IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

AL FALAH CENTER, et al., Plaintiffs, vs. TOWNSHIP OF BRIDGEWATER, et al., Defendants.	Civil Action No. 3:11-cv-02397 MAS LHG ELECTRONICALLY FILED

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

In January 2011 the Chughtai Foundation, predecessor in interest of Plaintiff Al Falah Center ("Al Falah"), applied to the Defendant Township of Bridgewater's Planning Board for permission to renovate the Redwood Inn, a shuttered banquet hall located in a residential zone, for use as a mosque. For about 75 years, Bridgewater's zoning law had provided that a house of worship would be a permitted use on all streets in residential zones. In 1976, a house of worship became a "conditionally permitted use," meaning a use permitted anywhere in these zones so long as the building complied with specified conditions concerning height, setback, and lot coverage. The Al Falah proposal complied with those conditions, so the application should have been granted routinely.

It was not. Within days of the submission of the application, and before the Planning Board held its first public hearing to consider it, Township officials began drafting an amendment to the Township's zoning ordinance that would make houses of worship conditionally permitted uses in residential zones only when located on properties with principal access from certain specified roads that did not include Mountain Top Road, where the Redwood Inn is located.

The Planning Board's first public meeting on the application, on January 24, 2011, revealed the context in which the Township officials had acted. After appeals to anti-Muslim prejudice appeared on the internet, and anti-Muslim emails

were forwarded directly to members of the Planning Board, the meeting to consider the application drew an extraordinary crowd that exceeded the capacity of the meeting room, so that the hearing had to be rescheduled. One person in the crowd was heard to say to the Board, "I hope you get the message from this crowd." Chughtai Dec. ¶ 17; *see also* Y. Abdelkader Dec. (5/18/2011) ¶¶ 5-7; Wallis Dec. (5/18/2011) ¶¶ 5-11.

In fact, however, Township officials understood these sentiments even before the first public meeting and were already at work in private to subvert Al Falah's application. Even before the Planning Board met, the Township Planner drafted and sent to the Township Attorney "for discussion purposes" an ordinance requiring that houses of worship have access to specific roads that did not include Mountain Top Road. The Township Planner hastily produced a reexamination of the Township's Master Plan asserting that the presence of houses of worship in residential zones could generate traffic problems and was otherwise out of character with residential neighborhoods. These were patently pretextual findings. The Township's own engineer had written a report agreeing with Al Falah's traffic analysis finding that the proposed use of the Redwood Inn would not cause traffic problems. Just a few months earlier, the Township had concluded a comprehensive Master Plan Amendment and Reexamination Report on its traffic patterns that found no problem in the roadways surrounding the Redwood Inn or

anywhere else requiring any change to zoning rules applicable to houses of worship. In the prior 75 year history of zoning in Bridgewater, neither the zoning ordinances nor the Township's planning documents, all of which professed as a goal protecting the character of Bridgewater's residential neighborhoods, suggested that houses of worship compromised that character.

Nonetheless, without citing any facts or expert opinion about traffic or other quality of life concerns, the Township Planner's reexamination report recommended a change in the zoning ordinance that her draft "for discussion purposes" had proposed: limiting houses of worship in residential zones to properties with access to specified roads not including Mountain Top Road. Within weeks, the Planning Board adopted the reexamination report and the Township Council on March 14, 2011 enacted Ordinance 11-03, amending the zoning ordinance as the Township Planner had proposed. Citing the new law, the Planning Board disclaimed jurisdiction over the Al Falah application and dismissed it. The Board and Council acted with such extraordinary speed and changed without any serious study or consideration a zoning regime that had existed for 75 years because they had to meet a deadline imposed by a recently enacted New Jersey law that would have required that Al Falah's application be considered without regard to new zoning ordinances enacted after May 5, 2011.

Plaintiffs seek a preliminary injunction declaring Ordinance 11-03 void and requiring Al Falah's application to be decided by the Planning Board under the zoning law in effect at the time the application was submitted.[1] Ordinance 11-03 discriminates against Plaintiffs because of their religion, imposes undue burdens on their religious exercise, and treats religious uses less favorably than comparable secular uses. It violates the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment, as well as analogous state statutory and constitutional provisions. It also is arbitrary and capricious in violation of the New Jersey Municipal Land Use Law ("MLUL").

STATEMENT OF FACTS

Acquisition of the Redwood Inn For Religious Use—Al Falah was formed by Muslims residing in the Bridgewater area, nine of whom have joined individually as Plaintiffs. They have been gathering together to worship at inadequate rented locations for several years. For all that time, they have been seeking a suitable location to establish a permanent mosque and Islamic

[1] Plaintiffs first moved for a preliminary injunction in May 2011, after only limited expedited document discovery. Briefing on that motion was completed in June 2011, but it was not heard or decided by the Court. The parties proceeded with further discovery, including depositions, until November 2, 2011, when, at the request of the Defendants, the Court stayed completion of depositions pending settlement discussions that did not bear fruit. The stay was lifted on May 22, 2012.

community center. Chughtai Dec. ¶¶ 5-7; T. Abdelkader Tr. 94:4-16; Wallis Supp. Dec. ¶ 8.[2]

They finally found the Redwood Inn, a banquet hall located on 7.64 acres. PX30, at 115 of 123. For many years it had rented its facilities for weddings, political dinners and other gatherings, both secular and religious; it ceased operation sometime after the summer of 2008. Flannery Tr. 30:9-31:20; Norgalis Tr. 7:24-12:13. Al Falah's members knew the Redwood Inn well because they rented it for their major annual holiday services for several years. Y. Abdelkader Tr. 21:24-22:5; Chughtai Tr. 62:9-12. Although the building would require repairs and upgrading, it was readily convertible for use as a prayer space and could be converted for other uses over time. It had ample on-site parking: a paved lot with a capacity of 230 cars. Tubman Dec. ¶ 4. It also offered something critical to Plaintiffs: the right to use the property as a house of worship without seeking a zoning variance. T. Abdelkader Tr. 95:4-95:19; T. Abdelkader Dec. ¶ 8. The Redwood Inn is in a residential (R-50) zone. Bridgewater's zoning ordinance then provided that houses of worship were conditionally permitted uses throughout the

[2] Plaintiffs have adopted the following citation format for record citations: (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, including the declarations that were originally submitted in support of Plaintiffs' motion when first filed in May 2011, are cited as "[Name] Dec." All cited deposition exhibits and deposition transcript excerpts are attached to the Declaration of Yue-Han Chow.

R-50 and other residential zones. PX111; Tubman Dec. Ex. M. Indeed, it had so provided at all times since 1976 (and before that it permitted houses of worship in such zones without condition). All of the prescribed conditions—relating to building size, height, and setback—could easily be met at the Redwood Inn.

In October 2010, the Chughtai Foundation, established by Plaintiff Zahid Chughtai, signed a contract to purchase the Redwood Inn. Chughtai Tr. 72:23-73:8; DX16. The Foundation assigned its rights under the contract to Al Falah, which closed the transaction and acquired full title to the property in April 2012. Chughtai Tr. 87:16-25; Mohammedi Tr. 18:2-7.

The Application to the Planning Board—The Al Falah Preliminary Site Plan Application (the "Application") was submitted to the Planning Board on January 6, 2011. 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 conditions prescribed by Bridgewater's existing zoning ordinance. It also explained that the building, like many other houses of worship, would be used for certain ancillary functions such as a religious school and a day care center.[3] PX39, 54-55 of 123. All of this, however, would be accomplished by adapting the existing Redwood Inn structure and without expanding the parking lot. The

[3] The Application originally included a full time pre-kindergarten through eighth grade parochial school, a permitted ancillary use. The Application was amended in February to remove this proposed use, which by then had become "a distraction from the primary mosque purpose of the application." Tubman Dec. Ex. R at 1.

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

The Application submitted to the Planning Board 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 impact analysis prepared by a traffic engineering firm based on particular proposed uses at the Al Falah Center and on the conservative assumption that at the time of maximum use all cars would leave or arrive at the same time. PX39, 113 of 123. The traffic analysis showed that the proposed mosque use would not require roadway improvements because it would generate only a modest addition to the traffic already being generated in the area. PX39, 90 of 123. Defendants admit that the Application as submitted complied with the conditional use requirements for a house of worship in a residential zone, except for one minor and easily remediable deviation from "design standards" (not a condition of use) relating to the number of plantings near the building's foundation. Doyle Tr. 26:10-29:15; Norgalis Tr. 72:18-73:24; PX4, 4 of 11; PX38; PX39, 8-24 of 123.

