IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NO. 11-2397

AL FALAH CENTER, et al.,	:	
	:	
Plaintiffs,	:	TRANSCRIPT OF PROCEEDINGS
	:	
-vs-	:	
	:	MOTION
TOWNSHIP OF BRIDGEWATER, Et al.,	:	
	:	
Defendants.	:	
	:	

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Trenton, New Jersey
June 29, 2011

B E F O R E:

THE HONORABLE JOEL A. PISANO
UNITED STATES DISTRICT COURT JUDGE

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above-entitled proceedings.

S/Joanne M. Caruso, CSR, CRR
Official Court Reporter
(908)334-2472

A P P E A R A N C E S:

ARNOLD & PORTER
BY: PETER L. ZIMROTH, ESQ.,
BRUCE R. KELLY, ESQ.,
KELLEY A. DZIUBEK, ESQ.,
And
ASIAN AMERICAN LEGAL DEFENSE & EDUCATION FUND
BY: KENNETH KIMERLING, ESQ.,
For the Plaintiffs.

PARKER MC CAY
BY: HOWARD D. COHEN, ESQ.,
For Township of Bridgewater, Mayor Flannery and
Town Council and Council Members.

VOGEL, CHAIT, COLLINS AND SCHNEIDER
BY: THOMAS F. COLLINS, JR., ESQ.,
For Bridgewater Planning Board and its Members.

June 29, 2011

THE CLERK: All rise.

THE COURT: Thanks, have a seat, everybody.

We've got some materials here. This the Al Falah Center v. Bridgewater.

I met you folks, but the record needs your appearances. If you don't mind, go right ahead.

MR. ZIMROTH: Peter Zimroth for Al Falah Center.

MR. KELLY: Bruce Kelly for Al Falah Center.

MR. MORGAN: Ben Morgan for Al Falah.

MR. COHEN: Howard D. Cohen of Parker McCay, attorneys for the Township of Bridgewater, the Mayor of the Township of Bridgewater in her official capacity, Township Council of the Township of Bridgewater and Township Council members in their official capacity.

MR. COLLINS: Thomas T. Collins in Morristown, New Jersey, for the defendants Bridgewater Township Planning Board and its members in their official capacity.

THE COURT: All right.

Miss Handler is here. Do you have an interest in the case?

MS. HANDLER: Just observing, your Honor.

THE COURT: Mr. McNamara.

MR. MC NAMARA: Just observing.

THE COURT: Nice to see you, but you do have an

interest. You represent a group of objectors to the land use case, correct?

MR. MC NAMARA: I represent a homeowner, single homeowner.

THE COURT: I'm sorry, not a group. You have been here before, you're welcome.

We've had a number of conferences and meetings on the case, but we're here in connection with a limited issue. So the record is clear on the case, we have the case commenced with the filing of a complaint on April 26, 2011.

There was then an amended complaint, May 18, 2011. The amended complaint seeks various forms of relief. It is a claim brought under various provisions of federal and state law. There are Section 1983 civil rights claims based upon free exercise of religion, equal protection, due process and there are also federal claims brought under the RLUIPA is what it's called, Religious Land Use and Institutionalized Persons Act, and there are state law claims brought under the state Constitution, under the State Law Against Discrimination and there are claims asserting unlawful exercise of the New Jersey Land Use Statute.

There is also an application for injunctive relief. The plaintiffs are seeking a declaration that the amended zoning ordinance that's called into question here was enacted unlawfully; that the ordinance on its face violates the

federal statute and land use statutes. There is an application for injunctive relief against the Planning Board requiring the Planning Board to hear the land use application as it was originally filed and not under the newly-enacted zoning ordinance, which is the ordinance that's being challenged.

There is a brief in support of the plaintiffs' motion for preliminary injunction that came in with the amended complaint on May 18th; there's a brief of the defendants in opposition to the application for injunctive relief and there is also a cross-motion for dismissal. There is a memorandum by the plaintiffs in opposition to the motion to dismiss and in reply to the injunction issue and then finally, there is the defendants' reply brief in support of their cross-motion to dismiss.

Now, a lot of other material has come here, not only with the injunction application, but also in connection with these proceedings. Particularly, there is an affidavit of counsel. This is an affidavit of Mr. Cohen, which attaches a number of exhibits, transcripts, copies of the ordinance, some of the things that are actually duplicative of some of the materials that I've already read.

There's a declaration of Scarlett Doyle, who is the professional planner and she is the municipal planner for the Township of Bridgewater, and also I have a declaration of Mr.

Forsythe, who is a professional engineer and his declaration attaches a copy of the -- it's a copy of a map of the Township of Bridgewater which depicts various roads, buildings with particular uses, et cetera.

I have all of that. I've also considered the statutes, not only the New Jersey Land Use Statutes, but I've also considered the federal statute, the Religious Land Use and Institutionalized Persons Act.

Now, we're here to discuss the motion to dismiss and the motion to dismiss is filed on behalf of the defendants. They're essentially two prongs to the motion. The first is that the plaintiffs' complaint ought to be dismissed because the claims asserted therein are not ripe for federal court adjudication.

Then there is an aspect of the motion which seeks the dismissal against the individuals who are named in their official capacity.

It's my purpose to address those motions here today and I think I gave you notice of that when you were here a couple of weeks ago.

Have I left anything out procedurally? Is there anything by way of procedure that you want to advise me of?

MR. ZIMROTH: Only, your Honor, that we had also submitted affidavits and exhibits and so on. You didn't mention it in your oral recitation, but they're all in the

record.

THE COURT: They're all in the record. I've seen countless declarations and affidavits and I think in previous conferences I've demonstrated that I have, indeed, read, I think I've read all of them. If I haven't read all of them, I apologize, but I believe I read everything that has been sent in.

There you have it. I see Miss Tubman in there. I read some things that she did and Miss Dziubek is here. Did I pronounce your name right?

MISS DZIUBEK: It's Dziubek, your Honor.

THE COURT: Miss Dziubek, I'm sorry. You have been here before as well.

Mr. Cohen, I'll be happy to hear you.

MR. COHEN: Thank you, Judge.

Understanding that the Court has read everything, if you'll permit, I would like to try to collapse our position, but if you'll indulge me, I do have some area to cover.

As your Honor identified early on, the application today is confined to the application to dismiss based upon ripeness. Simply put, as we sit here today, The Township submits the plaintiffs have not filed the requisite application for a final determination by the one board that has jurisdiction over this matter, The Township Board of Adjustment, as that board is the only board under the

Municipal Land Use Law that has the power to hear and decide variance applications.

The failure to and refusal to make that application on the part of the plaintiffs, we submit, is fatal to their complaint, even as amended. While there are both federal and state constitutional claims, claims with respect to violations of federal and state statutes and allegations of violations of local land use principles, we submit that none of that reaches the Court at this juncture because the case simply is not ripe.

There is not a scintilla of evidence in relation to the voluminous submissions by the plaintiffs that demonstrate, as we sit here today, that The Township violated any constitutional right under federal law -- excuse me, any federal constitutional right, any federal statute or, indeed, any state or local land use principle which I will address momentarily.

THE COURT: Excuse me. Forgive me for interrupting you, but this is important.

