Bridgewater's defense rests on pretenses about both the effect of Ordinance 11-03 and its purpose. As to its effect, Bridgewater says that the Ordinance merely refers the decision about whether Al Falah can renovate its building as a mosque to the Zoning Board of Adjustment ("ZBA") in a variance proceeding, and that because Al Falah has not sought a variance the case is not ripe for adjudication. This argument assumes that the variance proceeding imposes no greater burden on Al Falah than the Planning Board proceeding Ordinance 11-03 supplanted. But that is not so. Approval by the Planning Board would have been Al Falah's as of right. The passage of Ordinance 11-03 imposes requirements on Al Falah that it cannot meet in a variance proceeding before the ZBA.

Under New Jersey law, a variance cannot be granted unless the applicant shows that it "can be granted without substantial detriment to the public good" and that the proposed use "will not substantially impair the intent and the purpose of the zone plan and zoning ordinance" from which a variance is sought. N.J.S.A. § 40:55D-70

Ordinance 11-03 was passed with Al Falah's application precisely in mind. That was its "intent and purpose." The Defendants have never suggested in the District Court or in their brief to this Court how Al Falah might satisfy this requirement of New Jersey law. Moreover, if the ZBA somehow ignored this requirement and permitted a mosque at the site of the Redwood Inn, the Township Council—the very body that enacted the Ordinance—can overrule the ZBA. The District Court was correct in exercising its jurisdiction without first requiring Al Falah to engage in a time-consuming variance proceeding that the District Court correctly found to be futile.

As for the Ordinance's purpose, the Defendants say it addressed legitimate concerns about traffic and "neighborhood character." The Township's own traffic expert agreed with Al Falah's expert that the mosque would have only an insignificant effect on traffic patterns even at peak hours. And, in the entire history of Bridgewater's zoning, there has never been a suggestion in any Township planning document that the "character" of its neighborhoods required limiting houses of worship to certain roads—that is, until Al Falah filed its application.

JURISDICTIONAL STATEMENT

The District Court, and this Court, have subject matter jurisdiction because Al Falah's claims arise under a federal statute (RLUIPA) and the Constitution. As demonstrated below, Bridgewater's argument that jurisdiction is lacking because those claims are unripe should be rejected.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in ruling that Al Falah's claims, based on the additional burdens imposed by the mere enactment of Ordinance 11-03, are facial challenges to Ordinance 11-03 so that under *County Concrete Corp. v. Twp. of Roxbury*, 442 F.3d 159 (3d Cir. 2006), its claims are ripe without regard to whether Al Falah sought a variance.

2. Whether the District Court's factual conclusion that it would be futile for Al Falah to seek a variance was clearly erroneous.

3. Whether the District Court abused its discretion in entering a preliminary injunction.

STATEMENT OF RELATED CASES

No related cases are pending.

STATEMENT OF FACTS

The Factual Record Before the District Court

The decision under review rests on a rich factual record. Al Falah first moved for a preliminary injunction in May 2011 on written declarations alone. JA 161-1664. The motion was not heard then but was held in abeyance while the parties pursued extensive document and deposition discovery. Al Falah renewed the motion in October 2012. The parties then supplemented the record with additional declarations, extensive excerpts from the deposition testimony, and expert reports. Each side had the opportunity to depose all adverse declarants and expert witnesses. There were 25 such declarants and witnesses; 22 were deposed. This record gave the District Court a day-by-day (in some instances hour-by-hour and e-mail by e-mail) account of Al Falah's application for Planning Board permission to renovate the Redwood Inn as a mosque and Bridgewater's hasty enactment of Ordinance 11-03 to block that application.

That ordinance, enacted on March 14, 2011 and codified in pertinent part at Bridgewater Municipal Code §126-305, amended Bridgewater's zoning law to require that houses of worship (as well as schools, country clubs, and outdoor recreation facilities) would be

conditionally permitted uses in residential zones only if they had principal access to a public street as required by §126-131B of the Municipal Code. Section 126-131B, also added by Ordinance 11-03, reads as follows:

> B. Specified public streets.
>
> (1) The following public streets are identified for uses as set forth elsewhere in the Township Land Use 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:
>
> > (a) Garretson Road from Country Club Road to the US Route 202-206 overpass;
> >
> > (b) Country Club Road from New Jersey State Highway Route 28 to Garretson Road;
> >
> > (c) Milltown Road from US Route 22 to US Route 202;
> >
> > (d) Prince Rodgers Avenue from County Route 629 (North Bridge Street) to the Interstate Route 287 overpass.
>
> (2) 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.

Mountain Top Road, where the Redwood Inn is located, is not on a state highway, county roadway or any of the named town streets.

The key facts about the enactment of the Ordinance are described below necessarily in less detail than the District Court had before it. Except as noted, they are uncontroverted. Bridgewater could not controvert them, because they largely come from its own documents and the testimony of its witnesses.

1. **When Al Falah filed its Planning Board application it was entitled to approval as of right without a zoning variance**—Al Falah's members for several years have sought a suitable location to establish a permanent mosque. JA 1657-58; 2047; 1696-97 (Chughtai [plaintiff] Dec. ¶¶ 5-7; T. Abdelkader [plaintiff] Tr. 94:4-16; Wallis [plaintiff] Supp. Dec. ¶ 8).[1] They finally found the Redwood Inn, a former banquet hall on 7.64 acres that they had rented for major annual holiday services. JA 2418 (PX30, at 115 of 123). JA 2050; 2061 (Y. Abdelkader [plaintiff] Tr. 21:24-22:5; Chughtai Tr. 62:9-12). With some repairs and upgrading, it would be readily convertible for Al Falah's proposed use.

[1] Deposition testimony is cited as "[Name] Tr. [page and line reference]," (2) deposition exhibits are cited as "PX__" for documents marked in depositions taken by Plaintiffs and "DX __" for documents marked in depositions taken by Defendants, and (3) declarations and accompanying exhibits are cited as "[Name] Dec." All cited evidence appears in the Joint Appendix or in the Supplemental Appendix submitted herewith.

The Redwood Inn also offered something critical to Al Falah: the right to use the property as a house of worship without seeking a zoning variance. JA 2047; 1710-11 (T. Abdelkader Tr. 95:4-95:19; T. Abdelkader Dec. ¶8). It was in a residential zone (R-50). Bridgewater's zoning law then provided that houses of worship were conditionally permitted uses throughout residential zones—meaning that the use was permitted so long as conditions relating to building size, height, and setback were met. JA 3169-71; 652-60 (PX111; Tubman [plaintiff land use lawyer] Dec. Ex. M.)

Al Falah filed its Preliminary Site Plan Application (the "Application") with the Planning Board on January 6, 2011. JA 2170; 2339 (Tubman Tr. 63:13-64:4; PX39, 36 of 123). It showed how the Redwood Inn would be adapted for use as a mosque in full compliance with all applicable conditions. The Application included, *inter alia*, (1) site plans, (2) an environmental impact statement, (3) landscaping plans, (4) architectural plans, (5) an engineer's report, and (6) a traffic analysis. JA 2416 (PX39, 113 of 123). The traffic analysis showed that the proposed mosque would generate only an insignificant addition to the existing traffic in the area. JA 2393 (PX39, 90 of 123). Indeed, the

Application proposed reducing the number of parking spaces from 230 to 169, suggesting that the mosque would generate less traffic than the Redwood Inn had. *Compare* JA 354 (Tubman Dec. ¶ 4) *with* JA 2354 & 2392 (PX39, 50 and 89 of 123).

2. When Al Falah's application became public, it engendered virulent and vocal anti-Muslim animus—The Planning Board scheduled a public hearing on Al Falah's Application for January 24, 2011. Once that was announced, the applicant's Islamic identity provoked an outpouring of opposition. *See* JA 161-62 (Walsh Dec. ¶4). The Somerset County Tea Party began posting online notices encouraging people to attend the hearing to oppose the mosque. JA 2230-33 (PX10). One notice linked Al Falah to a mosque in Queens, New York, also named "Al Falah," that the Tea Party claimed was a hotbed of terrorist activity. *Id.* "Al Falah" is Arabic for "true success"; Plaintiffs have no connection to the Queens mosque. JA 1697 (Wallis [plaintiff] Supp. Dec. ¶ 9).

Bridgewater officials knew of the anti-Muslim opposition. The Tea Party emailed its posting to Scarlett Doyle, the Township Planner, who forwarded it to the Planning Board Chair, Mr. Fross, who forwarded it

to the Mayor. JA 2072; 2126 (Doyle [Township Planner] Tr. 51:6-52:4; Fross [Planning Board Chair] Tr. 69:24-70:23). Some time before the Board's January 24 scheduled hearing, Ms. Doyle told the lawyer who had filed the Application for Al Falah that things were getting "ugly" and that a zoning change was in the works. JA 2171-72 (Tubman [plaintiff land use lawyer] Tr. 128:12-129:20). Ms. Doyle quibbled with the word "ugly" and claimed she said "difficult." JA 2071 (Doyle Tr. 48:14-21). She denied that she said a zoning change was in the works (JA 2099 (*id.* at 291:1-4), but other Township officials (as well as documentary evidence produced by Bridgewater) contradict her. *See* pp. 13-17, below.