The Planning Board had a process in place to address such applications. First, the Planner, Ms. Doyle, would prepare a report on the application for the Planning Board. Flannery Tr. 37:10-24. The application also would be sent to

other Bridgewater officials, including the Engineer, the fire department official and the police department. *Id.* at 38:16-22; Doyle Tr. 23:13-22; PX14. Planning Board members would then receive a package containing the complete application, the Planner's report, and any other reports submitted by other township officials. Flannery Tr. 39:15-20, 40:3-8; PX39. Prior to the Planning Board meeting at which the applicant could respond to questions and members of the public could also be heard, Planning Board members would hold a "pre-meeting" to "organize [them]selves." Flannery Tr. 48:1-11.

Here, the Planner and Engineer reviewed the Application and submitted reports to the Board, and both acknowledged that the Application met the conditional use requirements. PX4; PX38. Regarding possible traffic issues, Gordon Meth, a traffic consultant hired by Bridgewater, analyzed and agreed with the study by Al Falah's traffic expert submitted with the Application, which concluded that the proposed use at the Redwood Inn site would not create any significant increase in traffic in the surrounding area. PX81; Doyle Tr. 31:13-32:2. This was the conclusion, as well, of the Somerset County Planning Board when it later commented on the traffic analysis. Chow Dec. Ex. A. The Application was also sent to Township officials responsible for commenting on any safety concerns, such as whether the surrounding roads were wide enough to accommodate emergency vehicles. Doyle Tr. 21:22-25:11, 29:16-32:4. The only relevant

comment in response was made by the Engineer, who found "acceptable" Al Falah's plan to widen the roadway along the Property frontage by five feet. PX38, 3 of 7.

Planning Board members received the Application and reports on January 20, 2011, four days before the scheduled Board meeting on January 24. PX39. From these reports, Board members understood that the Application complied with the existing conditional use criteria for houses of worship, although additional foundation plants would be needed to comply with a "design standard" (not a condition of use). Fross Tr. 38:8-39:2; Henderson-Rose Tr. 29:3-22. The Board had not denied any applications in recent years, if ever, based on deficiencies related to foundation plants. Fross Tr. 40:7-25; Doyle Tr. 29:12-15. On this record approval of the Application should have been routine.

Unfortunately, the applicant's Islamic identity provoked an outpouring of opposition. *See* Walsh Dec. Even before the Planning Board's first scheduled hearing on the Application, the Somerset County Tea Party began posting online notices encouraging people to attend the hearing to oppose the mosque. PX10. One notice purported to link Al Falah to a mosque in Queens that the Tea Party claimed was a hotbed of terrorist activity. *Id.* The supposed link was that the Queens mosque also had the name "Al Falah," which is Arabic for "true success"; Plaintiffs in fact have no connection to the Queens mosque. Wallis Supp. Dec. ¶ 9.

Township officials knew anti-Muslim opposition was building. The Tea Party emailed its posting directly to Ms. Doyle, who forwarded it to the Planning Board Chair, Mr. Fross, who forwarded it to the Mayor. Doyle Tr. 51:6-52:4; Fross Tr. 69:24-70:23. Some time before the Board's January 24 scheduled hearing, Ms. Doyle told Lloyd Tubman, the land use lawyer who had filed the Application for Al Falah, that things were getting "ugly" and that a zoning change was in the works. Tubman Tr. 128:12-129:20. Ms. Doyle quibbles with the word "ugly" and says she used the word "difficult." Doyle Tr. 48:14-21. She denies that a zoning change was in the works (*id.* at 291:1-4), but other Township officials (as well as documentary evidence) tell a different story. (*See* pp. 12-17 below).

In fact, Township officials did not want the Application to be approved, but understood that the Planning Board could not deny it under existing law. Their solution was to change the law. As set out more fully below, Township officials decided to do so before the first public meeting to consider the Application took place on January 24—that is, before hearing any testimony about the Application; before the Planning Board could consider whether Al Falah would take steps to ameliorate any concerns that might be raised about traffic or anything else; before any analysis was made of whether a change in the law was warranted; and indeed before such an analysis was even commissioned.

When they decided to change the law, Township officials faced several obstacles. First, the zoning ordinance establishing that houses of worship were a conditionally permitted use on all streets in residential zones had been in effect since 1976, and they had been permitted without condition for 39 years before that. PX111; Tubman Dec. Ex. M; DX83. During that time there had been several amendments to the zoning laws that affected houses of worship and several reexaminations of the Township's zoning laws and Master Plan. *See, e.g.,* PX47; PX56; PX58-59; PX95-97. None of these suggested that the location of houses of worship should be limited in a way that would preclude turning the Redwood Inn into a mosque. Doyle Tr. 110:7-22, 148:14-149:8. Something "new" had to be discovered to justify a sudden change.

Further, the Township had to hurry. The Planning Board had already scheduled the first hearing. Once the testimony was complete, the Board would have to vote on the Application. So the zoning ordinance had to be changed before that vote occurred. Equally important, 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, the 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; Flannery Tr. 81:2-82:11.

As the Court will see (pp. 12-38 below), because Township officials faced extraordinary time constraints, they did not follow an orderly deliberative process. A reexamination report was drafted in approximately one day. It purported to "examine" the need for a Township-wide change in Bridgewater's zoning law that had existed for 75 years, but did not recommend changing Bridgewater's Master Plan. It skipped that step and instead recommended changing the zoning ordinance relating to houses of worship even though the Master Plan did not require or suggest such a change. The justifications offered in the reexamination report for the new ordinance had no substance. And when that became apparent, Township officials attempted to create new justifications that were equally without substance.

The January 20 and January 24, 2011 Private "Pre-Meetings"—On Thursday, January 20, Mayor Flannery, Robert Bogart (Township Administrator), Thomas Forsythe (Township Engineer), Scarlett Doyle (Township Planner), Thomas Collins (Planning Board Attorney), and Alan Fross (Chair of the Planning Board) held a "pre-Planning Board meeting" to organize for the public meeting of the Board scheduled for Monday, January 24. They discussed the agenda for that public meeting, including the Al Falah Application. PX88; Fross Tr. 11:6-12:8; Flannery Tr. 48:6-16.

Within hours of leaving the January 20 meeting, Ms. Doyle began drafting a document with the file name "Houseworshipamendment.docx." Doyle Tr. 262:14-

263:22. It presents 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.

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

Ms. Doyle claims she cannot recall what was said in the meeting on the afternoon of January 20. Doyle Tr. 250:10-21, 290:9-25. But, contradicting her own claimed inability to recall, she denies that she was instructed to draft an ordinance amendment at that meeting. *Id.* at 291:1-4. She tries to explain the document she wrote that very evening by asserting that it was not a draft ordinance but merely her "thoughts." *Id.* at 264:7-17. That assertion is facially incredible; the document itself is denominated a "draft" written in the form of an amendment

to an ordinance and has the file title "Houseworshipamendment.docx" on her computer. Chow Dec. Ex. B. Yet the Township has continued the charade by stating in interrogatory answers that, in spite of what the document says on its face, it "is not a 'Draft Ordinance', proposed ordinance or possible ordinance." Chow Dec. Ex. C.

Either during the January 20 meeting or immediately thereafter, 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 of the Board. PX118. This second private meeting would include representatives of the Township Council, which would have to pass any new ordinance. *Id.*

On Sunday, January 23, 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." PX9. The email states in full, "Will one of you please bring eight (8) copies of the possible ordinance. Thanks." *Id.* In spite of this reference to eight copies of a "possible" ordinance in an email scheduling a meeting about "Houses of Worship," Ms. Doyle has insisted that the document to which this email refers was the Township's *existing* ordinance. 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, 2011, approximately three hours before the second pre-meeting began. 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. The change confirms what the timing and related testimony already demonstrate: the target of this draft ordinance was the Al Falah Application. Bridgewater's road classification scheme does not have a classification called "Minor Collector." PX116 at 8. 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. *Id.*

With a draft ordinance prepared in advance, the January 24 private pre-meeting went forward at 5:00 p.m. as scheduled. Unlike other meetings in preparation for the public meetings of the Planning Board, this time the Mayor invited members of the Township Council, the governing body that would have to enact the proposed ordinance. Norgalis Tr. 24:20-25:10; Henderson-Rose Tr. 15:2-17:2. If the zoning change was to be accomplished in advance of the May 5

effective date of the New Jersey "time of application" law, the Council would have to be in on the planning from the beginning. Although some participants say they cannot recall this meeting (*see, e.g.,* Flannery Tr. 57:22-58:10; Fross Tr. 64:23-65:9), more forthcoming testimony and documentary evidence shows that the following were present: Mayor Flannery, Ms. Doyle, Mr. Collins, Mr. Bogart, Township Councilwoman Christine Henderson-Rose (who was also a member of the Planning Board), Township Council Chairman Howard Norgalis and Township Attorney Mr. Savo. Norgalis Tr. 25:6-10; Henderson-Rose Tr. 15:19-16:10, 153:15-154:3; PX118.