The motion to dismiss is brought on ripeness grounds. This is not a motion brought under Rule 12(b)(6).

MR. COHEN: I understand that, Judge.

There are allegations in the opposing papers to the motion to dismiss that this is not an as-applied attack on the ordinance, that it is a facial attack. They use as the

centerpiece to their argument, the *County Concrete* Third Circuit decision suggesting that that decision is dispositive. We respectfully disagree.

In the *County Concrete* case, first, there was, in fact, a facial challenge. We have identified to the Court by going through the various allegations and counts in the complaint, indeed, as amended, that nowhere to be found in those specific counts is there a facial challenge. To the contrary, we submit that one scrutinizes the first amended complaint, the conclusion that should be reached, respectfully, is that this is an as-applied attack.

In the case of *County Concrete*, not only was there a facial attack, but in the case of *County Concrete*, there was the presence of overt animus, discrimination, including defamation with allegations bordering on financial extortion by the township's agents. None of those facts in this case, your Honor, exist. There has been no submission by the plaintiffs to support the baseless allegation that this is a facial challenge, much less even pleading a facial challenge in the first amended complaint.

We have identified to your Honor in our reply brief, *Brown v. City of Pittsburgh*, a Third Circuit decision decided in 2009, which indicates the prerequisites for having even a viable facial challenge to an ordinance and a viable facial challenge would require that there be some showing of no set

of circumstances, no set of circumstances existing under which the act complained of, in this case Ordinance 11-03, could be valid.

It requires that the ordinance in every conceivable set of circumstances would be unconstitutional. It requires that the ordinance provide a prohibition against a broad range of protected conduct. That is not the case with respect to Ordinance 11-03.

So we submit that the plaintiffs' reliance upon *County Concrete* as the centerpiece to their avoiding the ripeness issues that's before the Court is not an argument that passes muster when one examines the law and one examines the terms -- the claims and the counts in the first amended complaint.

I am not going to recite each and every portion of the first amended complaint to which I made reference, it's identified in our reply brief. I do not want to take time of the Court because I know the Court has reviewed all of that very carefully.

So that leaves the plaintiffs, as we submit, with an as-applied set of claims. We know that under the governing federal jurisprudence, with respect to ripeness, both under cases decided by the United States Supreme Court starting with *Williamson* and going down to the Third Circuit decisions including the most recent decision, unreported, but a decision

arising out of this district, Chief Judge Brown's decision in the *Roosevelt* case and, indeed, the *Taylor Investment* case, that all of the cases stand for the proposition that until and unless there has been a final determination, until and unless there has been a final determination by a local board with respect to the application at issue, the matter is simply not ripe for a federal court to invoke jurisdiction.

Now, the policy basis with respect to ripeness, as first announced by the United States Supreme Court and, indeed, refined in the *Murphy* case coming out of the Second Circuit cited with approval by the Third Circuit in the *Roosevelt* case, I think respectfully for your Honor's consideration, is instructive.

Because *Murphy* explained very clearly what the ripeness doctrine was all about, and it said very clearly, one, ripeness, by getting a final determination for a district court to consider an application for relief under federal law, that getting that local determination first, one, aids in the development of a full record; two, provides the Court with knowledge as to how a regulation will be applied to a particular property; three, may obviate the need for the Court to decide the constitutional dispute if the local authority provides the relief sought in the terms of the final application and four, that it demonstrates the judiciary's appreciation that local land use disputes are matters

distinctly and uniquely of local concern and suited for local resolution.

Now, the Third Circuit made one other observation in the *Roosevelt* case affirming Chief Judge Brown's decision and they said, and if I may quote because they're quoting from *Sameric Corporation of Delaware v. The City of Philadelphia*; a Third Circuit reported decision in 1998, and there, *Sameric* expressly stated, "Finally, we have stressed the importance of a finality requirement and our reluctance to allow the courts to become super land use boards of appeal. Land use decisions concern a variety of interests and persons and local authorities are in a better position than the courts to assess the burdens and benefits of those varying interests."

Now, here, as I stated just a moment ago, the plaintiffs seek to skirt ripeness by citing *County Concrete*. I already addressed *County Concrete*. I'm not going to repeat what I said, but in a further effort to skirt ripeness, the plaintiffs try to invoke the exceptions to the ripeness doctrine.

They argue -- they assert in their first amended complaint, well, to seek an application before the Board of Adjustment would be an exercise in futility. We submit there's not a shred of evidence, there is nothing that has been shown in the extensive submissions that would show that making such an application before the Board of Adjustment

would be an exercise in futility. Indeed, we know that under the Municipal Land Use Law, the Board of Adjustment is a separate statutory entity that is subject expressly to 40:55D-70d in relation to its jurisdictional responsibilities to assess and adjudicate a land use application for variance relief.

We know it is a quasi-judicial body. We know in this instance that there are no members, there are no members of a Board of Adjustment who are members of the Planning Board, there are no members of the Board of Adjustment who are members of the Mayors, there are no members of the Board of Adjustment who are part of the Township Council. They are independent sitting individuals who have a responsibility under law to hear and decide such an application if made according to law.

And we have the added feature under New Jersey law decided by the Supreme Court in 1992, *Sica v. The Board of Adjustment of the Township of Wall*, 127 N.J. 152, that says very explicitly in the case of an inherently-beneficial use, which is exactly what we have here, we have a house of worship, which is by definition under New Jersey law an inherently-beneficial use, they need not, if they make application to the Board of Adjustment, make application -- excuse me, prove positive criteria because that is implied as a matter of law as a house of worship, as an

inherently-beneficial use. Yes, they have to address the issue of negative criteria, but significantly under *Sica*, significantly under *Sica* there is a four-part test that the Board of Adjustment is obligated to employ when they decide an application for variance relief. That is tempering influence with respect to the very kind of application that this plaintiff, if made, needs to be considered by the Board. What is that?

The Board is obligated under *Sica*, one, to identify the public interest; two, to identify the detrimental effects from the granting of the variance; three, to determine whether the Board can reduce, can reduce any detrimental effects by imposing reasonable conditions and four, to weigh the public interest against the public detriment and determine whether, on balance, the grant of the variance would cause substantial detriment to the public good.

Now, we submit respectfully, your Honor, the plaintiff cannot, they simply cannot at this juncture argue with any factual basis that to pursue an application before the Board of Adjustment would be an act of futily, one of the exceptions for the ripeness argument.

Let me turn to the second exception under the ripeness doctrine, the discrimination exception. The plaintiffs argue, they argue that, well, first the plaintiffs concede there is no overt and no direct evidence of

discrimination by the Township or any of those acting on behalf of the Township.

Secondly, they argue, well, we should infer discrimination, we should infer discrimination and I'll address the factual context of that allegation, but they cite in their brief in support of their motion for injunctive relief, a number of cases, none of which on this issue, on this issue do anything to support their position with respect to discrimination.

They cite *Sts. Constantine and Helen Greek Orthodox Church*, where there was subtle forms of discrimination in the grant or denial of the zoning variance without procedural safeguards. That's not our case. They cite, and forgive me, it's hard to pronounce, *Adhi Parasakthi Charitable, Medical and Cultural Society of North America*, where there was an inference of discrimination to be drawn from the disparities, from the disparities and conditional use permit process where a Hindu group was required to go through a lengthy and expensive application and others were not. There is no showing of that here.