3. **Bridgewater understood that the Planning Board would have to approve Al Falah's application**—Ms. Doyle and other responsible officials (the Township Engineer, fire and police officials) were expected to review the Application and to provide any comments to the Board before it began meeting on it. Ms. Doyle and the Engineer, Thomas Forsythe, both prepared written reports to the Board. JA 2105; 2067; 2262 (Flannery [Mayor] Tr. 37:10-24, 38:16-22; Doyle Tr. 23:13-22; PX14). These reports acknowledged that Al Falah's Application met

the conditional use requirements; the Engineer found "acceptable" Al Falah's plan to widen the roadway along the property frontage by five feet. JA 2216-27; 2297; 2067-68; 2069 (PX4; PX38, 3 of 7; Doyle Tr. 21:22-25:11, 29:16-32:4). A traffic consultant hired by Bridgewater analyzed and agreed with the study by Al Falah's traffic expert concluding that the proposed use would not significantly increase traffic. [2] JA 3003-05; 2069 (PX81; Doyle Tr. 31:13-32:2).

Planning Board members read the reports, as well as the Application, and understood that the Application met the conditional use criteria and therefore would have to be approved. JA 2123 (Fross [Planning Board Chair] Tr. 37:21-40:25); JA 2131 (Henderson-Rose [Planning Board member] Tr. 29:3-30:13).

[2] Although Ms. Doyle's report noted that additional plants near the building's foundation would be needed to comply with a design standard contained in Bridgewater's zoning ordinance, this requirement would not have avoided the need for the Planning Board to approve Al Falah's application. The Planning Board is authorized to grant exceptions to such design standards (unlike zoning requirements for which non-compliance requires a variance from the ZBA). Bridgewater Municipal Code § 126-166. The Planning Board had not denied any applications in recent years, if ever, based on non-compliance with foundation plant standards. JA 2069; 2123; 2131 (Fross Tr. 38:8-39:2, 40:7-25; Henderson-Rose Tr. 29:3-22; Doyle Tr. 29:12-15). If the Planning Board chose not to grant an exception here, Al Falah could have complied with the design standard easily by agreeing to plant more shrubs.

4. Once Bridgewater's officials realized that the existing zoning law would require the Planning Board to approve an Application from a Muslim religious group, they decided to change that law—Bridgewater officials decided to change the law so that the Planning Board could not approve Al Falah's Application. They made this decision before any analysis of the need for a change in zoning was carried out or even commissioned.

The evidence about a few key meetings shows what happened. On Thursday, January 20, four days before the first public hearing on the Application, Mayor Flannery, Ms. Doyle, Mr. Fross (Planning Board Chair) Robert Bogart (Township Administrator), Thomas Forsythe (Township Engineer), and Thomas Collins (Planning Board Attorney) held a "pre-Planning Board meeting" to organize for the scheduled public meeting. They discussed the Al Falah Application. JA 3006-07; 2122; 2106 (PX88; Fross Tr. 11:6-12:8; Flannery Tr. 48:6-16).

Ms. Doyle began drafting a document with the file name "Houseworshipamendment.docx" within hours of leaving the January 20 meeting. JA 2096 (Doyle Tr. 262:14-263:22). It presented a proposed amendment to the Township's zoning ordinance that would preclude the

Planning Board from approving Al Falah's Application. After restating the Township's existing ordinance requirements for houses of worship, Ms. Doyle inserted the following language:

> DRAFT - FOR DISCUSSION PURPOSES
>
> HOUSES OF WORSHIP -
>
> Delete Section 126-353 (Houses of Worship-Conditional Use) and CREATE A NEW ORDINANCE SECTION: to read as follows:
>
> New Section 126- ___ HOUSES OF WORSHIP-
>
> General: Houses of Worship shall be permitted in all zones, but only where the property abuts a Commercial Collector, Principal Arterial or Minor Collector Roadway as defined in the Circulation Element of the Master Plan and such property has sole access to these roads.

JA 3180 (PX116). She emailed this draft to William Savo, the Township Attorney, on the evening of January 20. JA 2427; 1766 (PX42; Chow Dec. Ex. B).

Ms. Doyle claimed she could not recall what was said in the meeting on January 20, but denied that she was instructed to draft an ordinance amendment at that meeting. JA 2095; 2099 (Doyle Tr. 250:10-21, 290:9-25, 291:1-4). She tried to explain the document she wrote that evening by asserting that it was not a draft ordinance but

merely her "thoughts." JA 2097 (*Id.* 264:7-17). That assertion is facially incredible; the document is denominated a "draft" written in the form of an amendment to an ordinance and has the file title "Houseworshipamendment.docx" on her computer. JA 1766-74 (Chow Dec. Ex. B).

Mayor Flannery requested that another private "pre-Planning Board meeting" be held at 5:00 p.m. on January 24, just two hours before the scheduled public meeting. JA 3193-95 (PX118). This private meeting would include representatives of the Township Council, which would have to pass any new ordinance. *Id.* The day before this second private meeting, Mr. Bogart sent an email to Mr. Savo and Ms. Doyle, the subject of which was "Re: Houses of Worship - 5pm - Mon 24th." JA 2228-29 (PX9). The email states in full, "Will one of you please bring eight (8) copies of the possible ordinance. Thanks." *Id.* Despite this reference to copies of a "possible" ordinance in an email scheduling a meeting about "Houses of Worship," at her deposition Ms. Doyle insisted that the document referred to the Township's *existing* ordinance. JA 2100 (Doyle Tr. 293:4-295:3).

A small but telling revision was made to the draft ordinance on or before January 24. Mr. Savo's secretary sent an email titled "Houses of Worship" to Ms. Doyle on January 24, approximately three hours before the second pre-meeting began. JA 3187-92 (PX117). The email attached a revision of the document that changed the language about location of houses of worship as follows (deleted words struck through, added words underscored):

> General: Houses of Worship shall be permitted in all zones, but only where the property abuts a Commercial Collector, Principal Arterial or Minor ~~Collector~~ Arterial Roadway as defined in the Circulation Element of the Master Plan and such property has sole access to these roads.

Id. at JA 3190. The change confirms that this draft ordinance was aimed at the Al Falah Application. Bridgewater's road classification scheme does not have a classification called "Minor Collector." It has one called "Residential Collector," and the words "Minor Collector" in Ms. Doyle's original draft might have been interpreted to mean "Residential Collector." But that would not do, because Mountain Top Road, where the Redwood Inn is located, is a Residential Collector. JA 841. To ensure that no such reading was possible, the draft was changed so that it could not be interpreted in a way that did not exclude

Mountain Top Road. The text of the ordinance ultimately adopted even more clearly excluded Mountain Top Road; see p. 8, above.

5. Bridgewater enacted Ordinance 11-03 with extraordinary speed so that the change would preclude Planning Board approval of Al Falah's application—Bridgewater's officials faced two constraints in carrying out their plan to amend the law. First, they had to construct some plausible rationale for it, and history weighed against them. Houses of worship had been a conditionally permitted use on all streets in residential zones within Bridgewater since 1976, and they had been permitted without condition for 39 years before that. JA 3169-71; 652-60; 2198-2215 (PX111; Tubman [plaintiff land use lawyer] Dec. Ex. M; DX83 [1937 ordinance]). Over the decades Bridgewater had conducted formal reexaminations of the Township's zoning laws and Master Plan under New Jersey's land use law. *See, e.g.,* JA 2481-2652; 2663-2766; 2767-2803; 2804-14; 3008-14; 3015-72; 3073-3168 (PX47; PX56; PX58-59; PX95-97). As the Township Planner conceded, none of these suggested that the location of houses of worship presented a problem; none suggested limiting the location of houses of worship. JA 2084 (Doyle Tr. 110:7-22, 148:14-149:8).

Second, the amendment would have to be enacted with extraordinary speed if it was to block Al Falah's application. In May 2010 New Jersey had enacted a "time of application" law providing that unless a new zoning ordinance was enacted before May 5, 2011, any land use application would have to be considered pursuant to the zoning ordinance in effect at the time of its submission without regard to any later change. N.J.S.A. § 40:55D-10.5; JA 2110 (Flannery [Mayor] Tr. 81:2-82:11). Thus, any amendment to Bridgewater's zoning law would have to be enacted before May 5, 2011 if it was to apply to Al Falah's Application.

Bridgewater responded to these constraints by speeding through the amendment process faster than anyone had ever seen and by failing to do any work to determine whether conditions in Bridgewater had changed so that such a radical departure from Bridgewater's zoning history was warranted. The first step in the zoning amendment process normally is preparation of a reexamination report pursuant to N.J.S.A. § 40:55D-89. That report should identify and discuss, *inter alia*, land use problems that existed when the last prior reexamination report was

adopted and the extent to which those problems have changed since then. N.J.S.A. § 40:55D-89.

Here, the reexamination report was a sham, drafted in one day. Although the key people had decided before the first public meeting on the Application that Bridgewater would amend its zoning ordinance to block Al Falah's proposed mosque, the Planning Board proceeded with the scheduled public hearing on the Application at 7:00 p.m. on January 24. JA 2427-31 (PX43). As a result of press and internet publicity, more people attended this meeting than any prior Planning Board meeting. JA 162, 165-66; 2070 (Walsh Dec. ¶¶ 6, 13; Doyle Tr. 38:19-39:19). Before any testimony was heard on the Application, the Planning Board adjourned the hearing and rescheduled it for a later date in a larger hall because the attendance exceeded occupancy limits. JA 112; 2283-84 (Tubman [plaintiff land use lawyer] Dec. Ex. I at 8:3-24; PX27).

Once all or most of the public was gone, the Planning Board continued its discussions. JA 2108 (Flannery [Mayor] Tr. at 76:10-17). The Mayor did not disclose that a decision had already been reached to change the zoning for houses of worship and specifically for the Redwood Inn location but instead "wondere[d] if it wouldn't be

appropriate to ask our planner to prepare a reexamination report for us to look at regarding houses of worship." JA 2108; 2237 (*Id.* at 76:12-77:9; PX11 at 3:19-25). Without further substantive discussion, the Planning Board voted to authorize such a report. JA 2234-40 (PX11).