Mr. Norgalis did recall the meeting. His testimony demonstrates that decisions made at that meeting determined everything that followed. Mr. Norgalis testified that as a result of that meeting, he understood that the Planning Board and Township Council would carry out a process he aptly described as resembling a ping-pong game. Norgalis Tr. 35:19-36:3.

First, the Planning Board would authorize a reexamination report to study the purported need for changes in the zoning ordinance. That report 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 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 (*id.* at 40:21-41:4) back to the Planning Board, which would immediately recommend the passage of the proposed ordinance to the Council, which then would pass the ordinance. The ordinance amendment would apply to Al Falah's Application, because it would be enacted before May 5 when New Jersey's "time of application" rule was to take effect. *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. Mr. Norgalis testified that he had never seen the process of adopting an ordinance following a reexamination move so quickly. *Id.* at 232:12-20.

The January 24, 2011 Planning Board Meeting—Although members of the Planning Board and the Township Council had already determined that the Township would amend its zoning ordinance to block Al Falah's proposed mosque, the Board proceeded with the scheduled public hearing on the Application at 7:00 p.m. on January 24. PX43. As a result of press and internet publicity, some of which is described above, more people attended this meeting than any prior Planning Board meeting. Walsh Dec. ¶¶ 6, 13; Doyle Tr. 38:19-39:19. Before any testimony was heard on the Application, the Planning Board's attorney, Mr. Collins, announced that the hearing would be adjourned because the

attendance exceeded fire code occupancy limits. Tubman Dec. Ex. I at 8:3-24. The hearing on the Application was rescheduled for February 28, 2011 at a larger hall. PX27.

When the adjournment was announced, most of those in attendance left. Flannery Tr. 75:15-76:11. But once all or most of the public was gone, the Planning Board continued its discussions. *Id.* at 76:10-17. The Mayor "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." *Id.* at 76:12-77:9; PX11 at 3:19-25. Without any further substantive discussion, the Planning Board authorized such a report. PX11. There was no notice that this vote was going to take place.

This authorization was significantly misleading. The Mayor said that the Planning Board should undertake a study concerning houses of worship. *Id.* at 3:19-25. Presumably the purpose of a "study" is to study something—here, whether any changes in the zoning ordinance were necessary. In fact, however, that decision had already been made. And it had already been determined that the new ordinance would apply to Al Falah's Application and would preclude the Planning Board from approving it. None of that was said. All the Mayor said in public was that houses of worship would be studied. *Id.* Even that half-truth is telling, however, because it made clear that the focus of the Planning Board was on

houses of worship and not any of the other places of assembly that subsequently found their way into Ordinance 11-03 as part of the Township's attempt to hide that its focus was on houses of worship and on one in particular.

The Reexamination Report—Ms. Doyle began working on her reexamination report the next day, January 25. Her draft, dated January 26, was almost identical to the one ultimately adopted by the Planning Board on February 8. *Compare* PX12 *with* PX45. Ms. Doyle aptly described it as a "quickie." Doyle Tr. 59:16-60:3, 90:14-17; *see also* Flannery Tr. 79:10-13 (testifying that she did not recall any other reexamination report being prepared in so short a time).

The Reexamination Report written by Ms. Doyle and adopted by the Planning Board recommended significant changes in Bridgewater's zoning ordinance. Since at least 1937, a house of worship had been a permitted or conditionally permitted use throughout Bridgewater's residential zones without limitation on where it was sited. Mayor Flannery and Ms. Doyle admit (and planning documents discussed at pp. 20-22 below confirm) that the Planning Board had never studied or considered changing this before Al Falah's Application was submitted. Flannery Tr. 85:19-86:2; Doyle Tr. 39:21-24. Now, for the first time, the Report recommended that houses of worship be permitted in residential zones only if they were sited on State highways or County roads or on one of four named segments of Township roads. 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 would have been affected by the proposed change. Henderson-Rose Tr. 86:8-20.

Ms. Doyle's Reexamination Report sought to justify the proposed ordinance change by describing what supposedly was new since the last reexamination report.[4] The Report claimed that its recommendations were based on a "thoughtful evaluation" of a lengthy list of planning documents (master plans, master plan amendments, reexamination reports) going back to 1990. PX12 at 5. Putting aside whether "thoughtful evaluation" could occur so swiftly, the claim is misleading. As Ms. Doyle conceded at her deposition, nothing in any of the listed documents suggests limiting the siting of house of worship based on road access. Doyle Tr. 66:23-67:8. While these documents assert the Township's interest in a good "quality of life," in preserving the integrity and character of residential neighborhoods, and in sensible traffic regulations, none suggested that houses of worship located in residential neighborhoods undercut these goals.

[4] Under N.J.S.A. § 40:55D-89, the purpose of a reexamination report is to identify and discuss "major problems and objectives relating to land development in the municipality at the time of the adoption of the last reexamination report … [t]he extent to which such problems and objectives have been reduced or have increased subsequent to such date,… [t]he extent to which there have been significant changes in the assumptions, policies, and objectives forming the basis for the master plan or development regulations as last revised … [and] [t]he specific changes recommended for the master plan or development regulations, if any, including underlying objectives, policies and standards, or whether a new plan or regulations should be prepared."

The first report listed was the 1990 Master Plan. PX12 at 5. That report noted the banquet hall at the Redwood Inn was a non-conforming use in the R-50 zone. PX56A at AFC-BWT 20, 27. However, far from identifying a problem or recommending some change in the zoning laws, the 1990 Master Plan, as Ms. Doyle conceded, recognized that variance relief might be appropriate to accommodate minor *expansions* of the Redwood Inn. Doyle Tr. 166:20-167:9; PX56A at AFC-BWT 27.

Of the other reports listed by Ms. Doyle, two are most pertinent. Neither mentioned traffic, safety, or "quality of life" concerns related to houses of worship in residential zones. Doyle Tr. 178:17-180:15. Nor did they suggest that houses of worship compromised the integrity of residential neighborhoods. In 2005, the Planning Board adopted a reexamination report and master plan amendment that made recommendations about houses of worship relating to bulk standards and to determining the number of required parking spaces; it said nothing about road access. PX47 at 101-02.

The second such report, adopted in September 2010, just four months before Al Falah's Application was submitted, was an extensive reexamination report and master plan amendment specifically addressing traffic issues. PX58. It was based on comprehensive studies by outside traffic experts and included analyses of traffic and accident patterns. It did not identify any problems arising from traffic related

to houses of worship—although any such problems would have been within the scope of its inquiry.[5] It drew attention to particular roads and areas where traffic patterns presented safety concerns. *Id.* at 14-16. None was near the Redwood Inn. Doyle Tr. 178:17-179:25. The 2010 Report recommended some changes in zoning, but none would have affected the siting of houses of worship. PX58 at 24. It mentioned houses of worship only in its discussion of parking, as to which it proposed no change in zoning requirements but suggested that houses of worship be "encouraged" to adopt shared parking arrangements. *Id.* at 21, 23.

"Thoughtful Evaluation"—Ms. Doyle conceded that she could not recall ever having completed a reexamination report as quickly as the report that led to Ordinance 11-03. Doyle Tr. 59:16-60:3. She was able to finish so quickly because she did almost nothing to determine whether there was a problem that needed fixing or whether there were other, less radical ways to deal with whatever problems were discovered. There were no studies or surveys to determine 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. *Id.* at 67:12-15. She did no surveys to determine

[5] "This report focuses on selected traffic and circulation issues that have emerged during the post Reexamination report years [*i.e.*, since the February 2005 Amendment and Report]. *Policies, problems and objectives not noted in this report or the Circulation Element of the Master Plan are considered to be unchanged in content from the prior Reexamination reports.*" PX59 at 6 (emphasis added).

which houses of worship in Bridgewater offered ancillary services—such as day care or schools—that might increase traffic flows. *Id.* at 67:16-68:22. She conceded that safety concerns played no part in the report's recommendations on siting houses of worship. *Id.* at 95:4-11. She consulted no one to determine which roads to include in her recommended list. *Id.* at 92:3-15, 94:6-99:18.