They cite *Albanian Associated Fund*, which also deals with an inference of discrimination against a Muslim group to be joined from the town's more favorable actions in comparable applications toward other religious and non-religious land owners. Not a scintilla of factual submission to suggest that

any of those cases, any of those cases are parallel to the case that we have before this Court.

Then there's an argument by the plaintiffs, well, we should infer discrimination because of the timing, because of the timing of the acts undertaken by the Township. If I may, I would like to address that.

For starters, for starters, as a matter of law, nothing that the Township did violated any state law. We know that the Reexamination Report was adopted in accordance with NJSA 40:55D-89. We know that the ordinance, the implementing ordinance was adopted in accordance with NJSA 40:55D-62(a). We know that preceding the adoption of that ordinance, there was a Reexamination Report which identified the zoning purposes, the planning rational for the underlying rational for this ordinance, i.e., that this ordinance was intended to address and control the impact of the assemblages on strong residential character.

We also have in the record, even though the record in terms of the legislative acts of the Township are not the record in the context of a challenge to an ordinance, which I will address in just a moment, but just in the record we know we have a report by the Township planner, March 2, 2011, Exhibit I to my affidavit, Reexamination Report being Exhibit D to my affidavit, but the Exhibit I report by Miss Doyle goes on to not only recite the rational for the ordinance then

under review by the Township Council before the public hearing, but it also cites notably in that report a recognized treatise in New Jersey Land Use Practice, Moskowitz and Lindbloom which very clearly, very clearly identifies the very issue that this ordinance was designed to address and that is the impact of an assemblage on strong residential character and, indeed, suggest that among the methods to be employed to address that type of issue is to identify means by which to minimize impact by looking to locate these types of uses on appropriate roads with frontages, which is, indeed, what municipal arterialroad network identified in the ordinance was all about.

Now, having said that, the plaintiffs, in response to the motion to dismiss, in response to the Doyle report of March 2, in response to the Reexamination Report, they proffer, they proffer a report of a planning consultant, Mr. Rodriguez and they say, well, here's an example, here's what shows that everything the town did with respect to planning rational is simply without foundation.

Well, I would respectfully submit, at this juncture, in the context of ripeness, we're not at the stage of whether we have an ordinance that is now the subject of proceedings by the Court. We have a threshold question of whether the Court should even invoke its jurisdiction.

But we do know, we do know that if, as and when a

case does become ripe, then under the *Hirth* decision and under the *Sartoga* decision referenced in our papers, we do know that before such an adjudication can be made with respect to the validity or invalidity of an ordinance, that there needs to be discovery, there needs to be expert reports, there needs to be an evidentiary hearing before an adjudication is made. We're not at that stage, respectfully, your Honor.

THE COURT: I don't think anybody suggests we are, do we?

MR. ZIMROTH: No, your Honor, we're here to argue the motion to dismiss the complaint.

MR. COHEN: I now want to address a case that the plaintiffs lay heavy emphasis on and that's the *Riya Finnegan* case, a case decided by the New Jersey Supreme Court. First of all, it's a state law case.

Second, it did not involve a federal ripeness issue.

Third, the record below is one where there were determinations by both Planning Board and Zoning Board.

Fourth, after the Planning Board and Zoning Board addressed those issues, then the residents, the residents in town appeared before the Township Council and said, no, this case, this particular applicant which sought retail and office use and the then C-1 zone, this applicant should really -- this property should really be in the office professional district, the OP district.

So the council sends the case over to the Planning Board -- excuse me, sends the issue over to the Planning Board, the Planning Board looks at it and turns around and makes a recommendation for the adoption of an ordinance and the ordinance -- excuse, then the zoning is changed from C-1 to OP.

Now, significantly in the *Riya* case, in the *Riya* case the trial court invalidated the ordinance on three grounds. One, that there simply was no record made by any testimony by experts before the council, before the ordinance was adopted; second, that the ordinance was arbitrary and capricious and third, it was inverse spot zoning.

The Appellate Division reversed the trial court, but when the Supreme Court reversed the Appellate Division, when Justice Hoens wrote the decision, she pointedly said in her decision, we're not here to address and we don't agree with the trial court with respect to whether it's incumbent upon a municipality at the time of adoption of an ordinance, exercising its legislative function, that it's incumbent to have testimony of experts and reports and the like to support the ordinance before its adoption.

It did find an instance of capriciousness, it did find inverse spot zoning, but even when one looks at the facts of *Riya Finnegan*, they are markedly different from this case.

One, *Riya Finnegan* involved the Route 27 corridor, a

corridor that was already developed, a corridor that already had uses of the type that this ordinance that was attacked in *Riya Finnegan* now was changing as the Supreme Court noted suddenly.

Secondly, there were no similar uses in the case of *Riya Finnegan*. That's not the case with the Redwood Inn. The Redwood Inn site is located in a section of the municipality where there is no proximate uses similar to the use that is proposed for the applicant here. It's evident from looking at the map proposed by -- attached to the Forsythe declaration, but there's another point to be distinguished in terms of *Riya Finnegan*.

Absent from *Riya Finnegan*, but present in this case, was the Reexamination Report, the March 2 report and the Moskowitz references. So it's not an instance where stuff was made up, and indeed, even with respect to the seed argument in terms of what occurred, and I have more to say on that issue, when one looks at the rational, it's not as though Miss Doyle made stuff up. She had the Moskowitz treatise which expressly deals with the issue that this ordinance is intended to address.

THE COURT: While you mention Miss Doyle's affidavit, I think you misspoke. You said it was March 2nd. Did you mean June 2nd?

MR. COHEN: The declaration was signed on June 2. I

meant her report to Township Council. If I misstated myself, I apologize. The March 2 record to the Township Council I believe is attached to my affidavit.

THE COURT: Yes, it is.

MR. COHEN: Thank you.

Now, there's another significant point on the issue of timing. Plaintiffs argue, well, it was a race to the finish line; that because the time of decision rule which had been the law of the state, indeed, as I submit -- excuse me, as The Township submits under the law that governs the consideration of the ripeness issue, and the *Manalapan* decision, even if, even if an ordinance is adopted in the face of a then pending application, the law of the State of New Jersey under *Manalapan Builders* states that that is permissible so long as there is a legitimate zoning purpose associated with the ordinance being adopted.

Yes, the state legislature adopted an amendment to the law which is now under 40:55D-10.5, which converts the time of decision to the time of application. However, when the legislature adopted that statute, they intentionally suspended the operative effect of that statute to one year from the date of its adoption, meaning May 5, 2011. So that the law, the law that this Court, we respectfully submit, should be applying in the context of this ripeness application is what the law was at the time of the events in question, did

the Township violate any law and we submit it did not; that *Manalapan* controls and The Township had legitimate zoning purposes associated with what it did.

THE COURT: Excuse me a minute.

That raises an interesting question to me, is whether or not that argument is something that should be kept for a later date? Does that argument not -- is that argument not more relevant to the arguments against the injunctive relief?