Ms. Doyle began her reexamination report the next day, January 25, and completed it on January 26. JA 2241-61; 3432-51 (PX12, PX45). She aptly described it as a "quickie." JA 2073, 2080 (Doyle Tr. 59:16-60:3, 90:14-17); *see also* JA 2109 (Flannery [Mayor] Tr. 79:10-13).

The Reexamination Report made a recommendation never before even suggested by Bridgewater land use officials: that houses of worship be permitted in residential zones only if they were sited on specified roads. The roads selected were State highways, County roads, and four named segments of Township roads. JA 2249-50 (PX12 at 7-8). The Redwood Inn was not on any of those permitted roadways. At the time of the Reexamination Report, Al Falah's Application was the only application before the Planning Board that the proposed change would have affected. JA 2136 (Henderson-Rose [Council member] Tr. 86:8-20).

Ms. Doyle conceded that she could not recall ever having completed a reexamination report as quickly as this one. JA 2073 (Doyle

Tr. 59:16-60:3). She could finish so quickly because she did not do the work necessary to determine whether there was a problem or how any problem identified should be addressed. Unlike other Township zoning reports, which were accompanied by extensive surveys and analyses, here there were no studies or surveys to determine, for example, whether houses of worship (or any other places of assembly) were creating problems relating to traffic, scale, or any other "quality of life" concern and, if so, the nature and extent of the problems. JA 2074 (*Id.* at 67:12-15). She did no surveys to determine which houses of worship in Bridgewater offered ancillary services—such as day care or schools—that might increase traffic flows. JA 2074 (*Id.* at 67:16-68:22). She conceded that safety concerns played no part in the report's recommendations. JA 2081 (*Id.* at 95:4-11). She consulted no one to determine which roads to include in her recommended list. JA 2080, 2081-82 (*Id.* at 92:3-15, 94:6-99:18). Bridgewater's retained expert witness acknowledged that many aspects of existing uses of houses of worship would have to be studied in order to advise a planning board on whether they presented a problem, and that he had seen no such study here. JA 3635-36 (Banisch [defense expert] Tr. 165:5-170:20).

The "quickie" Reexamination Report was part of a process by which the Planning Board and Township Council combined to enact Ordinance 11-03 ahead of the May 5 "time of application" deadline mentioned above. Mr. Norgalis, the Council President, aptly compared the process to a ping-pong game. JA 2156 (Norgalis Tr. 35:19-36:3).

First, the Planning Board would authorize a reexamination report (the "quickie" Ms. Doyle prepared) that would recommend adding a new condition for houses of worship in residential zones that Al Falah's property could not meet. The Planning Board would not recommend a change in the Township's Master Plan; that would have taken too long. Instead, the Reexamination Report would be adopted and referred immediately to the Council, which in turn would enact a resolution accepting the recommendation for change and stating that the ordinance amendment was introduced on first reading.

The proposed ordinance would then be ping-ponged back to the Planning Board. JA 2157-58 (*Id.* at 40:21-41:4). That Board would immediately recommend the passage of the proposed ordinance to the Council, which then would pass the ordinance. The amendment would apply to Al Falah's Application, because it would be enacted before the

May 5 effective date of New Jersey's "time of application" rule. JA 2156, 2159, 2161 (*Id.* at 35:19-36:3, 66:22-67:23, 75:2-4).

The decision to begin this ping-pong game was made on January 24. The game was over by March 14. The Planning Board adopted a final version of the Reexamination Report (nearly identical to the original January 26 draft) at a public meeting on February 8. JA 2265 (PX19). Following the Planning Board's adoption of the Reexamination Report, the Township Council introduced an implementing ordinance at a public hearing just nine days later. JA 2815; 2162-63 (PX73; Norgalis [Council President] Tr. 88:7-89:25). The Council passed the ordinance on first reading and immediately hit the metaphorical ping pong ball back to the Planning Board, which was asked to opine whether the proposed ordinance was consistent with the Township's Master Plan and to make a formal recommendation on whether the proposed ordinance should be adopted. JA 2819 (PX73 at 4). A public hearing and final action by the Township Council was scheduled for March 3, 2011 (later deferred to March 14). This meant that the Planning Board had to get the ball back to the Council before then, which it did. *Id.*

Mr. Norgalis had never seen the process of adopting an ordinance following a reexamination move so quickly. JA 2164 (*Id.* at 232:12-20).

Following enactment of Ordinance 11-03, the Planning Board disclaimed jurisdiction over the Application and voted to dismiss it on April 12, 2011. JA 376; 1996-2001 (Tubman [plaintiff land use lawyer] Dec. ¶ 66; Chow Dec. Ex. K).

6. Bridgewater's purported "good zoning" justifications for Ordinance 11-03 are pretextual—Both at the time it enacted Ordinance 11-03 and thereafter, Bridgewater has attempted to articulate some justification grounded in sound zoning policy for its sudden abandonment of its 75-year policy of permitting houses of worship throughout residential zones—subject to no conditions prior to 1976, and since 1976 subject to conditions Al Falah could meet. Not surprisingly in view of the history, those justifications have been shifting, inconsistent and unsupported. Some illustrative examples are as follows:

Purported reliance on irrelevant documents—Ms. Doyle's Reexamination Report said it relied on "thoughtful evaluation" of many identified planning documents (master plans, master plan amendments,

reexamination reports) going back to 1990. JA 2247 (PX12 at 5). In her deposition she conceded that nothing in any of the listed documents suggests limiting the siting of houses of worship based on road access. JA 2074 (Doyle Tr. 66:23-67:8). Bridgewater's testifying expert reviewed the same materials and also conceded that they do not address the siting of houses of worship. JA 3649 (Banisch Tr. 355:24-356:9). One of them, a September 2010 reexamination report, completed just four months before Al Falah's Application was submitted, contained an exhaustive analysis and proposed master plan amendment addressing traffic issues. JA 2767-2803 (PX58). It did not identify any problems arising from traffic related to houses of worship—although any such problems clearly should have been noted if the consultants found them. JA 2810 (PX59 at 6). It drew attention to particular roads and areas where traffic patterns presented safety concerns. None was near the Redwood Inn. JA 2093 (Doyle Tr. 178:17-179:25).

Mischaracterizing the old as new—Ms. Doyle testified that her Reexamination Report described changes since the last reexamination report in September 2010. JA 2076, 2089 (Doyle Tr. 73:3-74:21, 144:5-22). It discussed this point as follows:

> Permitted uses, such as open air clubs, and conditional uses such as schools and houses of worship may attract, for the purpose of assemblage, significant numbers [of] persons which may affect the character of a residential neighborhood. [Due to the modern needs of accommodation, large paved parking areas, larger assembly buildings and the associated negative impacts of size, scale, bulk, height, traffic, and noise are more likely to be visually and acoustically disruptive to residential neighborhoods.][3] Bridgewater has had recent experience in neighborhood impacts relative to open air clubs of high assemblage in established residential neighborhoods. In addition, there is the recognition that the house of worship use has modified over time. The house of worship no longer serves only the small neighborhood community or town in which it is located. The house of worship may serve the residents of the county and even assembly participants of the larger region. The timeframes for assembly now stretch throughout all days of the week, during day and evening hours. Houses of worship now may offer child day care, schools, banquet and community centers. Health and personal counseling, multiple housing units for its worship leaders, outdoor religious activities as well as social and cultural festivities may also be associated with the house of worship. The increase in offerings require increased space, parking, and greater building mass, which is out of scale with the established identity and

[3] The bracketed sentence was not in Ms. Doyle's first draft, but is in the final version adopted by the Planning Board. It appears to have been added following review of that draft by the Board's lawyers. *See* JA 1940; 2438 (Chow Dec. Ex. D at 6; PX45 at 6).

> character of the single family residential districts in which they may be located.

JA 2248 (PX12 at 6-7). There then follows a single sentence asserting that it is "necessary" to amend the zoning ordinance "to assure that the participants will have convenient travel to their point of assemblage without [unduly] affecting the abutting and nearby residential neighborhood."[4] JA 2249 (*Id.* at 7).

When pressed about these supposedly new or modified functions of houses of worship, Ms. Doyle said that, although she had anecdotal knowledge of a few of Bridgewater's houses of worship, she did not know about any of the others and had conducted no studies or surveys on this topic. JA 2076-78 (Doyle Tr. 75:9-84:11). With respect to those she knew anecdotally, the supposedly new functions had been in place for "decades." JA 2078 (*Id.*)

Bridgewater's brief quotes a March 2, 2011 memorandum from Ms. Doyle to the Township Council that recited excerpts from an "authoritative planning source" about "changes in the ways houses of worship are used . . . ." App. Br. 10-11. Bridgewater fails to reveal—as

[4] The word "unduly" was not in Ms. Doyle's draft but was added when the Planning Board adopted the report on February 8. JA 2454 (PX46 at 5:2-9).

Ms. Doyle's memorandum had failed to reveal—that the passage relied upon from the 2004 edition of the Moskowitz/Lindbloom book is virtually identical to a passage in the 1981 edition of the same book. Bridgewater's testifying expert conceded this point. JA 3639 (Banisch 214:9-215:6). Thus, the supposedly new uses of houses of worship had been recognized three decades earlier. JA 3857-61; 4869-75 (Chow 10-22-2012 Supplemental Declaration attached PX114 (Old Version - 1981) with attached excerpts for pages 50 and 155; Chow 11-05-2012 Third Supplemental Declaration attached PX49 (New Version - 2004) with attached excerpts for pages: 242-43, and 290-92.).