The Absence of Changed Circumstances Justifying a Zoning Ordinance Amendment—As discussed above, a reexamination report should identify changed circumstances that may warrant a zoning ordinance amendment. Ms. Doyle initially testified that her Reexamination Report was describing changes since the 2005 Master Plan. Doyle Tr. 73:3-74:21. However, she later corrected herself to explain that her Report was supposed to, and did, describe changes since the last reexamination report in September 2010. *Id.* at 144:5-22. The entire discussion of these supposedly changed conditions is contained in one paragraph, 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.][6] 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 character of the single family residential districts in which they may be located.

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."[7] *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

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

[7] The word "unduly" was not in Ms. Doyle's draft but was added when the Planning Board adopted the report on February 8, 2011. PX46 at 5:2-9.

Bridgewater's houses of worship, she did not know what the state of affairs was at any of the others and had not conducted any studies or surveys on this topic. Doyle Tr. 75:9-84:11. With respect to those she knew anecdotally, the supposedly new functions had been in place for "decades"—well before September 2010 and even before 2005. *Id.*

The Planning Board itself simply relied on Ms. Doyle's unsupported statements concerning what was new. The testimony of Mayor Flannery, who also sat on the Board, is instructive. She did not ask Ms. Doyle what factual support there was for the Reexamination Report. Flannery Tr. 105:3-17. When examined about the sentence that said, "The timeframes for assembly now stretch throughout all days of the week during day and evening hours," she questioned the accuracy of the word "now" and wondered whether the changes described had not always been the case. *Id.* at 106:3-16. Similarly, another Board member testified that she did not know the basis for Ms. Doyle's statements about changed circumstances of houses of worship, and understood several other houses of worship in Bridgewater had drawn worshippers from outside Bridgewater and provided additional services for many years. Henderson-Rose Tr. 64:18-67:13, 223:18-226:9.

Bridgewater's "Recent Experience" With Open Air Clubs—The Reexamination Report contained one cryptic sentence about a "recent experience" concerning "neighborhood impacts relative to open air clubs of high assemblage in

established residential neighborhoods." PX12 at 6. Ms. Doyle testified that this referred to noise complaints relating to the basketball courts at Camp Cromwell, which is owned by the Boys Club of New York and is located in the same R-50 zone as Al Falah's property. Doyle Tr. 69:17-72:3. Ms. Doyle testified that there had been complaints from the neighbors about the "excited" basketball games and the attendant "exuberant, enthusiastic, vocal sound." *Id.*

According to Ms. Doyle, this example was relevant because Al Falah's Application included a basketball court. *Id.* at 72:4-12. It is hard to fathom how Ms. Doyle, or anyone on the Planning Board or Township Council, could believe that the experience at the Boys Club could justify changing the rules for the Al Falah mosque at the Redwood Inn. The Boys Club ran a summer camp filled with kids engaged in athletic competition. The basketball courts at the camp were permanent installations with bleachers for 300 spectators. 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, if and when it was established, could shoot hoops or play during recess, after which the backboards would be wheeled away. *Compare* Chow Dec. Ex. E *with* Chow Dec. Ex. F; *see also* Doyle Tr. 326:15-327:23.

Whether Traffic "Unduly" Affects Nearby Residential Neighborhoods—Ms. Doyle wrote in her January 26 draft, "[I]t is necessary to

introduce ordinance requirements to assure that the participants will have convenient travel to their point of assemblage without affecting the abutting and nearby residential neighborhood." PX12 at 7. Even one car could affect such neighborhoods, and Ms. Doyle said that she did not intend to address such *de minimis* effects. Doyle Tr. 85:8-86:11. Presumably that is why the word "unduly" was inserted when the Planning Board adopted the Report so that the sentence read "without unduly affecting...." However, the word "unduly" must mean that there are some levels of traffic that would be acceptable and some that would not. *Id.* at 86:12-16. Ms. Doyle could not articulate any standard or even a point of reference for distinguishing between the acceptable and the unacceptable. *Id.* at 86:18-87:15. This is understandable because in preparing her Reexamination Report neither she nor any other Township official or body undertook any traffic study, and a study completed four months earlier had identified no problem. PX58; PX59.[8] Moreover, Al Falah's traffic impact analysis, with which the Township's traffic expert agreed, showed that even at peak hours the traffic to and from the Al Falah mosque site would not materially affect the volume of traffic already on the surrounding roads. PX81.

[8] Ms. Henderson-Rose testified that she was primarily concerned about the potential effect of traffic from the mosque on the surrounding community and would have expected to hear expert testimony before being able to determine how much additional traffic was too much. Notwithstanding her professed concerns, she did not review the traffic impact study submitted with the Application. Henderson-Rose Tr. 37:23-38:10, 180:13-183:9, 293:8-294:1. Nor did she wait to hear testimony about traffic before voting to adopt the Reexamination Report.

Whether the Recommended Ordinance Was "Necessary"—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. Bogart Tr. 128:7-132:20. The Reexamination Report itself lists some, though by no means all, 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. PX45 at 13; Doyle Tr. 88:19-90:20. Although the Reexamination Report recommended a study of these alternatives, the Township ignored that recommendation. Nor did the Report consider the possibility of calibrating the size of houses of worship with particular roads as a few New Jersey townships (including neighboring Bedminster) had done. Chow Dec. Ex. G. 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.

The Planning Board's Adoption of the Reexamination Report—The Planning Board took up a final version of the Reexamination Report (nearly identical to the original January 26 draft) at a public meeting on February 8, 2011.

PX19. Although the Board ostensibly was considering a Township-wide ordinance concerning various places of assembly, all but one of the public comments were about whether a mosque should be permitted at the Redwood Inn, with the great majority of those who opposed a mosque citing concerns about traffic. PX46 at 9:4-101:4. At the conclusion of the meeting, as had been forecast at the 5:00 p.m. pre-meeting on January 24, the Planning Board adopted Ms. Doyle's Reexamination Report. *Id.* at 101:5-105:1.

The Township Council's February 17, 2011 Meeting—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. PX73; Norgalis Tr. 88:7-89:25. Once again, most comments from the public were about whether the speakers wanted a mosque at the Redwood Inn, and most opponents complained about traffic. PX73. At the end of the meeting, 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. PX73 at 4. A public hearing and final action by the Township Council was scheduled for March 3, 2011 (later deferred to March 14), which meant that the Planning Board had to get the ball back to the Council before then. *Id.*

The Planning Board's Adoption of Ms. Doyle's "Consistency" Memorandum—On February 22, 2011, Ms. Doyle sent a memorandum to the Planning Board purportedly addressing whether the proposed ordinance was consistent with the Master Plan. PX24. She said the Board should formally recommend to the Council that it adopt the proposed ordinance. *Id.*

Although the proposed ordinance was certainly consistent with (indeed was based upon) the Reexamination Report Ms. Doyle had written less than a month earlier, the Master Plan itself had not been amended; that would have taken too long. Doyle Tr. 89:22-90:20. As actions by the Township Council subsequently acknowledged (*see* pp. 33-36 below), the new ordinance was inconsistent with the Master Plan. PX48 at 2. Rather than acknowledge that inconsistency, the February 22 memorandum sought to conceal it with doubletalk:

> The above referenced [proposed] ordinance is consistent with the recently-adopted Master Plan Reexamination Report dated February 8, 2011, which is attached hereto and incorporated herein by reference in that it implements the Board's recommendations for land use ordinance amendments within the township. However, the 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.

PX24. In other words, the proposed ordinance was inconsistent with the Master Plan because no Master Plan or Master Plan Amendment or Master Plan

Reexamination Report had ever mentioned any need to restrict houses of worship in residential zones based on their access to particular roads. And since 1937 the zoning ordinance itself had permitted houses of worship in all residential zones without such a condition. But apparently Ms. Doyle (and subsequently the Board) found none of this a problem because the proposed ordinance was allegedly consistent with unspecified "general purposes, objectives and intent" of the Master Plan. *Id.* The meaninglessness of that latter statement 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. 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); PX48 at 2, 76, 77. *See* discussion of the Council's actions at pp. 36-37 below.

The February 28, 2011 Reconvened Planning Board Hearing on the Application and Approval of Recommendation of New Ordinance—At its February 28 meeting, the Planning Board continued the "ping pong" game by approving a resolution recommending the proposed ordinance and referring it to

the Township Council with Ms. Doyle's February 22 memorandum. Tubman Dec. Ex. U at 7:7-18, 63:2-64:4.