MR. COHEN: I would submit respectfully --

THE COURT: Because what they want is an injunction requiring the Planning Board to hear the case under the previous -- under the law at the time of the application.

MR. COHEN: I understand that, Judge.

THE COURT: That raises some other problems, that argument raises other problems but I don't know that that's particularly helpful in determining ripeness.

MR. COHEN: I wouldn't suggest as I'm standing here that that's dispositive on the issue of ripeness. It is an argument that I advance. I still remain cautiously optimistic that we will succeed on ripeness, but obviously that very issue that you identified is an issue that would be dealt with in the context of the application for injunctive relief should this Court hear it.

I want to also now talk about the issue of the land use categories that are covered by 11-03 because that also

goes to the issue of ripeness, it goes to the issue of discrimination.

The plaintiffs say, look, you targeted us. You targeted us and we're the only show in town, and I apologize for the use of that word, but it's illustrative. We're the only proposed use of the Redwood Inn that is now being impacted by 11-03. Well, in point of fact, that is simply not borne out by the record.

First, there are four categories of land use covered by 11-03. Schools, open air clubs, country clubs and houses of worship. We have identified in the map submitted with Mr. Forsythe's declaration that four houses of worship are now non-conforming under 11-03. We have identified five open air clubs that are now non-conforming under 11-03 and we have identified nine schools which are non-conforming under 11-03.

Now, if that's not enough, Judge, among those open air clubs is location number nine. Location number nine is the Jewish Community Center of Hunterdon and Warren Counties -- Somerset, Hunterdon and Warren Counties. The Jewish Community Center is located off Talamini Road, located as shown on the map. The Jewish Community Center is 13.5 acres. The Jewish Community Center has located on it a community center, cultural events, educational events, a nursery school, kindergarten, outdoor pool, has an indoor pool, baseball field, basketball courts, camp.

What doesn't it have? It does not have a house of worship.

If the Jewish Community Center were to at some point in time conclude that they would like to add to their campus the location -- excuse me, a house of worship like the applicant in this instance, Al Falah Center, Chughtai Foundation, they would, just like the Chughtai Foundation, be required under 11-03 to make application for a variance, so this is not an ordinance that was simply applied to one proposed use where they didn't have something erected, comprising a house of worship.

So to the extent they argue, well, the four houses of worship are rendered non-conforming, but that's not our case, we didn't even get a chance to get something in the ground.

I believe that's a parallel between this case and the *Roosevelt* case decided by Chief Judge Brown and affirmed by the Third Circuit. In the *Roosevelt* case, we had a Yeshiva that sought to use a synagogue building as a place of religious study, a boarding school. We had an instance after that when the municipality adopted an ordinance that said, one, you're not allowed to be there, but more importantly, it made provision for this particular use in what's called the R-40 Zone. This is all set out in Judge Brown's decision and in the Third Circuit's decision.

The Yeshiva refused to make application for variance

saying that, no, a house of study is a house of worship, they're one in the same and we are not required under the law to make application for variance. That matter was heard by Judge Brown and dismissed for lack of ripeness.

The Third Circuit, three-judge panel unanimously affirmed Judge Brown citing the very policies with respect to ripeness that I referenced to the Court early on in my argument.

The plaintiffs, and I will not belabor the point, but even the Rodriguez report, Judge, even if that was to be looked at and I recognize you're correct, it's not an issue to consider right now, but even the Rodriguez report, all it does is simply proffer something where there's a difference of planning opinion. That's not an issue to be addressed by the Court if, in fact, there is no ripeness basis to invoke -- there's a lack of ripeness and not a basis to invoke federal jurisdiction.

The Sarah Wallis declaration that was produced by plaintiffs also, respectfully, I believe is a non-starter.

THE COURT: Is that the one where she starts about a conversation with the Mayor?

MR. COHEN: Yes, with council person.

THE COURT: Right.

MR. COHEN: With council person Rose. I would respectfully submit there's nothing in that declaration, as it

stands now, that suggests the presence of religious animus or discrimination and, indeed, by way of offer of proof, obviously the -- by way of offer of prove, that is not an accurate depiction of what took place in those conversations.

Interestingly in the mass of documentation produced by the plaintiffs, not one document was submitted to show presence of discrimination. Indeed, on an informal basis, the plaintiffs sought production of thousands of e-mails that were exchanged between members of the public, e-mails between and among the members of the council and the Planning Board. Notably absent, and we produced it without prejudice, but we produced it, notably absent in any of the papers was there a single submission showing the presence of discrimination or animus on the part of the Township.

Whatever communications the public had, either at the Reexamination Report hearing or at the public hearing on the ordinance, those are not positions, whatever they may be, public expressing their First Amendment rights, that can be attributed to the Government and we cited case law to that proposition.

The plaintiffs in that application for injunctive relief, only to the extent it applies to the issue of ripeness, pitched to the Court, well, the world's going to come to an end in October because the contract is going to end. Well, first, significantly, the contract was never

produced. It was never produced to the Township prior to the application before the Planning Board, during the application before the Planning Board, during the reexamination process or at the ordinance stage.

Now, in point of fact, The Township doesn't know about the contract, they don't know what its terms are.

THE COURT: I have to tell you, I understand this point, it's something you raised before but I don't understand how it relates to what we're doing here today. I think we are necessarily -- we may necessarily get to that as we may necessarily get to a lot of stuff that you have been talking about here today, but really what we need to determine is whether this is a facial challenge against the ordinance or not.

MR. COHEN: Yes, your Honor, correct. You're absolutely correct.

My last point, and you've indulged me so I want to give Mr. Zimroth fair time, my last point deals with the issue of the ripeness issue in the context of the Zoning Board.

We have made known to the Court that the Zoning Board has made available no less than eight days on which the application, if filed, can be heard. So it's not an instance where the plaintiffs are without a remedy. They just say, well, we got a claim, it's ripe and we don't need to go to the Board of Adjustment.

Thank you.

THE COURT: Look, you've done a very good job of articulating a lot of what this case is about and I appreciate it. I would like you to focus on one thing additionally, however.

First of all, the argument the plaintiffs make is that while there may not be direct evidence of discrimination by members of the Planning Board or the Town Council or the Mayor or any Township agents, that it is permissible to take into the mix the circumstances under which the ordinance was enacted. I don't think you'll disagree with that as a general statement?

MR. COHEN: No, I don't.

THE COURT: Circumstantially the plaintiff has made some allegations and that's why it's important to note that this is not a 12(b)(6) motion, so that being said, we can get into some of the particulars of that, but I dare say that that's the kind of a debate that is more appropriate for either an argument on the merits or summary judgment motion or some other time, but in the plaintiffs' reply brief, this is the one filed on June 17th, pages six and seven, in discussing the *County Concrete* case, the plaintiffs' argument goes thusly: When the plaintiffs' claim is that the enactment of an ordinance is unlawful, that is to say the municipal officials have taken official action in order to enact an

ordinance, then a dispute about what they did, i.e., passing the ordinance, is, therefore, ripe for adjudication. They say in these circumstances, it would be futile to apply to the Zoning Board not because the Board is bias, but because it cannot change the ordinance that is being challenged.

Now, why isn't that an argument that has some force on the question of ripeness?