Mischaracterizing what led to the passage of the Ordinance— When the Ordinance passed on March 14, Council members put in the record clearly false statements about what had prompted the change, claiming that "it was in [the] work[s] since 2008, 2009." JA 2982; 1474 (PX78 at 157:6-14; Hirsch [plaintiff land use lawyer] Dec. ¶ 11). In fact, no such change had been suggested or considered or otherwise been "in [the] work[s]" until shortly after the Al Falah Application in January 2011. While one of Ms. Doyle's memoranda (notably not her Reexamination Report) cited annual reports of the ZBA from 2008 and

2009 as support for the proposed amendment, she conceded that nothing in the ZBA reports recommended restricting houses of worship in residential zones based on access to certain roads. JA 2290; 2090-91 (PX30 at 2; Doyle Tr. 148:14-19, 149:4-8). *Drawing unwarranted comparisons*—The reexamination report contained a cryptic sentence about a "recent experience" concerning "open air clubs of high assemblage in established residential neighborhoods." This sentence referred to complaints from neighbors about "exuberant, enthusiastic, vocal sound" coming from the "excited" basketball games on the courts at Camp Cromwell, which is owned by the Boys Club of New York and is located in a residential zone. JA 2075 (Doyle Tr. 69:17-72:3). Ms. Doyle said she cited this example because Al Falah's Application included a basketball court. JA 2075 (*Id.* at 72:4-12). No reasonable person would believe that this experience justified a hasty enactment of an amendment applicable to Al Falah. The Boys Club ran a summer camp for athletic competition; its basketball courts were permanent installations with bleachers for 300 spectators. JA 2098 (Doyle Tr. 272:1-273:24). Al Falah's Application mentioned the possibility of wheeling portable backboards to the paved area of the parking lot,

presumably so that students in a religious school could shoot hoops or play during recess, after which the backboards would be wheeled away. *Compare* JA 1953-54 (Chow Dec. Ex. E) *with* JA 1955-71 (Chow Dec. Ex. F); *see also* JA 2101 (Doyle Tr. 326:15-327:23).

Doubletalk—On February 22, 2011, Ms. Doyle sent a memorandum to the Planning Board about whether the proposed ordinance was consistent with the Master Plan. JA 2274-79 (PX24). It said, "[T]he ordinance amendment is inconsistent with the Master Plan to the extent that the Master Plan does not explicitly address the specific details of the recommended ordinance. The proposed ordinance is consistent with the general purposes, objectives and intent of the Master Plan." The meaninglessness of the second sentence is evident from Ms. Doyle's testimony that *passing* the new ordinance and *not passing* the new ordinance both would have been "consistent" with the "general purposes, objectives and intent" of the Master Plan. JA 2085-86 (Doyle Tr. 115:8-117:4). The Township Council saw through this verbiage when it concluded that in order to pass the new ordinance, it would have to pass a special "reasons" resolution—a resolution that would not have been necessary if the new ordinance had been consistent

with the Master Plan. N.J.S.A. § 40:55D-62(a); JA 2654-55, 4933-38 (PX48 at 2, 76; JA 3626 (Banisch [defense expert] Tr. 65:11-66:3).

Misstating facts—Shortly before the Ordinance was enacted, Mr. Forsythe, the Township Engineer, supplied the Township Council with yet another memorandum justifying it. JA 2117; 2056; 2658-60 (Forsythe Tr. 65:10-12; Bogart Tr. 121:17-122:6; PX52). The Reexamination Report and Ms. Doyle's March 2 memorandum to the Council had mentioned traffic volume as affecting residential quality of life. JA 2432; 2288-92 (PX45 at 6; PX30). Mr. Forsythe's memorandum of March 10, 2011 was the first time a Township official tried to justify the ordinance based on purported concerns about traffic *safety*. JA 2661-62 (PX53). Ms. Doyle, who chose the roadways to be included in the proposed ordinance, testified that safety issues played no role in her selection. JA 2080, 2081 (Doyle Tr. 92:3-15, 95:4-11).

Mr. Forsythe's memorandum addressed the selection of roadways for the access ordinance (identified in the text of Ordinance 11-03 quoted at pp. 7-8, above), as follows:

> The roads included in this Access Ordinance all are at least 30' wide, run between County and/or State Highways, [and] have signalized intersections. These roadways allow for better

> sight visibility, pedestrian safety, easier and safer access to the larger State Highways and County roadways. These roads also allow for safer passing opportunities for emergency fire, police and ambulance vehicles. This is of particular concern on a crowded or narrow roadway which may not provide sufficient pullover opportunity for passenger vehicles.

JA 2662 (PX53).

The assertion concerning the purported safety aspects of the permitted roads was inaccurate. Bridgewater produced eleven "road cards" describing the features of the permitted county roads identified in Ordinance 11-03 (see p. 7, above). Contrary to the quoted statement, seven are less than 30 feet wide for their entire length or for some segment.[5] As for the Township roads, the road cards show that two of the four road segments on which houses of worship are permitted by Ordinance 11-03 are less than 30 feet wide. One permitted segment of Milltown Road is listed as 18 feet wide and goes under a railroad underpass so low that it does not permit passage of emergency vehicles. *See* JA 1976-90 (Chow Dec. Ex. H); JA 3679-80; 1991-93 (Doyle Tr.

[5] *See* JA 1976-90 (Chow Dec. Ex. H) (road cards for Chimney Rock Road from Logan to Thompson (18 feet); Foothill Road from Rt 206 to N. Bridge (20 feet); Mount Horeb Road (20 feet); Washington Valley Road (18 feet)).

187:22-189:7). [Chow Dec. Ex. I]. Mr. Forsythe conceded that aspects of his memorandum were misleading. JA 2118-19 (Forsythe [Township Engineer] Tr. 109:11-115:17).

Bridgewater similarly asserts that Ordinance 11-03 is justified as part of a policy to drive "substantial growth and large-scale uses" toward a designated "regional center" under a state plan designed to limit "sprawl." App. Br. 11. But Bridgewater's testifying expert conceded that Ordinance 11-03 makes multiple roads and road segments outside the designated regional center permissible sites for houses of worship. JA 3658-59 (Banisch Tr. 431:12-436:22).

Ignoring alternatives—When they decided that the proposed ordinance was "necessary," neither the Planning Board nor the Council considered less drastic alternatives to ameliorate the supposed traffic problems and other effects of houses of worship on surrounding neighborhoods. JA 2057-58 (Bogart [Township Administrator] Tr. 128:7-132:20). The Reexamination Report itself had identified such measures: buffer screening requirements, maximum percent of improved lot coverage, parking in front yard areas, signage, and minimum lot areas for residences supporting houses of worship. JA 2445 (PX 45 at 13).

Although the Reexamination Report recommended a study of these alternatives, that recommendation was ignored. Instead the Planning Board recommended and the Council adopted a predetermined radical "solution" that guaranteed Al Falah's Application could not be approved by the Planning Board regardless of building size, the number of worshippers, the number of cars going to and from the facility, or any other parameter.

7. **The lack of a permanent mosque significantly impairs Plaintiffs' ability to practice their religion**—Al Falah demonstrated, and Bridgewater did not seriously dispute, that the lack of a permanent spiritual home has impeded its ability to practice the Muslim faith, to grow, to cohere and to raise money for its programs.

A mosque is where Muslims gather in communal prayer, and to educate themselves and their children in the tenets of Islam. It serves as the center of charitable and social activities and the venue for religious celebrations and funeral services. *See* JA 1709-10, 1714-15; 1656-57; 1696-98 (T. Abdelkader [plaintiff] Dec. ¶¶ 5, 16-18; Chughtai [plaintiff] Dec. ¶¶ 4-5; Wallis [plaintiff] Supp. Dec. ¶¶ 8, 11.

Without a mosque it is difficult, if not impossible, for Plaintiffs to live an Islamic life. Muslims come together in communal prayer five times daily. Without a mosque at the Redwood Inn property, it is nearly impossible for Plaintiffs to follow these fundamental tenets of Islam, as travel to and from the nearest established mosque is too burdensome. *See* JA 1656-57; 1698; 3671-72; 3695 (Chughtai Dec. ¶¶ 4, 6; Wallis Supp. Dec. ¶ 11; Chughtai Tr. 20:5-21:6; Wallis Tr. 28:7-19). Without a mosque Al Falah cannot attract a permanent Imam to lead the Al Falah community. JA 1703-04 (Wallis Supp. Dec. ¶¶ 21-23).

The most important of the communal prayers in Islam is Jummah, the mid-day prayer on Fridays. Because Al Falah does not have a mosque, it rented a hall from the Green Knoll Fire Company in Bridgewater. The Fire Company told Al Falah that it could not publicly identify the fire house as the location of Al Falah's Jummah prayers. This has caused confusion among congregants and potential visitors. Al Falah's arrangement with the Fire Company accommodates only Jummah prayers, leaving the Al Falah community with no mosque for the other communal prayers prescribed by the Qu'ran. *See* JA 1656-57, 1659; 1698-1700 (Chughtai Dec. ¶¶ 4, 6, 10; Wallis Supp. Dec. ¶¶ 11-12,

14-15). Al Falah has rented different facilities for the special communal prayers that occur in the evenings during Ramadan. *See* JA 1657; 1700-01 (Chughtai Dec. ¶ 5; Wallis Supp. Dec. ¶ 16).