The Board then reconvened the public hearing on the Al Falah Application that had been adjourned on January 24 due to overcrowding. PX27. Prior to the February 28 hearing, there had been threats by the Tea Party that it would try to block access to the meeting place. PX23. Notes of an internal "Mosque Planning Board ... Logistical Meeting" state that police representatives were made *"aware of the TEA Party threat to flood surrounding streets with cars making access to meeting extremely difficult."* *Id.* (emphasis added). In fact, members of the Planning Board were provided a separate entrance to the meeting. PX25. Hundreds of people attended the meeting. Y. Abdelkader Dec. (5/18/2011) ¶ 9.

The Planning Board began the hearing on the Application, but the only testimony heard before the hearing was adjourned was that of an Imam who answered questions about Islamic religious practice and how his mosque in Boonton, New Jersey operates. Tubman Dec. Ex. U at 88:5-178:6. The Board also heard numerous comments from members of the public opposing a mosque, in most cases on grounds related to traffic. When the hearing was adjourned, the Chair of the Planning Board said that it would not reconvene until March 28 "[i]f the application stays under the jurisdiction of the Planning Board." *Id.* at 176:25-177:10; Tubman Dec. ¶ 55.

The Doyle and Forsythe Memoranda Attempting to Supply Retroactive Justification for the Proposed Ordinance—The Reexamination Report purported to explain the need for the proposed ordinance and to supply the factual and other purported justifications. Apparently someone (Ms. Doyle could only "speculate" who that might have been) thought that the Reexamination Report was inadequate and asked Ms. Doyle to supplement her report with a memorandum to the Council. Doyle Tr. 125:4-23. Ms. Doyle conceded that such a memorandum was unusual; she could not think of any other instance when such a second report was submitted to the Council. *Id.* at 126:4-22.

The memorandum she produced, dated March 2, 2011, added nothing of substance to the Reexamination Report. It repeated the same baseless assertion that circumstances surrounding the use of houses of worship had changed. Ms. Doyle had no more factual support for this assertion than she had for the same assertion in the Reexamination Report. Doyle Tr. 126:23-132:17. She added several sentences about schools—a subject that her Reexamination Report had not mentioned. As with houses of worship, she stated that there were supposed changes in the traffic patterns relating to schools without any support or any discussion of whether those changes occurred since the last reexamination report.[9]

[9] "In the past, location of assembly uses such as schools was often within a reasonable walking distance of the homes they served. They were a convenience to the residents. Over time, this changed as bussing of students and driving of

Footnote continued on next page

The memorandum also cited two reports of the Zoning Board of Adjustment (from 2008 and 2009) that Ms. Doyle apparently had overlooked in her Reexamination Report. PX30 at 2. Ms. Doyle concedes that nothing in the ZBA reports recommended restricting houses of worship in residential zones based on access to certain roads. Doyle Tr. 148:14-19, 149:4-8.

Even the March 2 memorandum apparently did not satisfy the Council that it had made a sufficient record to justify the proposed ordinance, so someone asked Mr. Forsythe, the Township Engineer, to supply yet another memorandum.[10] Forsythe Tr. 65:10-12; Bogart Tr. 121:17-122:6; PX52. The Reexamination Report and the March 2 memorandum had mentioned traffic volume as affecting residential quality of life. 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*. PX53. This late entry came after the Council had passed the proposed ordinance on first reading (PX73), after the Planning Board had recommended passage of the ordinance (PX29), and just four

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second cars to social destinations became commonplace. More recently, schools have expanded the use of their classroom space to host adult evening classes for a variety of disciplines, including scouts, reading classes, avocation clubs, sporting activities, as well as for non-profit meetings. These assembly uses can create traffic patterns and demands on roadway during non-traditional school hours which can generate discord in a residential neighborhood." PX30.

[10] Mr. Forsythe testified that the immediate request came from Mr. Bogart, the Township Administrator. Forsythe Tr. 65:10-12. Mr. Bogart said that any such request (he could not recall making one) would have been at the behest of the Mayor. Bogart Tr. 121:17-122:6.

days before the Council was to take its final vote. As noted above, Ms. Doyle, who chose the roadways to be included in the proposed ordinance, testified that safety issues played no role in her selection of those roadways and that she had not even consulted Mr. Forsythe in preparing the Reexamination Report. Doyle Tr. 92:3-15, 95:4-11. There was good reason not to consult Mr. Forsythe; he is not a traffic engineer and has no training in this area other than a few post-college seminars. Forsythe Tr. 11:10-12:1.

Mr. Forsythe's memorandum, entitled "Access Ordinance Roadway Selection Analysis," contains two paragraphs, only the second of which addresses the selection of roadways for the access ordinance:

> The roads included in this Access Ordinance all are at least 30' wide, run between County and/or State Highways, 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.

PX53.

The assertion concerning the purported safety aspects of the permitted roads is inaccurate in significant respects. The Township produced eleven "road cards" describing the features of county roads (permitted roads). Contrary to the statement in the memorandum, seven are less than 30 feet wide for their entire

length or for some segment.[11] As for the town roads, according to the road cards produced by Defendants, two of the four road segments on which houses of worship are permitted by Ordinance 11-03 are less than 30 feet wide. One segment is listed as 18 feet and goes under a railroad underpass so low that it does not permit passage of emergency vehicles.[12]

Mr. Forsythe conceded that aspects of his memorandum were misleading and that he did not so inform any member of the Township Council. Forsythe Tr. 109:11-115:17.

The Township Council's Public Hearing to Approve the Proposed Ordinance—The Township Council originally scheduled the public hearing on the proposed Ordinance for March 3, 2011. Township officials expected the hearing to draw an extraordinary crowd.[13] As it happened, the Township's apparent failure to provide timely notice of the meeting to surrounding municipalities caused the

[11] *See* 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)).

[12] The segment of Milltown Road is listed as 18 feet wide. *See* Chow Dec. Ex. H. Along one stretch of Milltown Road, the road is reduced to one lane where it allows passage for cars under a railroad overpass. Doyle Tr. 187:22-189:7. Fire trucks cannot even get through this section because of the height of the overpass. *Id.*; *see also* Chow Dec. Ex. I. The road card for a portion of Country Club Road that is included in one of the Four Road Segments lists the paved road width as 22 feet. *See* Chow Dec. Ex. H.

[13] "Based on the anticipated crowd for Thursday's Council Meeting I [the police chief] suggest a simple plan similar to a County Championship game as we had on this past Saturday where approx. 2500 people were in attendance .... Same protocol should be followed as with any Council Meeting but obviously officers will be present to deter unruly behavior." Chow Dec. Ex. J.

Council to defer action on the proposed Ordinance to its meeting of March 14, 2011. PX121; PX146.

Even though the March 14 hearing was about enactment of a purportedly Township-wide revision of the zoning law that applied to places of assembly in addition to houses of worship, the transcript shows that the meeting was really about whether to permit use of the Redwood Inn as a mosque. PX78; Hirsch Dec. ¶ 10. The majority of those who spoke in favor of the proposed Ordinance made specific comments about the proposed mosque at the Redwood Inn. PX78.

Nonetheless, at the end of this process Township officials understood, as they had throughout, the need to conceal that this Ordinance was really about Al Falah's Application. So when the Ordinance passed on March 14, they put in the record clearly false statements about what had prompted the change claiming that "it was in [the] work[s] since 2008, 2009." PX78 at 157:6-14; Hirsch Dec. ¶ 11. In fact, no such change had been in the works until shortly after the Al Falah Application in January 2011.

The Township Council unanimously passed the Proposed Ordinance. PX48; Wallis Dec. (6/17/11) ¶ 5. It is Ordinance 11-03. Tubman Dec. ¶ 61.

Purported Dismissal of the Application—Based on the passage of Ordinance 11-03, the Planning Board disclaimed jurisdiction to approve the

Application and voted to dismiss it on April 12, 2011. Tubman Dec. ¶ 66; Chow Dec. Ex. K.

ARGUMENT

In deciding a motion for a preliminary injunction, a trial court considers (1) the movant's likelihood of success on the merits, (2) whether the movant will suffer irreparable harm without relief, (3) whether the nonmoving party will suffer irreparable harm if the injunction is issued, and (4) the public interest. *E.g., Chester ex rel. NLRB v. Grane Healthcare Co.*, 666 F.3d 87, 89 (3d Cir. 2011). As demonstrated below, Plaintiffs meet this standard and are entitled to a preliminary injunction (1) declaring the Ordinance void and enjoining Defendants from enforcing it, and (2) directing the Planning Board to resume consideration of Plaintiffs' Application for use of the Redwood Inn without consideration of the Ordinance.