By the way, I want you to know, what we have here, you're entirely correct in framing the legal issues, there are two lines of cases that need to be put up against one another. One is the ripeness doctrine line of cases, *Williamson*, *Taylor, Roosevelt*, et cetera and the exceptions to the ripeness line of cases, namely *County Concrete*, *Assisted Living Associates*, *Riggs*, *Easter Seal Society* and a recent memorandum opinion in *Lapid Ventures v. Piscataway*. So there are two lines of cases that need to be compared.

That's really what we're focusing on here, so the point is taking the plaintiffs' argument in this brief on pages six and seven, I've read what's on the bottom of page six onto page seven. Bottom of page seven the argument is probably applying *County Concrete's* distinction between as applied and facial challenges requires answering only two questions: One, what governmental body's actions is being challenged is unlawful and, two, has the body completed its work on the action alleged to be unlawful?

That appears to be what they're doing here and I ask you, what do you have to say about that in terms of ripeness, putting aside all of your comments on the merits and you make a lot of sense. These are arguments that you've made in your papers and I fully expect to have articulated in a subsequent proceeding, but what is it that you say in contrast to these arguments that the plaintiff makes in urging the Court to conclude that *County Concrete* applies here?

MR. COHEN: I think the response to that is as follows, Judge: County Concrete involved a facial challenge.

THE COURT: Why doesn't this? What's different about it?

MR. COHEN: When one looks --

THE COURT: *County Concrete* they have a little extra. There's animosity between the town fathers and the applicant, overtly. We don't have that here, admittedly, but there are circumstances from which it is argued, the Court can infer some discriminatory affect, if not intent.

MR. COHEN: But, Judge, that would completely, I would submit, ignore *Manalapan* because that's the issue that is being identified. They argue under *County Concrete* that -- they argue in conclusory form, well, what the town did was unlawful and they argue that, well, if we didn't say explicitly, we meant facially. Let's assume arguendo that's what they meant.

What is unlawful as a matter of law? What is unlawful as a matter of law? What law applied at the time of the actions undertaken? Maybe the argument would be difficult -- maybe the issue would be more difficult to respond to if I was dealing with the time of the application statute being in effect because there, there would be protected action with respect to the applicant, but that's not what occurred here, Judge.

Ultimately, respectfully, the Court, I submit, needs to apply the law that is in effect at the time of the matters in dispute. The law that was in effect at the time of the matters in dispute was the law which gives the municipality, even in the face of an application, accepting your Honor's observation a few minutes ago, Mr. Cohen, you can't walk away from when things occurred, even assuming arguendo you accept the timing issue, on the issue that the actions were unlawful using *County Concrete*, and therefore, the Board of Adjustment has no place to go because they can't address that issue, my response to that is, but there was nothing shown to be unlawful here.

The time of the decision rule apply and the so-called inferences of discrimination which the plaintiffs assert saying, you picked us out, there's nothing to support that, even under the cases that they've talked about.

I mean, *Riggs*, for example, *Riggs* involves state law

issues. We're not dealing with a case that, you know, that could be filed in the state Superior Court under -- in the form of an action in law of prerogative writ. We're not dealing with state law issues on the issue of ripeness. We're dealing with federal law issues on the issues of ripeness and I don't believe, respectfully, that the law in *Riggs* is dispositive on the federal ripeness issue.

Your Honor referenced --

THE COURT: I don't know that it's asserted to be. It's simply part of the line of cases discussing the exceptions to the ripeness.

MR. COHEN: Right. The *Moorestown* case, I think that's the *Assisted Living* case.

THE COURT: Yes.

MR. COHEN: That also factually is in apposite to what occurred here and I don't believe that that case is dispositive with respect to the matters that you identified. *Assisted Living* -- excuse me.

Assisted Living Association of Moorestown dealt with -- just bear with me, Judge. There's no question what the result would be in terms of an application for a variance. It subsumes the conclusion that before they even walk in the door, they're goose is cooked with respect to an application for a variance. That was what the *Moorestown* case was about. That's not our case.

They can't show anything facially that would suggest that making application to the Board of Adjustment would be an exercise in futility.

Then the *Easter Seals* case, there, the Court determined at the outset that the Township officials opposed the use on having intention to prohibit it. That's not our case, respectfully, Judge. There is no evidence that the Township was seeking to prohibit anything.

What The Township did, as is evidenced in the Reexamination Report, as is evidenced in the March 2 report by Miss Doyle to the Township Council before the ordinance was adopted, and as is evidenced in the Moskowitz and Lindbloom treatise, was an ordinance that was designed to regulate assemblage impacts on strong residential character.

So there was no suggestion anywhere in the record, the underlying record, that there was anything that parallels the *Easter Seals Society* case.

THE COURT: What's the exhibit number of your March 2nd, Miss Doyle's --

MR. COHEN: Exhibit I. I believe it's Exhibit I.

THE COURT: Okay.

MR. COHEN: That's my response.

THE COURT: Okay.

Mr. Zimroth.

MR. ZIMROTH: Thank you, your Honor.

I can be relatively brief here.

I think your Honor identified very clearly what I think the only issue is before the Court and that is whether or not our complaint seeks to declare an ordinance invalid on its face. I think you previously identified that also is an issue.

I want to start by asking the Court to take a look at the defendants' brief on June 3rd, 2011.

THE COURT: Which brief?

MR. ZIMROTH: The first brief they filed, Defendants' Brief in Support of Cross-Motion to Dismiss, June 3rd, 2011.

THE COURT: Bear with me. It's here.

Yes.

MR. ZIMROTH: In that brief, your Honor --

THE COURT: What page?

MR. ZIMROTH: First page.

In that brief, your Honor, the defendants describe what they think this case is about, describing our complaint. They say that almost towards the bottom of the first paragraph, they say that we have "moved for preliminary injunctive relief seeking to declare 11-03 invalid on its face."

That's exactly what we've done. That's a concession right in their brief and it's not just a gotcha, your Honor. It's correct. That is exactly what we have done.

County Concrete instructs the courts how to determine whether an attack is invalid on its face and what it says is that if what you are attacking is the enactment, the mere enactment, the very existence of the ordinance, that's an attack on its face. That's what we are doing here.

We are saying that the mere existence of that ordinance is what harms us, it's what prejudices us, that's what we are attacking. The Zoning Board of Appeals has no jurisdiction to declare that statute illegal, unconstitutional or anything, only this Court does.

Just a word or two about *County Concrete* as well, your Honor. The defendants have asserted in their brief that *County Concrete* was a situation where the zoning law was applied only to plaintiffs' property and that is not correct, your Honor. The zoning law that was at issue there was a town wide -- was actually a really fundamental change in zoning of the Township, and it down zoned lots of property, lots of property, not just the plaintiffs' property. In fact, the Court makes reference to that very fact in another part of it's opinion on page, I think this is 172, 442 F.3d 159 and I'll read it for the Court into the record. It says, "It's not clear from the face of the complaint that the ordinance only affects appellant's property. Appellants allege that the zoning ordinance changed zoning of that tracts of land but did not claim that this was all it did," and then the Court goes

on to say, "This seems unlikely, since according to the complaint, the ordinance repealed and revised Roxbury Township's entire land development ordinance." That's, in fact, if you go into the record of the District Court on the remand, you'll see that's exactly what this ordinance did.