Communal prayer also occurs at Islam's two most important holiday celebrations—Eid ul-Fitr and Eid ul-Adha. Al Falah has been required to rent different facilities for these celebrations. Those facilities have often been too small or religiously inappropriate—one, for example, required women to be placed in closets or next to the bathrooms during prayer services, which is completely unacceptable. JA 2051; 1657; 1701-02 (Y. Abdelkader Tr. 89:21-90:10; Chughtai Dec. ¶ 5; Wallis Supp. Dec. ¶¶ 17, 19). It is also time consuming for Al Falah's congregation to worship at rented facilities because worshippers must arrive early to set up the rental facility appropriately and stay an hour late to restore it to its original condition. *See* JA 1705 (Wallis Supp. Dec. ¶ 26).

Lack of a mosque also impairs religious practice at death. In Islam, the deceased are buried quickly. Every effort is made to complete necessary rituals and burial on the day of passing. Immediately prior to burial, Muslims participate in a communal prayer—Janazah—within a

mosque. The father of two of the plaintiffs died while this lawsuit was pending. Because Al Falah has no mosque, what should have been a time of prayer for them within their own religious sanctuary was instead spent scrambling to make accommodations for funeral services for their father at a distant and unfamiliar mosque. JA 1712-16; 1706-07 (T. Abdelkader Dec. ¶¶ 12-21; Wallis Supp. Dec. ¶ 29).

8. **There is no feasible alternative site available for Al Falah's mosque.**—Bridgewater argued below that inability to turn the Redwood Inn into a mosque would not harm Al Falah because the Redwood Inn is not of intrinsic spiritual significance and seven alternative sites within Bridgewater would be permitted locations for a mosque under Ordinance 11-03. It does not press this argument on appeal, and with good reason. Of the seven sites Bridgewater identified, only two were on the market. JA 1666 (Steeves [plaintiff expert] Dec. ¶¶ 6-7). Neither had a building on it that could be converted to a mosque. The land acquisition costs at these two alternatives would make them economically infeasible. In order to build a mosque at either of the two alternatives Al Falah would first have to sell the Redwood Inn and recover its $1,685,000 acquisition cost, an uncertain and possibly time-

consuming proposition. It then would have to acquire one of the alternative sites. One was for sale for $2,850,000, the other for $21,000,000. JA 1668-72 (Steeves Dec. Exs. A-B). For a small religious group like Al Falah, all this additional expense and risk in just acquiring a site with nothing on it is a substantial burden. The District Court credited Al Falah's showing on these points. JA 28-29; 46 (Opinion at 24-25; 42).

The District Court's Conclusions

In analyzing this record, the District Court noted controlling authority stating that discriminatory intent may be proved by both direct and circumstantial evidence. Direct expressions of discriminatory intent need not be found. The trier of fact instead may look to "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." JA 23 Opinion at 19, quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993); *see Vill. of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977); *Washington*

v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring). Applying that principle to this record, the District Court found circumstantial evidence of religious discrimination against Al Falah based on "the animus held by the residents of the Defendant's community, in addition to the expedited nature of the implementation of the Ordinance. . . . " JA 23 (9/30 Memorandum Opinion at 19).

The District Court went on to find that Al Falah was likely to prevail on its claim that Ordinance 11-03 imposed both an irreparable injury and a "substantial burden" on its religious exercise within the meaning of RLUIPA. It credited evidence, which it had discussed in its analysis of irreparable injury, that Al Falah is "without a permanent spiritual home, which has impeded its growth and its capacity to raise money for its programs." JA 44 (Opinion at 40). And it concluded that Ordinance 11-03 prevents Al Falah from establishing one. [6]

[6] Bridgewater refers to the need for unspecified "other land use approvals" in addition to the Planning Board approval that Ordinance 11-03 blocked. App. Br. citing JA 6. The portion of the District Court's decision Bridgewater cites for this proposition does not support it. The only required land use approval relevant to this appeal is the conditional land use approval of the Planning Board, because that is the only such approval affected by Ordinance 11-03.

The District Court also addressed, both on the facts and the law, the question that permeates Bridgewater's brief on appeal: what about a variance? As a factual matter it concluded, as any fair fact-finder would conclude, that a variance will not be forthcoming. It said,

> 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.

JA 47 (Opinion at 43) n.10. It concluded, "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." JA 47 (Opinion at 43).

On the law, the District Court reaffirmed the conclusion it had reached in denying Bridgewater's motion to dismiss: Al Falah's claim is ripe for adjudication.[7]

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews a decision granting 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).

[7] Bridgewater inaccurately asserts that its motion to dismiss "was denied without prejudice because the District Court determined that it was 'not ripe for adjudication' at that time." App. Br. 5. The relevant order says, "Defendants' motion to dismiss the Amended Complaint as not ripe for adjudication is **DENIED.**" SJA 4 (6/30/11 Order). The phrase "not ripe for adjudication" described the argument being rejected, not the ruling. In explaining the ruling orally, the District Court said that the denial of the motion to dismiss was "without prejudice" in the sense that "there may be some arguments down the road which are similar, if not the same, as the arguments being made here today and I don't want defense to be foreclosed from making them." JA 3507 (6/29/11 Tr. at 50).

ARGUMENT

I. The District Court Correctly Found Al Falah's To Be a Facial Claim Ripe For Adjudication

A. Under *County Concrete* a facial claim based on the enactment of a zoning ordinance is ripe for adjudication

Bridgewater argues that this case is not ripe for review because Al Falah has not sought a variance from the ZBA. This Court's ruling in *County Concrete* disposes of this argument. In that case, the Court held that in the context of an attack on a land use ordinance a facial challenge is one that challenges the mere enactment of the ordinance; in other words, a claim that the existence of the ordinance, in itself, harms the claimant is a facial challenge. The Court further held that when there is such a facial challenge, it is ripe for review and the federal court may exercise jurisdiction even though the challenger has not sought a variance. The Court's ruling has been consistently applied by the district courts in this Circuit.[8] It is correct, and there is no reason to overrule it just eight years after it was decided.

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[8] *See, e.g.*, *CMR D.N. Corp. v. City of Phila.*, 829 F. Supp. 2d 290 (E.D. Pa. 2011); *Lapid Ventures, LLC v. Twp. of Piscataway*, 2011 WL 2429314 (D.N.J. June 13, 2011); *Ohad Assocs., LLC v. Twp. of Marlboro*, 2011 WL 310708 (D.N.J. Jan. 28, 2011); *RHJ Med. Ctr., Inc. v. City of DuBois*, 754 F. Supp. 2d 723 (W.D. Pa. 2010); *Waterfront*

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In *County Concrete*, a property owner wanted to extend its sand and gravel removal operations and, in 1994, submitted an application for subdivision and site plan approval for that purpose. A dispute with the township ensued. In 2001, with the dispute still unresolved, the township enacted a zoning ordinance that effectively prevented the proposed use. 442 F.3d at 163. The property owner sued in federal court alleging that enactment of the ordinance violated its constitutional rights (substantive due process and equal protection) and amounted to a regulatory taking. The township argued that these claims were unripe for the same reason that Bridgewater advances here—that the property owner could have sought a variance but did not do so.

This Court held that the constitutional claims were ripe for judicial consideration. It found that because the property owner was challenging the very enactment of the zoning ordinance, it was asserting a facial challenge. The Court then held, consistent with its

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Renaissance Assoc. v. City of Phila., 701 F. Supp. 2d 633 (E.D. Pa. 2010); *RLR Invs., LLC v. Town of Kearny*, 2009 WL 1873587 (D.N.J. June 29, 2009); *Stockham Interests, LLC v. Borough of Morrisville*, 2008 WL 4889023 (E.D. Pa. Nov. 12, 2008); *New Horizon Inv. Corp. v. Mayor & Mun. Council of Twp. of Belleville*, 2008 WL 4601899 (D.N.J. Oct. 15, 2008); *Warren v. New Castle Cnty.*, 2008 WL 2566947 (D. Del. June 26, 2008); *Cornell Co. v. Borough of New Morgan*, 512 F. Supp. 2d 238 (E.D. Pa. 2007).

own prior rulings and those of other courts, that a plaintiff asserting such a facial challenge need not exhaust variance procedures that in theory might result in permission to use the plaintiff's land as desired. *Id.* at 166.

County Concrete's holding makes both doctrinal and practical sense. As a doctrinal matter, when a municipality responds to a landowner's use application by changing the law in a way that materially changes the burden the landowner must satisfy, the enactment by itself imposes a detriment on the landowner. If the enactment is subject to challenge as discriminatory or otherwise unlawful, the landowner targeted by it has a claim based on its "mere enactment." *County Concrete*, 442 F.3d at 167. The governing body whose conduct is alleged to have been unlawful has completed its work. There is no need to wait and see whether the landowner can satisfy the different and more difficult burden in a variance proceeding before a different body that has no authority to change the challenged ordinance. The imposition of the burden imposed by the ordinance is, without more, an injury that a federal court may redress. As *County Concrete* explained,

> We stated in *Taylor Investment* [*,Ltd. v. Upper Darby Twp.*, 983 F.2d 1285 (3d Cir. 1993)] that [the] finality rule [of *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)] only applies to as-applied challenges, such as the one asserted in that case, and not to facial due process claims. Other courts have also held that seeking a variance (i.e., complying with *Williamson's* finality test) is not a prerequisite to a plaintiff's claim that the enactment of a zoning ordinance, in and of itself, violates the Due Process Clause.
>
> Appellants seize upon *Taylor Investment's* as-applied/facial-challenge distinction, and argue that their attack on the Ordinance is a facial one only and that we should hold that a facial substantive due process challenge to a zoning ordinance---asserted on the theory that the law as a whole is arbitrary, capricious and unreasonable-is ripe even if the plaintiff did not seek a variance from the zoning ordinance. We so hold.