I. PLAINTIFFS WILL PREVAIL ON THE MERITS

A. The Ordinance Violates RLUIPA

RLUIPA, 42 U.S.C. § 2000cc *et seq.*, prohibits state and local government infringement on religious exercise through land use regulation. RLUIPA is to be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by [its] terms … and the Constitution." § 2000cc–3(g). The law's sponsors explained RLUIPA's purpose as follows:

> Churches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes.
>
> The hearing record compiled massive evidence that this right is frequently violated. Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes....
>
> Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black churches and Jewish shuls and synagogues. More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or "not consistent with the city's land use plan."

146 Cong. Rec. S7774-01 (daily ed. July 27, 2000) (Ex. 1, Joint Statement of Sen. Hatch and Sen. Kennedy).

Defendants' conduct exemplifies the governmental overreach RLUIPA prohibits. Islam is a minority religion in the United States, unfamiliar to many people, and the object of prejudice by those who conflate Islam with the acts of terrorists who purport to speak in its name. Plaintiffs are Americans who sought a building in which to practice their religion. They contracted to buy property on which that use was conditionally permissible under long-standing zoning law, and

filed an application with the Planning Board demonstrating that their use would meet the established conditions. The hearing on what should have been a routine application revealed strident opposition, some of which was obviously the product of anti-Muslim animus. Succumbing to that opposition, Bridgewater hastily rewrote its zoning law to frustrate Al Falah's religious use of its property. The Township's purported concerns about traffic and neighborhood integrity are not supported by the record. They are clearly pretextual in light of the 75-year history of permitting houses of worship throughout residential zones and the absence in any of the numerous planning documents cited by the Township of any expression of concern that houses of worship were inconsistent with the goal of preserving residential neighborhoods.

Discrimination—RLUIPA bars land use regulation "that discriminates against any assembly or institution on the basis of religion or religious denomination." 42 U.S.C. § 2000cc(b)(2). To establish a violation of section 2000cc(b)(2), Plaintiffs must show that (1) Al Falah is an "assembly or institution," (2) subject to a "land use regulation," (3) that has been imposed or implemented "in a manner that discriminates against [Al Falah] on the basis of religion or religious denomination." *Id.* The first two requirements are indisputable. Regarding the third, the Township appears to believe that discrimination can be shown only if an individual defendant expressed anti-

Muslim animus. That is not the law under RLUIPA or under comparable First Amendment or Equal Protection clause jurisprudence.

In two seminal cases, the Supreme Court discussed the kinds of evidence that can establish discriminatory intent—*Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977). Both cases dealt with alleged racial discrimination, and in both the Court found that the plaintiffs had not proven discriminatory intent. In doing so, the Court made clear that discriminatory intent need not be "express or appear on the face of the statute .... Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts ...." *Washington*, 426 U.S. at 241-42.

Justice Stevens expounded on this point in his oft-cited concurrence:

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. It is unrealistic ... to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker....

Id. at 253 (Stevens, J., concurring).

The next year, *Arlington Heights* held that in order to establish discriminatory intent a plaintiff need not prove that the state action rested "solely" on a discriminatory purpose, because "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." *Arlington Heights*, 429 U.S. at 265. And determining whether discriminatory purpose was "a" motivating factor "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" (*id.* at 266), including the "historical background" and the "specific sequence of events leading up [to] the challenged decision." *Id.* at 267.

The plaintiffs in *Arlington Heights* wanted to build integrated multifamily housing units on a property zoned for single-family use. They asked the Village to rezone so that the project could proceed, and the Village refused. The Court upheld this refusal because the sequence of events leading up to the Village's decision did not "spark suspicion." *Id.* at 269. The plaintiffs' property had been zoned for single-family use since 1959, when the Village first adopted a zoning map, and the plaintiffs' rezoning request had "progressed according to the usual procedures." *Id.* The Court also said, in a comment particularly relevant here, that it would be a very different case if the Village had changed the zoning law in response to the plaintiffs' development proposal. "[I]f the property involved here

always had been zoned [for multiple family dwellings] but suddenly was changed to [single family dwellings] when the town learned of [plaintiffs'] plans to erect integrated housing, we would have a far different case." *Id.* at 267.

Sudden actions by local officials played a central role in one of the leading RLUIPA cases, *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002). There, the Church wanted to build a new facility on property it had purchased in the City. That property had been vacant for nearly a decade. But as soon as the City learned of the purchase, the City "became a bundle of activity" including adopting new development plans for that property and instituting condemnation proceedings. *Id.* at 1225. The City's "sudden[] burst into action" led the court to conclude that the plaintiffs had presented significant circumstantial evidence of discriminatory intent that would establish a violation of RLUIPA.[14] *Id.*

This case has all the attributes of the "far different case" envisioned in *Arlington Heights* as well as what happened in *Cottonwood*—the change in zoning, the "sudden burst into action" to deal with the religious organization's application, the suspicious departure from previous practice, and much more. We list here

[14] In this respect RLUIPA jurisprudence is no different from that under the Free Exercise Clause, where discriminatory intent also may be inferred from circumstantial evidence. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993); *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 165-66 (3d Cir. 2002).

some of the more egregious circumstances, described in the statement of facts with citations to the record, that lead to a finding of discriminatory intent:

> 1. After 75 years of permitting houses of worship in residential zones without regard to road access, the Township, in response to Al Falah's Application, passed a new ordinance that classified the Redwood Inn's location as being on a non-permitted road. *See* pp. 6-38 above.
>
> 2. At least since 1976 the Township had issued numerous planning documents listing goals of neighborhood integrity, residential neighborhood character, and similar generalities without ever saying or suggesting that these goals were in any way compromised by a house of worship on any roadway in a residential zone. *See* pp. 19-22 above.
>
> 3. The Township enacted Ordinance 11-03 at warp speed, much faster than anyone had ever seen and too fast to give serious consideration to a change of this magnitude, for one reason: to make sure that the new ordinance would be enacted before New Jersey's "time of application" law took effect. *See* pp. 12-38 above.
>
> 4. Township officials ignored other much less radical means to deal with their purported concerns because those solutions would have taken longer and likely would not have had the effect of blocking the mosque. *See* pp. 22-23, 28 above.
>
> 5. The process was accompanied by false or misleading statements designed to obscure the Township's purpose.[15] For example, when the Ordinance passed, Councilman Hayes (who has since been elected the Township's mayor), falsely announced to the public

[15] False exculpatory statements are admissible to show consciousness of guilt in the criminal context. *United States. v. Kemp*, 500 F. 3d 257, 296 (3d Cir. 2007).

that the Ordinance had been in the works for years. *See* pp. 36-37 above.

6. In an attempt to cover up its Alice in Wonderland process where the "study" is commissioned only after the decision has already been made, the Township continues to make the incredible claim that what was labeled a "draft" ordinance days before January 24, 2011 was not in fact a "draft." *See* pp. 12-17 above; Chow Dec. Ex. C; Doyle Tr. 264:7-17.

7. As the preordained process of amending the ordinance sped forward, the Township found it necessary to make up new justifications as it went along. *See, e.g.*, pp. 33-36 above regarding traffic safety.

8. What the Township did say in support of the Ordinance at the time of passage, for example relating to traffic volume, contradicts its traffic expert hired to review Al Falah's Application and its prior planning documents, particularly its extensive traffic study completed just four months before Al Falah submitted its Application. *See* pp. 8-9, 21-22, 26-27 above.

This record—showing acts inconsistent with the Township's historical practices, done in response to unprecedented political pressure fueled by anti-Muslim publicity, and justified by misleading public statements—overwhelmingly supports an inference of discriminatory intent. Indeed, this record in conjunction with the text and legislative history of RLUIPA demonstrates that what Bridgewater has done to Plaintiffs is precisely what Congress enacted RLUIPA to stop.

Substantial burden—If Ordinance 11-03 imposes a substantial burden on Plaintiffs' religious exercise, it violates RLUIPA unless it is in furtherance of a compelling government interest *and* it is the least restrictive means of furthering

that compelling government interest.[16] RLUIPA defines "religious exercise" to include "[t]he use, building, or conversion of real property for the purpose of religious exercise." 42 U.S.C. § 2000cc-5(7)(B). Al Falah's proposed redevelopment of the Redwood Inn clearly is "religious exercise" within that definition. RLUIPA does not define "substantial burden," and the Third Circuit has yet to consider its meaning in a religious land use case under RLUIPA.