The significant point there is that the Court didn't ask the question, well, does the zoning ordinance apply to anybody else? What it was asking the plaintiff in that case is, are you saying that the existence of that ordinance is what prejudices you? If the answer to that is yes, this is an attack of the ordinance on its face and you don't have to go to the Zoning Board. That's exactly what we have here.

Now --

THE COURT: But it doesn't mean you automatically prevail.

MR. ZIMROTH: I didn't say that, your Honor. I'm just saying that the case is ripe for adjudication.

THE COURT: It is so, is it not, that you could prevail on this motion, I could conclude that this is a facial attack on the ordinance and deny the motion to dismiss at this juncture, you still have the alternative to go to the Zoning Board?

MR. ZIMROTH: Your Honor, if -- I suppose we always have an alternative to go to the Zoning Board, but to do that would delay this process for months. We're already -- this

application should have been approved --

THE COURT: Hold it. I don't know that it would necessarily delay anything for months.

First of all, if I deny this motion to dismiss, there's a lot more to be done in this case.

MR. ZIMROTH: Correct.

THE COURT: And you don't know when it would be decided or resolved, nor do you control any appeals process which might ensue and at the same time, you would have available to you, if you chose to pursue it, remedies from the Zoning Board. This case and that application, if made, are not mutually exclusive, are they?

MR. ZIMROTH: Your Honor, I would -- in response to that question, I would have to punt a little bit here, just a little bit.

THE COURT: Look, it's complicated, I recognize that. We get ahead of ourselves sometimes because I know part of the argument you're making here is you shouldn't have to go to the Zoning Board because there are problems with burdens of proofs and burden of persuasion which shouldn't be your headache.

MR. ZIMROTH: Exactly. And also there are problems --

THE COURT: I get all of that.

MR. ZIMROTH: This is why I'm saying I would punt, I would want to talk to Miss Tubman a little bit about this --

THE COURT: And if you go to the Zoning Board, you run the risk of having the Zoning Board perhaps impose conditions upon your application which aren't palatable to you because you might have gotten something out of the Planning Board under the previous ordinance that you might not get out of the Zoning Board --

MR. ZIMROTH: Thank you, your Honor.

THE COURT: -- as a result of the new ordinance.

MR. ZIMROTH: You have rescued me. That's exactly the point. I think -- I don't control any of that, your Honor. I mean, you do. I mean the timing of decisions and stuff like that.

THE COURT: This whole business about the contract, the drop-dead date of October in the contract is, to me, an interesting problem for you, but I don't know that it helps any of us because regardless of how these matters are resolved, the likelihood is this litigation is not going to be over, whether it be in this court or another one by October.

MR. ZIMROTH: We would -- let me say this, your Honor, and I think I haven't made a secret of this, okay. If, if we prevail on this motion, we would urge you to decide at least the preliminary injunction quickly and we can talk about what needs to be done. It is true that in terms of final disposition, there would have to be discovery and all kinds of things. I don't think that's necessarily true with the

preliminary injunction. We can talk about that and I think that's what we should be talking about, because I think it is very clear, very plain that under *County Concrete* and under the *Lapid* case which is followed from *County Concrete*, that this is a facial attack on the ordinance.

Defendants themselves have conceded the point in their brief, in their opening brief, I should say. They backed off completely now, but in their opening brief they conceded it. I'm, frankly, at a loss to see how this is not an attack on the ordinance on its face.

THE COURT: Okay.

You want to respond?

MR. COHEN: Very briefly.

THE COURT: Then we'll take a break.

MR. COHEN: Very briefly.

This, I can say with confidence, I wrote the brief to which the reference is made at the inception of the argument, while the defendants concede. With all due respect, Judge, that is a disingenuous comment.

What the defendants did was merely repeat, repeat what was stated in that motion. The issue is, is there anything stated in the complaint --

THE COURT: Let me make you comfortable. The language on page one of your brief, the preliminary statement is not dictating the result of this motion. It's interesting,

it's there.

MR. COHEN: Enough said.

THE COURT: At the end of the day, what I need to look at is I need to look at the amended complaint and I need to filter through it and determine what the case is and what it isn't.

MR. COHEN: Agreed.

THE COURT: That's what I have to do.

MR. COHEN: Agreed.

The only other observation I would make, *Lapid* is an interesting decision by Judge Martino, but I don't think it's dispositive, it doesn't really do any more. I'm not being disrespectful to Judge Martino, but it doesn't do any more than what the law that this Court needs to apply ultimately.

THE COURT: I agree with you.

To me, the issue is defined by *Williamson* and *Roosevelt* or *County Concrete*. That, to me, is where it comes down.

MR. COHEN: And the last observation, and I thank you for your time, and that is *County Concrete*, there was only one quarry in town. They can talk all about comprehensive rezoning, they can talk all about what might be in that opinion, but markedly absent in our case, I submit, and obviously your Honor will or has already scrutinized the first amended complaint, is a facial attack.

THE COURT: Where is the amended complaint in the facial attack? Show it to me.

Mr. Zimroth, here's your chance.

MR. ZIMROTH: Okay. Let me get the complaint. I have it here.

Count one, paragraph 39, this is the claim under the RLUIPA substantial burden. "The substantial burden has been imposed by the enactment of the ordinance." That's last sentence in paragraph 79.

THE COURT: Seventy-nine, I thought you said 39.

MR. ZIMROTH: Seventy-nine.

THE COURT: I have it. "The substantial."

MR. ZIMROTH: "The substantial burden has been imposed by the enactment of the ordinance."

Count two is the New Jersey analog to that same point.

Count three is the Equal Protection claim, paragraph 92. "Among other things, defendants enacted a zoning ordinance that arbitrarily" does what we claim it does. That's paragraph 92.

Count four is the New Jersey analog to that. "Among other things, defendants enacted a zoning ordinance." That's what we are fighting about here is the enactment of that zoning ordinance. That's what the whole complaint is about, is the circumstances in which the ordinance was enacted, that

it was done with a discriminatory intent and so forth.

Count five is similar, substantial burden which refers back to some of the allegations in the previous count.

Count six is discrimination count under RLUIPA. "Among other things, defendants enacted a zoning ordinance that" and we go on to describe what the zoning ordinance did.

I can go through the others. This whole complaint is about nothing other than the way in which the ordinance was passed and the circumstances of the passage of the ordinance. That's what this whole complaint is from beginning to end.

THE COURT: Okay, five minutes, please.

THE CLERK: All rise.

(Recess.)

THE CLERK: All rise.

THE COURT: Mercifully I'm going to rule on this. I say that not because the motion and the issues presented would not justify a formal opinion, but because I believe I have an understanding of the circumstances, the facts and the law. I can articulate a decision on this limited issue of ripeness and there is a time constraint that I think needs to be observed from everybody's point of view and, frankly, I want to get the case moving along and we can talk about how we're going to do that, either today or at some other time in the near future.