County Concrete, 442 F.3d at 165-66 (citations omitted).

This holding also makes practical sense. When a municipal zoning enactment occurs in response to a specific application by a specific landowner, it would be an exercise in futility to force that very landowner to seek a variance undoing what the zoning law was designed to achieve. *County Concrete* explained its reasoning on this point as follows:

> This is not a case where a municipality has enacted a general ordinance and a homeowner

> objects to the application of the ordinance to his or her property. Here, the Township knew exactly how appellants intended to use their land and passed the Ordinance specifically tailored to prevent that use.

County Concrete, 442 F.3d at 167 (citations omitted).

B. *County Concrete* controls this case because Al Falah asserts a facial claim under RLUIPA based on the substantial burden imposed by the enactment of Ordinance 11-03 which targeted Al Falah's Application

The District Court rejected Bridgewater's ripeness argument on the authority of *County Concrete*. It first did so on the face of the pleadings when Judge Pisano denied a motion to dismiss. He found that under *County Concrete* the plaintiffs were not required to pursue a variance in order to ripen their claim for consideration by a federal court, because they were pursuing a facial challenge to Bridgewater's zoning amendment based on allegations that it was enacted with specific intent to preclude Al Falah's proposed use of the Redwood Inn. JA3504-05 (6/29/11 Tr. 47-48).

After extensive subsequent discovery, Bridgewater again presented its ripeness argument in its motion for summary judgment. Judge Shipp adhered to Judge Pisano's decision, finding it to be a correct application of *County Concrete*'s holding. JA 14-15

(Memorandum Opinion at 10-11 (emphasis in original & footnote omitted)).

County Concrete and this case are indistinguishable. In each case, the landowner had a pending application for a permit to which it was entitled by right. In each case, the municipality responded by changing its zoning law to make the landowner's proposed use permissible only with a variance that might be granted or denied by the local board applying different standards. In each case, the landowner alleged that the enactment of the zoning amendment was unlawful either because it abridged constitutionally guaranteed property rights (*County Concrete*) or constitutional and statutory religious rights (this case).

Bridgewater does not assert that *County Concrete* was wrongly decided. Instead it attempts to distinguish this case on various grounds; as demonstrated below, each should be rejected.

Al Falah's intent to pursue an "inherently beneficial use" would not carry its burden before the ZBA—Bridgewater says that Al Falah's mosque would be an "inherently beneficial use," whereas County Concrete's use was not. Under New Jersey law, say the Defendants, an applicant who wants a variance for an inherently beneficial use has a

lesser burden than other applicants. That is true so far as it goes. But even applicants with inherently beneficial uses must meet certain statutory requirements before a variance can be granted. Specifically, before a variance for an inherently beneficial use may be granted, the applicant must show that the variance will not result in a "[1] substantial detriment to the public good and [2] will not substantially impair the intent and the purpose of the zone plan and zoning ordinance." N.J.S.A. § 40:55D-70. It is precisely these statutory requirements, the so-called "negative criteria", that Al Falah cannot meet because of Bridgewater's unlawful enactment of Ordinance 11-03. To see how substantial a burden has been imposed on Al Falah by the enactment of the ordinance, one need only compare Al Falah's situation before and after the passage of the new ordinance.

Before the enactment of Ordinance 11-03, the Planning Board would have been required to approve Al Falah's application to renovate the Redwood Inn as a mosque. Under the law, "[t]he planning board *shall*, if the proposed development complies with the ordinance and this act, grant preliminary site plan approval." N.J. Stat. Ann. § 40:55D-

46(b) (emphasis added).[9] New Jersey courts hold that the applicant for a conditionally permitted use is entitled to Planning Board approval as of right if its application demonstrates compliance with the conditions. *Exxon Co., U.S.A. v. Livingston Twp. in Essex Cty.*, 199 N.J. Super. 470, 477-78, (N.J. App. Div. 1985); *see also* William M. Cox & Stuart R. Koenig, *New Jersey Land Use, Zoning & Administration* § 17-3. Here, the Township's officials who reviewed the application reported that Al Falah met the conditions, and the Planning Board and Township Council were so informed. See pp.11-13, above.

Ordinance 11-03, hastily enacted in response to public outcry over Al Falah's application to the Planning Board, by design remitted Al Falah to a forum where it would not prevail: the ZBA. Under New Jersey law Al Falah cannot obtain a variance unless its application meets both the "positive criteria" (that there are "'special reasons' for the grant of the variance") and the "negative criteria" (that the variance

[9] Al Falah also would have been entitled, absent the enactment of Ordinance 11-03, to final approval from the Planning Board. The law provides, in pertinent part, "The planning board shall grant final approval if the detailed drawings, specifications and estimates of the application for final approval conform to the standards established by ordinance for final approval, [and] the conditions of preliminary approval." N.J. Stat. Ann. § 40:55D-50. Because the enactment of Ordinance 11-03 aborted the Planning Board proceedings, Al Falah's application never reached the final approval stage.

"can be granted without substantial detriment to the public good" and that the proposed use "will not substantially impair the intent and the purpose of the zone plan and zoning ordinance"). N.J. Stat. Ann. § 40:55D-70(d); *Sica v. Bd. of Adjustment of Twp. of Wall*, 127 N.J. 152, 156, 603 A.2d 30, 32 (1992).

Although under *Sica* Al Falah might meet the positive criteria as an "inherently beneficial use," such uses are not excused from meeting the "negative criteria." In 1997 the New Jersey legislature amended its law to state this requirement expressly, adding the italicized words:

> No variance or other relief may be granted under the terms of this section, *including a variance or other relief involving an inherently beneficial use*, without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance.

N.J. Stat. Ann. § 40:55D-70(d) (emphasis added). The amendment "serves as a reminder that even with an inherently beneficial use, an applicant must satisfy the negative criteria." *Smart SMR of N.Y., Inc. v. Borough of Fair Lawn Bd. of Adjustment*, 152 N.J. 309, 324, 704 A.2d 1271, 1279 (1998); *see* William M. Cox & Stuart R. Koenig, *New Jersey Land Use, Zoning & Administration* at 190-91.

The passage of Ordinance 11-03 has placed insurmountable hurdles in Al Falah's path. What arguments could it make to support a showing that a variance would not (1) be a "substantial detriment to the public good" and (2) would not "substantially impair the intent and the purpose of the zone plan and zoning ordinance?" Throughout this litigation, we have challenged the Defendants to explain how Al Falah could meet these requirements. They have never done so, either in the District Court or in their brief to this Court.

Al Falah certainly could not argue to the ZBA that, "Our mosque is not what the Council had in mind when it enacted Ordinance 11-03." Al Falah's proposed use was the only specific religious use that the Council considered when enacting Ordinance 11-03. With respect to the first negative criterion ("substantial detriment to the public good"), when it passed Ordinance 11-03 the Township Council adopted the position (albeit without support and contrary to a long history) that the Redwood Inn was not an appropriate site for Al Falah's proposed mosque because a house of worship there would impair the neighborhood character through "undue intrusion from traffic, noise, light and degraded air quality." JA 2438 (PX45) at 6. This rationale,

however, did not lead the Council to provide that the location of houses of worship on certain roads should depend on factors that a ZBA might have tinkered with—for example, the number of congregants, the size of the facility, how many cars travel to and from it, where the congregants came from, or how much noise or light the facility would generate. Indeed, the Council did not follow the suggestion in the Reexamination Report that measures other than a restriction on location be studied. See p. 34, above. The Ordinance is absolute: houses of worship are not conditionally permitted except on the named roads, period. A grant of a variance that permitted a house of worship on a road not named would entirely undercut what the Council provided.

Ordinance 11-03, in itself, would similarly burden any attempt by Al Falah to satisfy the second negative criterion—that permitting a mosque on the site of the Redwood Inn would "not substantially impair the intent and the purpose of the zone plan and zoning ordinance." An application by Al Falah to the ZBA would present the "particularly damning" deficiency that Ordinance 11-03 was enacted so recently.[10]

[10] *See Twp. of N. Brunswick v. Zoning Bd. of Adj. of N. Brunswick*, 378 N.J. Super. 485, 494, 876 A.2d 320, 325 (App. Div.) *cert. denied*, 185 N.J. 266 (2005) (finding that a zoning board of adjustment usurped the

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But here there is more than recency of enactment. Ordinance 11-03 was enacted with the Redwood Inn site in mind. The rationale adopted by the Council when it enacted the Ordinance was that certain locations, specifically focusing on the Redwood Inn, were not appropriate for houses of worship because they would compromise the "character" of the surrounding neighborhood—again, without regard to size or any other parameter. *See, e.g.,* JA 2653-57; 2438-39; 2289 (PX48, PX45 at 6-7, PX30 at 1). The Council reasserted this view by presenting in this litigation the testimony of a planning expert arguing on multiple grounds that the Redwood Inn site is the wrong place for a house of worship. *E.g.,* JA 3773-75; 3821; 3880 (PX102 at 61-63, PX103 at 17, PX149). His opinions are conclusory and not supported by the evidence, but he speaks for his client.

Bridgewater's main response to all this is to argue that the Court should ignore the problems created by Ordinance 11-03 because Al Falah would be excused from meeting these negative criteria. It

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power of the municipality's governing body by granting a variance to permit multi-family residential development only a year after property had been rezoned to preclude it; court found the recency of the rezoning to be "particularly damning").

attempts to support this claim with a truncated quotation from *Salt & Light Co. v. Willingboro Twp. Zoning Bd. of Adjustment*, 423 N.J. Super. 282 (App. Div. 2011), that distorts its meaning. Bridgewater's quotation from that decision appears at page 28 of its brief, as follows:

> 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), *cert. denied*, 210 N.J. 108 (2012) (internal quotations omitted).