Lower courts have applied a common sense meaning to "substantial burden" in religious land use cases, looking to the extent to which government action hampered the plaintiff's religious use of property and the availability of realistic alternatives. 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). There are several factors here that show, either singly or in

[16] The "substantial burden" subsection of RLUIPA applies under any of three alternative specified conditions. Two are met here. First, the Ordinance clearly affects interstate commerce. § 2000cc(a)(2)(B). Construction projects such as the one Al Falah intends to carry out on the Redwood Inn affect interstate commerce. *See Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 181 (2d Cir. 1996); *Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 541 (S.D.N.Y. 2006). Second, the Ordinance has been imposed as part of a system of land-use regulations under which the Township makes "individualized assessments of the proposed uses for the property involved." § 2000cc(a)(2)(C). Bridgewater's Planning Board makes such individualized assessments—for example, by assessing whether applicants for conditional use approval (like Al Falah) actually meet the conditions. The Township enacted the Ordinance to preclude Al Falah from even obtaining that individualized assessment by the Planning Board.

concert, that the Ordinance has imposed a substantial burden on Plaintiffs' religious exercise.

First, Al Falah spent considerable time, effort and money finding and purchasing an appropriate property for its mosque and ensuring that its application would comply with all the applicable zoning rules. Then the Township abruptly changed the rules. Such a change without more imposes a substantial burden. In *Albanian Associated Fund v. Township of Wayne*, 2007 WL 2904194 (D.N.J. Oct. 1, 2007) (Sheridan, J.), a Muslim group applied for permission to build a mosque on its property. While the application was pending before the planning board, the municipality adopted an "open space" preservation plan that called for the condemnation of the group's property. The court held that this mid-stream change while the application was pending could reasonably be found to impose a substantial burden. *Id.* at 13. *Cottonwood Christian Center*, 218 F. Supp. 2d 1203, and *World Outreach Conference Center v. City of Chicago*, 591 F.3d 531, 535-38 (7th Cir. 2009), are to the same effect.

Second, the Ordinance has imposed "delay, uncertainty, and expense" on Al Falah, another indicator of substantial burden. *Int'l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1068 (9th Cir. 2011), *cert. denied*,

132 S. Ct. 251, 181 L. Ed. 2d 145 (2011).[17] Here, the Ordinance has effectively paralyzed Al Falah's effort to establish a religious home. After Al Falah purchased a properly zoned property, spent hundreds of thousands of dollars and subjected its members to humiliating public proceedings in an effort to obtain approval for their long-awaited mosque, Plaintiffs have no religious home. Meanwhile Plaintiffs must scramble constantly to arrange for temporary, inconvenient and costly rented facilities, all the while paying carrying costs on a property they cannot even visit as a congregation. Al Falah's lack of a permanent spiritual home has impeded its ability to grow, to cohere and to raise money for its programs. Y. Abdelkader Tr. 89:21-90:10. Without a mosque Al Falah cannot attract a permanent Imam to lead the Al Falah community. Wallis Supp. Dec. ¶¶ 21-23.

Defendants say seven alternative sites would be permitted locations for a mosque under Ordinance 11-03. Only two are on the market. Steeves Dec. ¶¶ 4-5. Neither has a building on it that could be converted to a mosque. The land acquisition costs at these two alternatives 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

[17] *See also Sts. Constantine & Helen Greek Orthodox Church, Inc.*, 396 F.3d 895, 901 (7th Cir. 2005); *Westchester Day Sch.*, 504 F.3d at 349 (finding that an absence of "ready alternatives," or alternatives "requir[ing] substantial 'delay, uncertainty, and expense,'" may "be indicative of a substantial burden") (citations omitted).

and possibly time-consuming proposition. It then would have to acquire one of the alternative sites. One is for sale for $2,850,000; the other is for sale for $21,000,000. 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 absence of "economically feasible alternatives" demonstrates substantial burden.[18] Even if one of these two sites were economically feasible, "RLUIPA does not contemplate that local governments can use broad and discretionary land use rationales as leverage to select the precise parcel of land where a religious group can worship." *Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 992 n.20 (9th Cir. 2003).

Defendants also argue that Ordinance 11-03 does not substantially burden Plaintiffs' religious exercise at the Redwood Inn because Al Falah could apply to the ZBA for a variance permitting a mosque at that site. The ZBA may not grant a variance unless it finds that the variance "*will not substantially impair the intent*

[18] *See Westchester Day Sch.*, 504 F.3d at 352-53; *see also Islamic Ctr. of Miss. v. City of Starkville*, 840 F.2d 293, 299 (5th Cir. 1988) ("By making a mosque relatively inaccessible within the city limits … the City burdens their exercise of their religion."); *Barr v. City of Sinton*, 295 S.W.3d 287, 301, 305 (Tex. 2009) (rejecting city's argument that a religious halfway house suffered no substantial burden because it could move elsewhere); *Church of the Hills v. Twp. of Bedminster*, 2006 WL 462674, at *6 (D.N.J. Feb. 24, 2006) (Chesler, J.) ("[T]he Court cannot agree with the Defendants[']] assertion that '[t]he fact that the Plaintiffs cannot engage in worship with their entire congregation at the same time and place does not and cannot establish a substantial burden.'") (citations omitted).

and purpose of the zone plan and zoning ordinances." N.J.S.A. § 40:55D-70 (emphasis added). If Al Falah applied for a variance, the same people who objected to its Application no doubt would oppose a variance. They would claim that granting a variance would substantially impair the intent and purpose of Ordinance 11-03 because it was passed precisely with Al Falah's proposed mosque in mind. They also would cite the decision of the Township Council to pay for and sponsor in this litigation multiple reports by an expert arguing that the Redwood Inn is not an appropriate site for a mosque. If the ZBA nevertheless granted a variance, the objectors could seek *de novo* review by the Township Council—the very body that enacted Ordinance 11-03 with the Redwood Inn directly in its sights. *See Comm. for a Rickel Alternative v. City of Linden*, 111 N.J. 192, 199-203, 543 A.2d 943, 947-49 (1988).

And how long would this process take? When the Hindu Temple applied to the Bridgewater ZBA for a variance in 2004, it took five years to obtain one, and then only after years of hearings before the ZBA, lawsuits in both state and federal court, and an investigation by the Department of Justice. Chow Dec. Ex. L; T. Abdelkader Dec. ¶ 10; Savo Tr. 41:25-42:5.

Once substantial burden on religious exercise is shown, the government can defend its action only by demonstrating that imposition of the burden furthers a "compelling governmental interest" and "is the least restrictive means of furthering

that … interest." 42 U.S.C. § 2000cc(a)(1); *Washington v. Klem*, 497 F.3d 272, 277 (3d Cir. 2007). This is the "most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Bridgewater cannot meet it.

As one court has explained, "[o]ne way to evaluate a claim of compelling interest is to consider whether in the past the governmental actor has consistently and vigorously protected that interest." *Grace Church v. City of San Diego*, 555 F. Supp. 2d 1126, 1140-41 (S.D. Cal. 2008). The evidence demonstrates that the Township's proffered traffic and neighborhood integrity concerns were discovered only after Township officials decided behind closed doors that the Planning Board should not approve a mosque at the Redwood Inn. Even if taken at face value, such vague and unsubstantiated concerns are insufficiently compelling to justify burdening religious exercise. *See Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 886 (D. Md. 1996) (stating that the following interests are not compelling: "safeguarding the heritage of the City…; stabilizing and improving property values…; fostering civic beauty; strengthening the local economy; and promoting the use and preservation of historic districts and/or sites for the education, welfare and pleasure of the residents of the City").

Even if the Township's asserted concerns amounted to a "compelling governmental interest," there are other much less restrictive ways to deal with those concerns. *See* p. 28 above.

Equal terms—The enactment of Ordinance 11-03 violated RLUIPA's equal terms clause, which bars land use regulation "that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). The central issue in an equal terms case is what secular uses a religious use should be compared to in deciding whether the religious use has been treated on less than equal terms. The controlling authority is *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253 (3d Cir. 2007), which held that the appropriate secular comparators are those that are "similarly situated in regard to the *objectives* of the challenged regulation." *Id.* at 268 (emphasis original).

In *Lighthouse*, the plaintiff alleged, and the defendants disputed, that such a secular comparator had in fact been established in the town. But the Court ignored that dispute, and focused instead on the terms of the challenged law. The issue thus was whether the challenged law treated religious uses worse than it treated similar secular uses. Where such disparity in treatment is established, the equal terms clause "operates on a strict liability standard," requiring no proof that the unequal treatment has "substantially burdened" the plaintiff's religious exercise. *Id.* at 269.