Suffice it to say, Mr. Cohen, I've heard all of your

arguments and you're very articulate in discussing circumstances, the facts, the positions of the respected parties, but as I indicated to you in colloquy, I think a lot of what you said goes towards the merits of the case and whether or not plaintiffs will or do present a likelihood of success on the claims that they assert, but what we need to do here, and please, do not understand me to be deciding any of the merits presented in this case now because I am not. It's clearly not my intention to do that, but rather, my limited consideration is whether this complaint should move forward in the federal court.

That is to say, whether the claims that are being asserted are, as the word is used, ripe for the Court to invoke its subject matter jurisdiction over this case.

Now, this, of course, is a challenge to Ordinance 11-03 in the Township of Bridgewater. The circumstances of the enactment of the ordinance are the subject of all the background in the complaint. Suffice it to say, it is generally the plaintiffs' position that the ordinance on its face was enacted improperly, unlawfully for a discriminatory purpose and that the ordinance itself is unconstitutional, in that it violates the plaintiffs' rights to free exercise of religion, it violates the plaintiffs' rights to due process of law, it violates the plaintiffs' rights to equal protection of law, it violates the federal statute Religious Land Use and

Institutionalized Persons Act and it also violates various provisions of not only state constitutional law but state land use law.

We know, particularly within the land use and/or takings context, that there are two lines of cases and we've discussed this at length today, two lines of cases that I need to consider in determining whether the plaintiffs' claims are, indeed, a facial attack to the ordinance or whether they challenge the ordinance as it is applied only to their piece of property. There are two lines of cases. There is the Heinel of cases commencing with *Williamson County Regional Planning Commission* in the United States Supreme Court at 7473 U.S. 172 and a number of cases that have been decided following *Williamson County*. Most importantly in the Third Circuit, the *Congregation Anshei Roosevelt* case which, of course, was a case that was commenced before one of my colleagues and then decided in the Third Circuit. That is actually an unpublished Third Circuit opinion at 338 Federal Appendix 214. The district court case is 2008 U.S. District Lexis 63994.

Those cases stand for the proposition that where a challenge is made to a land use regulation, that ordinarily the plaintiff should be required to exhaust all of the remedies available under the land use scenario presented and that is before a federal court exercises subject matter

jurisdiction over the land use dispute, and there are a number of reasons for the ripeness doctrine. They are set forth adequately in the cases and based upon policy considerations, judicial economy, any number of rationals.

There is the conclusion that in cases involving land use decisions, the property owner does not have a ripe constitutional claim until the zoning authorities have an opportunity to arrive at a final definitive position regarding how they will apply the regulations at issue to the particular land in question. It's otherwise known as the Finality Rule.

Against that is a line of cases which I suppose accurately is controlled by the Third Circuit's opinion in *County Concrete Corporation v. Roxbury Township*. This is 442 F.3d 159, wherein the Third Circuit recognizes the Finality Rule that is announced in *Williamson* and the cases that followed it, but finds an exception to the Finality Rule and the Third Circuit in determining the question in the *County Concrete* case says, "Finality Rule does not apply to facial attacks on the zoning ordinance, i.e., a claim that the mere enactment of a regulation either constitutes a taking without just compensation or a substantive violation of due process or equal protection. The final decision is not necessary in that context because when a land owner makes a facial challenge, he or she argues that any application of the regulation is unconstitutional for as an applied challenge to the land

owners only attack that applied the regulation to his or her property, not the regulation in general."

Then the *County Concrete* case goes on to analyze whether the takings claims that were asserted in that case were ripe and goes on to discuss substantive due process claims, equal protection claims that were presented in that case.

They discussed in that opinion, of course, the *Taylor Investments* decision which was another case on the subject, discussing the ripeness doctrine and Third Circuit in *County Concrete* goes on to conclude, "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." That is the holding in *County Concrete* that is announced on page 166, 442 F.3d.

So what I need to do, without, of course, again without addressing the merits or the issues to be presented at a hearing on the preliminary injunction or at some subsequent motion to dismiss or on some subsequent cross-motion for summary judgment or some other subsequent proceeding, which, of course, counsel are imaginative enough to conjure, my obligation here is limited to take a look at the complaint and analyze the nature of the claims to determine whether, indeed, this is a facial challenge to the ordinance or as an-applied

challenge.

I'm specifically, to give you comfort, Mr. Cohen, not going to make reference to the preliminary statement in your brief because it's unnecessary and I don't think it would be appropriate.

What I'm going to do is take a look at the first amended complaint and this is not going to take long because there's some language in the first amended complaint which, to me, drives the decision on this very limited issue. Taking a look at the first amended complaint and taking, of course, into account general concepts of pleading, a well-pleaded complete rule and anything else that dictates the standard by which we review a pleading, keeping in mind, of course, again, this is not a 12(b)(6) motion, I make reference to the following allegations in paragraphs in the first amended complaint.

This is paragraph 79, wherein it is alleged, "The actions of the Township Council, Planning Board, Mayor and other Township officials have violated and continue to violate plaintiffs' rights under the Free Exercise Clause by imposing a substantial burden upon religious exercise of plaintiffs and by intentionally and in violation of Section 1983 discriminating against plaintiffs on the basis of religious belief. The substantial burden has been imposed by enactment of the ordinance, which was enacted to deny plaintiffs' right

to establish the mosque as a conditionally permitted use consistent with existing zoning laws." That paragraph, in my view, presents a facial challenge to the ordinance.

Paragraph 88 is essentially the same allegation under the state Constitution. It is a Free Exercise claim asking for an order prohibiting defendants from enforcing the ordinance.

Paragraph 92, in connection with an Equal Protection claim under federal Constitution, "Among other things, defendants enacted a zoning ordinance that arbitrarily establishes different standards for plaintiffs' proposed development and those that have been applied and will continue to be applied, to similar proposed land uses by non-Muslim houses of worship and secular property owners."

That allegation, to me, does raise a facial attack to the ordinance, although I'm sure it could be argued that the language in that paragraph, as it clearly states, its concern for different standards being applied to plaintiffs' land should rather be interpreted as an as-applied challenge, but to me, the defense can't have it both ways because there would be an argument being made, there may be subsequently argument made that the plaintiff needs to demonstrate that it suffered, has suffered some injury as a result of the ordinance.

So the fact that there is language here that speaks about a specific injury to this particular property as a

result of the ordinance doesn't end the analysis. It does, nevertheless, attack the zoning ordinance itself and that, I consider, to be a facial attack.

There is paragraph 101 seeking a declaratory judgment that the defendants' actions and the ordinance have violated and continue to violate plaintiffs' rights. That to me, is a challenge to the ordinance.

Lastly, paragraph 113, "Defendants have violated the Religious Land Use and Institutionalized Persons Act by imposing and implementing a land use regulation that intentionally discriminates against plaintiffs on the basis of religion. Among other things, defendants enacted a zoning ordinance that arbitrarily establishes different standards for plaintiffs' proposed development," et cetera. That, to me, expresses a facial challenge to the ordinance.

So taking into account the conflicting lines of cases, I conclude as a matter of law that the *County Concrete* case does control the circumstances presented, notwithstanding that there might be some argument as to factual distinctions, but, nevertheless, having determined from the language in the amended complaint that I just read that this does present a challenge based on a theory that the law as a whole, the ordinance as a whole is arbitrary, capricious and unreasonable, I conclude that the first amended complaint does present a facial challenge to Ordinance 11-03 and, accordingly

and for those reasons, the motion to dismiss on ripeness grounds is denied without prejudice.