Bridgewater's quotation from *Salt & Light Co.* contains two bracketed punctuation marks. The first was in the court's opinion, which was itself quoting from *Medici v. BPR Co.,* 107 N.J. 1, 21–24, 526 A.2d 109 (1987). But the second bracketed mark is a period inserted by Bridgewater that distorts the meaning of the court's opinion. The insertion of that period, and the omission of the remainder of the sentence, makes it appear that the phrase "negative criterion" and all that follows to the purported end of the sentence is the object of the verb phrase "presumptively satisfies." This suggests that *Salt & Light Co.*

was saying, as Bridgewater argues, that both the positive and negative criteria are presumptively met where by an applicant's proposed use is "inherently beneficial." But the text of *Salt & Light Co.* shows that this is not so; the phrase beginning with "negative criterion" is the subject of a new clause that has a meaning contrary to what Bridgewater asserts, a meaning that is hidden by the fact that Bridgewater has inserted a period and omitted what follows in the sentence the Appellate Division actually wrote. The full sentence, with Bridgewater's inserted period shown in brackets, reads as follows:

> "An inherently beneficial use 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 **[.inserted by Bridgewater, which omitted the remainder of the sentence]**" is not subject to the "enhanced quality of proof" required under *Medici v. BPR Co.,* 107 N.J. 1, 21–24, 526 A.2d 109 (1987).

As can be seen, the Appellate Division said only that the burden for an inherently beneficial use is significantly less than one which is not inherently beneficial. "Beneficial uses" do not have to satisfy the "enhanced quality of proof" that other uses must satisfy.

But, regardless the "quality of proof" required, the burden remains. It could not be otherwise—and the *Salt & Light Co.* decision could not have held otherwise without error—because the New Jersey legislature amended the Municipal Land Use Law to ensure that even "inherently beneficial" uses must meet the negative criteria. See pp. 50-51, above. Whether that burden is to prove the negative criteria beyond a reasonable doubt, or through clear and convincing evidence, or simply by a preponderance of the evidence, it is still the applicant's burden. And because of the enactment of Ordinance 11-03, it is a burden that Al Falah cannot meet.

But even if, by some means Bridgewater has yet to describe, Al Falah persuaded the ZBA that a variance should be granted, that would not end the matter. Any interested party may appeal a decision by the ZBA to grant a variance to the Township Council which speaks the final word for the Township. Bridgewater Municipal Code § 126-75; *see Comm. for a Rickel Alternative v. City of Linden*, 111 N.J. 192, 199-203, 543 A.2d 943, 947-49 (1988). The Council need not defer to a decision by the ZBA to grant a variance. Its review is *de novo*. *See* N.J. Stat. Ann. 40:55D-17; *Evesham Twp. Zoning Bd. of Adjustment v. Evesham Twp.*

Council, 86 N.J. 295, 300, 430 A.2d 922 (1981). The Council is deemed "perhaps uniquely qualified to determine whether granting the requested variance would substantially impair the ordinance or the master plan." *Rickel Alternative*, 111 N.J. at 203, 543 A.2d at 949. Bridgewater's Township Council enacted Ordinance 11-03 with Al Falah's proposed conversion of the Redwood Inn directly in its sights. It sponsored a litigation expert's report in this action asserting that a mosque at the Redwood Inn would compromise the "character" of the neighborhood. JA 3821 (PX103 at 17). The Council has five members. All five unanimously voted in favor of Ordinance 11-03 in 2011. JA 2653-57 (PX48). Four of those members still sit on the Council; the fifth has been elected mayor of Bridgewater. JA 3526-33 (Chow Supp. Dec. Ex. N).

There are no conditions the ZBA could require that would permit it to grant a variance—Bridgewater asserts that if Al Falah sought a variance the ZBA would have to "consider whether any potential detrimental effects resulting from use of the property could have been mitigated through the imposition of reasonable conditions." App. Br. 27. This assumes that Ordinance 11-03 sets a condition that can be

"mitigated" by imposing some unspecified different condition on a mosque at the Redwood Inn. But that assumption ignores what Ordinance 11-03 provides and also what was deliberately omitted from it. Ordinance 11-03 declared houses of worship impermissible based on a condition that cannot be changed: their location on prohibited roadways. The record shows that the Planning Board and the Council had no interest in considering other less absolute conditions such as set backs, bulk requirements, and noise and light controls. The ZBA is not permitted to usurp the Township Council's legislative function by ignoring entirely the requirement that houses of worship not be located in certain locations, including at the Redwood Inn. *See, e.g., Twp. of North Brunswick v. Zoning Bd. of Adjustment of Twp. of North Brunswick*, 378 N.J. Super.485, 490-91 (App. Div.).

Al Falah's claim is facial, not as-applied—Bridgewater attempts to buttress its ripeness argument by arguing that Al Falah really is asserting an as-applied claim rather than a facial claim governed by *County Concrete*. It does so in three ways. First, it states at page 12 of its brief that Al Falah asserted both as-applied and facial claims, but the cited portion of the Joint Appendix is an excerpt from a deposition

that says nothing about whether Al Falah's claims are as-applied or facial. Bridgewater also cites a statement in the District Court's decision but distorts its meaning. Bridgewater's brief says on its first page, "[T]he District Court specifically found the as applied challenge to Ordinance 11-03 to not yet be ripe because the Plaintiffs… had never sought a variance from the effect of the ordinance. (JA14 n.5)." (Emphasis added.) The cited footnote actually said, "To the extent Plaintiff alleges as-applied claims, these are not ripe for judicial review since the Plaintiff has not sought a variance." Because the statement is qualified by "to the extent," it has no practical effect on the analysis. Al Falah has consistently and unequivocally stated that all its claims are facial. Judge Shipp clearly understood that none of the claims were "as applied"; if he thought there were any, as he stated, he would have dismissed them. His decision did dismiss claims against the individual defendants, and a claim under the New Jersey Law Against Discrimination, on grounds having nothing to do with whether the claims were as applied or facial.

Second, Bridgewater argues that if Al Falah were truly asserting a facial challenge to Ordinance 11-03 it would have attempted to prove

that the Ordinance could not be lawfully applied under any circumstances to anyone, not just Al Falah. App. Br. 30. This principle is applied primarily in freedom of expression cases like *Brown v. City of Pittsburgh*, 586 F.3d 263 (3d Cir. 2009), or cases challenging a law as unconstitutionally vague or overbroad. *Id. County Concrete* did not mention it when it held that in the context of a zoning dispute a facial attack is one that challenges the mere existence of a zoning ordinance. In whatever other contexts the principle cited by Defendants might make sense, it makes no sense here. Ordinance 11-03 applies to entities such as country clubs, outdoor recreation facilities, and schools that are not entitled to the protection of RLUIPA from the imposition of "substantial burdens" via land use regulation. Whether some religious entity that did not have an application pending before the Planning Board and was not in the Township's cross-hairs would have a claim under RLUIPA or the other statutory and constitutional provisions pled by Al Falah is irrelevant to Al Falah's case.

Finally, Bridgewater argues that the District Court in effect treated Al Falah's claim as an as-applied claim because it did not declare Ordinance 11-03 to be void. App. Br. 22. However, the District

Court found that Al Falah was likely to prevail on the merits of its claim that the Ordinance violated RLUIPA. That is all it was required to do on a motion for a preliminary injunction. The scope of relief to be entered on final judgment remains open.

The ZBA could not avoid consideration of Ordinance 11-03— Bridgewater twice cites *House of Fire Christian Church v. Zoning Bd. of Adjustment of Clifton*, 379 N.J. Super. 526 (App. Div. 2005), as support for its ripeness argument, but the case is inapposite. The *House of Fire* plaintiff knew when it purchased its property that variance relief would be required for the intended use, which would deviate from long-standing conditions concerning minimum lot size and width. The plaintiff applied to the ZBA for a variance. While the ZBA proceedings were pending, the municipality amended its zoning ordinance to impose additional conditions relating to setbacks and parking. That amendment (but not the pre-existing law that required plaintiff to seek a variance) was alleged to violate RLUIPA. The Appellate Division found the RLUIPA claim to be unripe. But in that situation the Clifton ZBA could have denied a variance without consideration of the allegedly wrongful amendment because a variance was required under the pre-

amendment law that was not alleged to violate RLUIPA. In the present case, Bridgewater's ZBA could not decide a variance application by Al Falah without reference to Ordinance 11-03.

II. Al Falah's Claim That Ordinance 11-03 Violates RLUIPA's "Substantial Burden" Provision Is Likely To Succeed on the Merits

The District Court considered probability of success only as to Al Falah's claim under RLUIPA's "substantial burden" section.[11] JA 45-47 (9/30 Memorandum Opinion at 41-43). That section provides in pertinent part:

> (a) Substantial burdens
>
> (1) General rule
>
> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a compelling governmental interest; and

[11] The "substantial burden" claim was alone sufficient to support the preliminary injunction sought, so the District Court did not address whether Al Falah's claims under other sections of RLUIPA, as well as the federal and state constitutions, are likely to succeed. Those claims remain pending.

(B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1).

The statute does not define "substantial burden." Courts have taken a common-sense approach to defining it.[12] They have held that "substantial burden" in religious land use cases is to be interpreted according to "its ordinary or natural meaning." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226 (11th Cir. 2004). "Substantial," when used as an adjective, is defined in *Webster's Third New International Dictionary* 2280 (1976) to mean that something has "substance," is "not imaginary or illusive," is "real," or is "of moment" or "important." *Black's Law Dictionary* 1280 (5th ed. 1979) defines the term "substantial" as something "of real worth [or] importance," "belonging to substance," "actually existing," "real,""not seeming or imaginary," "not illusive," "something worthwhile as distinguished from something without value or merely nominal."