I say "without prejudice," because 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.

Now, there's another motion to dismiss that is made on behalf of the individual defendants. The individual defendants are named in Section 1983 claims in their official capacities.

And the argument is that suits against public officials in their official capacities are considered to be suits against the public entity. And we get Section 1983 claims where the defendants are named in individual capacities. That hasn't been done here.

The argument in opposition to the motion is that because the official conduct of these individuals has public interest ramifications, there is some symbolic necessity to having these individuals in the case.

Do I have that right?

MR. ZIMROTH: Well, sort of. I think what we are saying there is that we couldn't find any case that said that it was impermissible and it was dismissible. We found cases and I think the cases that were cited that said that it wasn't required that you sue the individuals in their official

capacity, but as far as a reason, we think a good reason why it shouldn't be dismissed, your Honor, has it correct. I think that and we cited --

THE COURT: I have to tell you, Mr. Zimroth, I understand the argument you're making. I'm not so sure it carries the day. I'm not so sure it carries the day, but because I am not dismissing the case on ripeness grounds, I don't feel I need to finally determine this aspect of the motion.

These individual defendants are clearly going to be subject to some discovery and, Mr. Cohen, I'm going to deny this motion without prejudice, specifically because I invite you to renew it on a more complete record. I think there's some strength to it. For our purposes today, I'm denying the motion without prejudice.

Now, tell me how you want to proceed. You don't have to tell me specifically now, but you're going to have to tell me specifically soon how you proceed in this case.

MR. ZIMROTH: Your Honor, if your Honor will hear me out, I have some suggestions about how we might proceed.

THE COURT: Yes.

MR. ZIMROTH: Okay. So I think that from our perspective, there are two parts of how to proceed. One is the motion for preliminary injunction and then there's the final relief, okay.

In terms of the preliminary injunction, we do not think we need any further discovery. We think that the record is what it is. The Court can decide that issue on the basis of the record that is before it.

At the same time, we would like to proceed with some expedited discovery beginning with document discovery that we can talk about and then some depositions thereafter.

THE COURT: You're a good lawyer and I'm not going to tell you how to run your own case, but if I were you, I don't know that I would be real comfortable going forward in this injunction application strictly on the strength of circumstantial evidence. That's what you have.

MR. ZIMROTH: Yes. It's also the case, your Honor, that a preliminary injunction hearing or decision, the Court does not have to rule that we will win at the end. It has to only find that that's a likelihood.

THE COURT: I know that. We all know what the standards are. You have to show a clear likelihood of success on the merits and you would make that argument based on what I've read entirely on circumstantial evidence.

MR. ZIMROTH: Your Honor, if the Court is going to require us to come forward with proof that goes into the soul of individual plaintiffs, that's impossible.

THE COURT: We don't even look into the souls of witnesses on cross-examination in criminal cases.

MR. ZIMROTH: Exactly. We'll, obviously, take what your Honor is saying seriously, but we would like to proceed with some expedited discovery in any event, so that's how we would like to proceed. I think it wouldn't be -- what we'd like to do is start with pretty expedited document discovery and see whose depositions we want to take. I think that it will not be that burdensome for the defendants because, as the Court is aware, two things. First of all, there has been some informal production already, but more to the point, the Justice Department has opened an investigation.

I know that the town turned over the letter that the Justice Department sent to us so I've seen the request that the Justice Department has put in and presuming they have been working on that for a long time already, so ours wouldn't be any more burdensome than that. That's how we'd like to proceed.

THE COURT: Here's what I would suggest, and I'll hear from Mr. Cohen, but what I would suggest you do is come up with some sort of a theory on what discovery you need, when you need it by and how you want to get it and if the other side agrees with you, if you agree with whatever they want to have from you, including I'm sure, among other things, your contract --

MR. ZIMROTH: They have it. I'm real surprised at that because we sent the contract.

THE COURT: Let me finish.

Then what I suggest you do is send in a letter that includes a proposed schedule and we'll look at it. I may refer you to the magistrate judge if I think she needs to get involved in it. Figure out what you need to do and get it moving.

MR. ZIMROTH: Sounds right. I was just a little puzzled. Maybe through the Court we can ask Mr. Cohen, we sent him the contract. Did he not get it?

THE COURT: I don't know.

MR. ZIMROTH: Did you not get it?

MR. COHEN: I got the contract on attorneys' eyes only basis, that was a restriction and I haven't violated that restriction. That was expressly the terms under which the contract was supplied. The only person who has seen that contract is me and Mr. Collins, both of us expressly restricted to attorneys' eyes only.

THE COURT: Okay.

MR. COHEN: I can address that issue of scheduling?

THE COURT: Yes.

MR. COHEN: I'm leaving for vacation. I will be back the week of July 11.

THE COURT: I am willing to enter an order requiring you to go on vacation.

MR. COHEN: After today I will need a vacation.

Secondly, 15 disks of documentation have been produced to date voluntarily, but are subsumed within the informal document request which is now being converted to a formal document request. That's number one.

Number two, on the issue of Department of Justice responses, just so the record is clear, first, the Department of Justice investigation is not a finding that there has been a finding of anything. They're undertaking an investigation. I'm familiar with the letter because I've seen it before.

That being the case, the regular Township attorney, William Savo, has been responding and interacting with the Justice Department on that letter. My understanding is that documentation is being provided to the Justice Department in response to that letter and to the extent that documentation is subsumed within the document request that the plaintiffs have served, the informal document request which was converted to a formal document request, no objection, we will provide it.

I need to speak with Mr. Savo and find out precisely what the status is of that document production, but I will address that before I leave so that that way Mr. Zimroth and counsel will know when that material will be made available.

With respect to the scheduling of discovery, i.e. depositions -- by the way, just so I don't leave anything out, Mr. Kelly of Mr. Zimroth's office, was in contact with me

during the informal process governing discovery and said, well, do we need to subpoena those who are consultants to the town, i.e., Miss Doyle, Mr. McNamara -- Mr. Forsythe.

THE COURT: Mcnamara?

MR. COHEN: They can subpoena him. And Mr. Meth among others and what I said at that time, and I hold to my word on that, there is no need to subpoena them. Send me the request and we'll respond.

In point of fact, my understanding, and I will check this, Mr. Forsythe is employed by the town, but whatever it is, whatever he's got, to the extent it falls within the scope of their request, they will have.

With respect to Miss Doyle, same holds true.

As to Mr. Meth, I know he's an independent consultant. I did make the request known to him. I don't know the status of that, so we'll deal with all those issues.

Now, with respect to depositions, my suggestion is, and Mr. Zimroth and I have gotten along just fine on issues of scheduling, I expect that we can work those issues out. I obviously need to determine availability of witnesses. We have the summer vacations and things to work around, but I'm confident we can address those issues. I'd like to do that when I get back.

THE COURT: I'm happy to leave it to you until further notice. Get back to me as soon as you can on it, what

your needs are, what any disputes are and tell me what you need of the Court. Okay.

Then I believe I've decided everything I needed to decide, so go off the record.

(Matter concluded.)

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