[12] This Court has decided only one RLUIPA "substantial burden" case involving land use regulation. That decision was not published in the Federal Reporter. It was written "for the parties" with the caveat that "we do not undertake in this opinion to clarify the state of the law in this area." *Lighthouse Institute for Evangelism Inc. v. City of Long Branch*, 100 F. App'x 70, 73, 77 n.5 (3d Cir. 2004).

The burden imposed by the denial of a congregation's application for rezoning or a special use permit is "substantial" if it has "*something more than an incidental effect* … [or] *place[s] more than an inconvenience on*" a "religious exercise." *Midrash* at 1227 (emphasis added); *Smith v. Allen*, 502 F.3d 1255, 1277 (11th Cir. 2007) ("To constitute a substantial burden under RLUIPA, the governmental action must *significantly hamper* one's religious practice.") (emphasis added). Even "pressure that tends to force adherents to forego religious precepts" by, for example, conditioning a special use permit on a congregation's agreement to forego expansion of a church, is sufficient to satisfy the "substantial burden" test in RLUIPA under the Eleventh Circuit's decision in *Midrash.* 366 F.3d at 1227. The courts recognize that "a burden need not be found insuperable to be held substantial." *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007).

Deciding what is or is not a substantial burden inevitably will be a case-specific factual inquiry. But three general principles relevant to this case can be discerned from the reported decisions, and each favors

the District Court's determination that Al Falah's claim is likely to succeed.

First, the courts look to whether there is an existing or readily available alternative facility in the community that serves the plaintiffs religious needs. *Lighthouse*, 100 F. App'x at 77; *Int'l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059,1069 (9th Cir. 2011) (fact issue on availability of alternatives precluded summary judgment on substantial burden claim); *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 361 (7th Cir. 2003) ("CLUB") (no substantial burden where plaintiffs had "successfully located within Chicago's city limits"); *Albanian Associated Fund v. Twp. of Wayne*, 2007 WL 2904194, at *10 (D. N.J. Oct. 1, 2007) (regulation may be a substantial burden despite plaintiff having existing but inadequate facility). Here, as noted at page 38, above, the District Court addressed this issue and credited Al Falah's showing that no feasible alternative is available in Bridgewater.

Second, a land use regulation likely will be held to be a "substantial burden" where, as here, the regulation was imposed with the plaintiff's proposed use in mind and changed the rules after the

plaintiff purchased its property and/or applied for a use permit. This makes sense because the "substantial burden" provision of RLUIPA "backstops the explicit prohibition of religious discrimination in the later section of the Act, much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination." *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005). *See Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203,1226 (C.D. Cal. 2002) (exercise of eminent domain to prevent proposed religious use); *accord, Albanian Associated Fund,* 2007 WL 2904194, at *10, *supra* (similar).

Third, a regulation will not be a "substantial burden" if it requires no more than the filing of a routine application. *See San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004) (rejecting argument that requirement of filing complete application for zoning amendment would impose substantial burden where "it [was] not at all apparent that its re-zoning application will be denied"); *CLUB*, 342 F.3d at 725-26, *supra*. Here, however, the problem is not that Ordinance 11-03 has the effect of requiring a variance application; the

problem is that it dooms any such variance application. See pp. 48-54, above.

The District Court, examining these relevant factors, concluded that Al Falah is likely to succeed in establishing that Ordinance 11-03 constitutes a "substantial burden." That decision was correct under the authorities described above.

A claim under RLUIPA's "substantial burden" provision requires proof of additional elements; they are undisputed here. Bridgewater does not dispute that its enactment of Ordinance 11-03 was a "land use regulation." Al Falah's proposed renovation of the Redwood Inn is "religious exercise," which includes "use, building, or conversion of real property for the purpose of religious exercise." 42 U.S.C. § 2000cc-5(7)(B). RLUIPA limits the scope of its "substantial burden" remedy to three alternative specified conditions. Al Falah demonstrated, and Bridgewater did not dispute, that it satisfies two: the Ordinance affects interstate commerce by precluding a construction project, and is part of a system of "individualized assessments" of proposed uses of property. *Id.* at § 2000cc(a)(2)(B)-(C); *see Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 181 (2d Cir. 1996) (commerce). Bridgewater also has not

challenged the District Court's finding that Bridgewater is unlikely to succeed in proving the statutory defense that the Ordinance furthered a compelling governmental interest by the least restrictive means available.[13] JA 47-48 (Opinion 43-44). As noted at page 34, above, Bridgewater ignored the suggestions in its own Planner's Reexamination Report that measures other than a restriction on location of houses of worship be studied.

III. The District Court Did Not Abuse Its Discretion

Bridgewater acknowledges that the standard of review for a preliminary injunction is abuse of discretion but claims that the District Court abused its discretion here. That argument should be rejected.

No further evidentiary hearing was required—Bridgewater argues for the first time on appeal that the District Court should have held an evidentiary hearing to test the credibility of unspecified witnesses. App. Br. 33-34. This argument was not raised below, where Bridgewater did not request any opportunity to present evidence that the District Court

[13] Bridgewater argues that the District Court abused its discretion by giving insufficient weight to the "good zoning" values Ordinance 11-03 supposedly served. These arguments lack merit (see pages 72-73, below), but even if accepted fall short of supporting the statutory defense.

failed to provide. As noted at page 6 above, Bridgewater had an opportunity to depose all witnesses whose declarations Al Falah relied upon. It did depose all but two, and made free use of those depositions in opposing Al Falah's motion. After receiving the voluminous evidence now contained in the joint appendix for this appeal, the District Court heard counsel in an oral argument that fills a 71-page transcript. The only thing short of a full-dress trial that the District Court omitted was hearing live oral testimony. The authorities Bridgewater cites do not hold, or even suggest, that failure to insist on oral testimony is an abuse of discretion in such a case.

The findings on irreparable injury and balance of harms are well supported by the record—Al Falah documented the harm it suffers from not having a religious home. See pp. 35-37, above.

Bridgewater disputes none of this. It has three things to say on irreparable injury and balance of harms, and all are misleading. First, it argues that the Redwood Inn has no intrinsic religious significance and Al Falah could establish a mosque somewhere else. But under Ordinance 11-03, "Vast portions of the Township are now excluded as possible locations for houses of worship and the three other uses." JA

3555 (Rodriguez [plaintiff expert] report at 17). Bridgewater tried and failed to demonstrate that a feasible alternative site could be found on permitted roadways. See pp. 37-38, above.

Second, Bridgewater says that Al Falah objects to "being required to file an application" for a variance and the "delay" that will cause. App. Br. 45. This is a straw man. Al Falah has no objection to filing applications as such; it filed one with the Planning Board. Its objection to filing a variance application with the ZBA is that the application would be a doomed mission, as demonstrated above and as the District Court found.

As Bridgewater well knew when it enacted Ordinance 11-03, the variance process can be extraordinarily time consuming for a disfavored minority applicant. The Hindu Temple in Bridgewater filed an application for a variance to expand its facility in 2004. It was required to seek that variance by Bridgewater's existing zoning law—not a new ordinance specifically aimed at the Hindu Temple as Ordinance 11-03 was aimed at Al Falah. That variance application failed, and it took five years, and lawsuits in state and federal court under RLUIPA and other legal theories before the Bridgewater finally settled the matter. JA 2003

(settlement resolution). The Hindu Temple was an established and sizable religious community. Perhaps it could survive that expensive process. But Al Falah is a relatively small religious community with limited funds struggling to get started in a hostile environment. It cannot so easily survive this process, as the Defendants clearly understood. After the conclusion of one of the public hearings on Ordinance 11-03, a member of the Township Council tried to persuade one of the plaintiffs to cease in their efforts to renovate the Redwood Inn as a mosque and seek another property elsewhere. As the plaintiff described it,

> Ms. Henderson-Rose also strongly urged that Al Falah seek to build its mosque on a different property, and, in effect, drop its application to build on the old Redwood Inn property. She said, in substance, that even if Al Falah were granted a variance to build a mosque on the old Redwood Inn property, our existence there would be very difficult. Al Falah would be heavily scrutinized, and any time we wanted to make a change to our property, the struggle to attain additional variances would be very onerous for us.

SJA 2 (Wallis 6/16/11 Dec. ¶ 7).

Finally, Bridgewater argues that the District Court gave inadequate weight to Bridgewater's control over its zoning. Insofar as

the decision in this case may curtail Bridgewater's discretion to zone all of its land as it pleases all of the time, it does so because Congress, in RLUIPA, decreed that some things are more important. The remedy granted has been appropriately limited. The District Court granted a *preliminary* injunction affecting one owner and one property. The final relief to be granted even as to that property remains to be determined below, and Bridgewater's control over land use elsewhere in the Township is unaffected.

CONCLUSION

The order of the District Court entering a preliminary injunction should be affirmed.

Dated: February 20, 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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CERTIFICATE OF IDENTICALNESS

I certify that the text of the electronic brief is identical to the paper copies.

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1. This brief contains 14,662 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and a motion has been filed herewith for leave to file a brief in excess of the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 20th day of February, 2014, I caused this Brief of the Appellees to be filed electronically with the Clerk of this Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 20th day of February, 2014, I sent the required number of bound copies of this Brief to the Clerk of this Court and one copy of the Brief to Counsel for Appellants at the above listed addresses, via Federal Express.

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