Here, the secular comparators are the Township's own facilities. In the R-50 zone where the Redwood Inn is located (and in most other residential zones),

Bridgewater's zoning law states that "municipal buildings, parks, playgrounds or other municipal facilities" (other than schools) are "permitted" without regard to specific road access. By contrast, houses of worship are permitted in the zone only if they have access to particular roads. As to the supposed justifications for this limitation on houses of worship—whether the "negative impacts of size, scale, bulk, height, traffic, and noise" that the Reexamination Report asserted were "likely to be visually and acoustically disruptive to residential neighborhoods," or the still more nebulous desirable "character" of residential neighborhoods—no one could credibly claim that the same concerns would not be raised by various types of municipal facilities. Such facilities include libraries, athletic arenas or fields, public swimming pools, parks, playgrounds, public tennis courts, band shells, police stations, and municipal assembly halls. These are all "permitted" uses whereas houses of worship at the same locations are not. Ordinance 11-03 leaves Bridgewater free now or in the future to put any such facility on the site of the Redwood Inn or on any of the hundreds of other sites in residential zones that are not permitted for a house of worship.

Although not necessary to support their case, Plaintiffs have also pointed out that the Township has a soccer complex on one of the non-permitted roads in the same neighborhood as the Redwood Inn and has expanded that complex and added significant parking facilities just last year. Y. Abdelkader Supp. Dec. This

expansion is yet another indication of the Township's hypocrisy when it claims that traffic generation is an important concern motivating the enactment of Ordinance 11-03. Another such indication can be found in the Planning Board's consideration in 2010 of a proposal for constructing parking facilities on Mountain Top Road itself to further the Township's recreational uses—without once expressing concern about additional traffic generation on that road. PX97 at 74.

Unreasonable limitation—RLUIPA also bars land use regulation that "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. § 2000cc(b)(3)(B). "As the legislative history evidences, '[w]hat is reasonable must be determined in light of all the facts, including the actual availability of land and the economics of religious organizations.'" *Vision Church v. Village of Long Grove*, 468 F.3d 975, 990 (7th Cir. 2006) (quoting 146 Cong. Rec. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady)).

As discussed above, the Ordinance arbitrarily prohibits houses of worship from approximately 80% of the previously available roadway frontage in the Township, including the Redwood Inn's location on Mountain Top Road. The unreasonable character of the Ordinance is apparent from Defendants' inability to identify an alternate site permitted under the Ordinance that is available and affordable. *See* pp. 48-49 above.

B. The Ordinance Violates Other Federal and State Laws Governing Religious Discrimination and Zoning

Although the Court can grant relief based on any one of the RLUIPA violations discussed above, Plaintiffs have pleaded claims under other legal principles that would render the ordinance unlawful even if RLUIPA were not on the books. Because RLUIPA is dispositive and those additional claims were addressed by Plaintiffs' first memorandum of May 18, 2011 and reply of June 17, 2011, we note them only briefly.

The New Jersey Law Against Discrimination—The facts that establish a RLUIPA violation also establish a violation of N.J.S.A. § 10:5-12.5, which prohibits a municipality from regulating land use "in a manner that discriminates on the basis of … creed" and is interpreted consistently with federal antidiscrimination statutes.[19] *See* Pltf. 5/18/11 Mem. (Doc. 13) at 20; Pltf. 6/17/11 Mem. (Doc. 29) at 24-25.

The MLUL Prohibition of Arbitrary and Capricious Zoning—Even without regard to religion, the MLUL prohibits enactment of zoning ordinances based on unsupported, generalized statements about supposed newly discovered but unstudied traffic concerns and neighborhood effects. *See Riya Finnegan LLC*

[19] *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1212 (3d Cir. 1995); *McAllister v. Greyhound Lines, Inc.*, 1997 WL 642994, at *7 (D.N.J. Oct. 7, 1997) (Wolin, J.); *Grigoletti v. Ortho Pharm. Corp.*, 118 N.J. 89, 570 A.2d 903 (1990).

v. Township Council of S. Brunswick, 197 N.J. 184, 193, 962 A.2d 484, 490 (2008).[20] *See* Pltf. 5/18/11 Mem. (Docs. 7-1) at 22-26.

Free Exercise Guarantees of U.S. and New Jersey Constitutions—Plaintiffs' showing of the Township's violations of RLUIPA's discrimination, substantial burden, and equal terms provisions is sufficient to establish similar violations of Plaintiffs' right to free exercise of religion under the First Amendment (U.S. Const. amend. I) and N.J. Const. art. I, ¶ 3. Here, the evidence demonstrates that Bridgewater enacted the Ordinance to accommodate anti-Muslim animus, and that the Ordinance cannot survive strict scrutiny. *See* pp. 38-54 above.

A claim under New Jersey's free exercise clause requires the court to consider whether the law has "substantially burdened" plaintiffs' free exercise of religion. *Jehovah's Witnesses Assembly Hall of S. New Jersey v. Woolwich Township of New Jersey*, 223 N.J. Super. 55, 60-61, 537 A.2d 1336, 1339 (App. Div. 1988). The evidence demonstrates "substantial burden" here, as discussed at pp. 45-51 above in the context of RLUIPA.

[20] *See also Bailes v. Twp. of E. Brunswick*, 380 N.J. Super. 336, 348, 882 A.2d 395, 402 (App. Div. 2005) (zoning power cannot be exercised arbitrarily); *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 251, 281 A.2d 513, 518 (1971) (zoning regulations "must be reasonably calculated to meet the evil and not exceed the public need").

Equal Protection (U.S. Constitution and New Jersey Constitution)—As demonstrated at pp. 52-54 above with respect to RLUIPA's equal terms clause, the Ordinance excludes from certain residential streets religious uses that have the same purportedly negative impacts on residential neighborhoods as municipal facilities such as libraries and sports complexes. While RLUIPA's equal terms clause invalidates such unequal treatment without further inquiry, in this case the Ordinance also violates federal and state constitutional guarantees of equal protection. Under the Fourteenth Amendment the Ordinance is subject to review under the "rational basis" test. Given the record demonstrating that the Township had no evidence that the Ordinance would achieve any legitimate objective, it fails that test. *A fortiori*, the Ordinance also violates New Jersey's constitutional equal protection guarantee, stated in N.J. Const. art. I, ¶ 5 ("No person shall be denied the enjoyment of any civil ... right, nor be discriminated against in the exercise of any civil ... right ... because of religious principles ...."), which requires a flexible level of scrutiny based on the rights at issue and hence is less deferential than the federal "rational basis" test. *Lewis v. Harris*, 188 N.J. 415, 442 (2006).

II. PLAINTIFFS WILL CONTINUE TO SUFFER IRREPARABLE INJURY IF PRELIMINARY INJUNCTIVE RELIEF IS DENIED

There are two independent grounds for finding that the Ordinance inflicts irreparable injury on Plaintiffs. First, any "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."

Elrod v. Burns, 427 U.S. 347, 373 (1976); *accord Tenafly Eruv Ass'n*, 309 F.3d at 178; *Jehovah's Witnesses Assembly Halls of N.J., Inc. v. City of Jersey City*, 597 F. Supp. 972, 981 (D.N.J. 1984) (Debevoise, J.).

Second, money damages cannot compensate for denial of the right to use real property, because each piece of real property is unique. *Cottonwood Christian Ctr.*, 218 F. Supp. 2d at 1230; *In re Bella Vista Assocs.*, 2007 WL 4555891, at *10 (Bankr. D.N.J. Dec. 18, 2007) (interest in real property is inherently unique); *see also Pelfresne v. Village of Williams Bay*, 865 F.2d 877, 883 (7th Cir. 1989).

III. BOTH THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST FAVOR GRANTING PLAINTIFFS PRELIMINARY INJUNCTIVE RELIEF

If preliminary injunctive relief is not granted, Plaintiffs will continue to be irreparably harmed. They will also be required to spend money they will have to raise from donations to pay insurance, taxes, security, and maintenance on property they cannot use. For the Township a preliminary injunction will mean only that it will have to proceed with the Planning Board process. If there are legitimate concerns raised by the Application those will be explored in that process.

As for the public interest, Congress—by enacting RLUIPA—identified a strong public interest in prohibiting local governments from frustrating religious land uses. That interest is best served by prompt interim relief. New Jersey—by enacting its "time of application" law—declared that allowing local officials to

frustrate legitimate land use applications by changing the law, as Bridgewater did here with Ordinance 11-03, is contrary to the public interest.

CONCLUSION

Plaintiffs' motion should be granted. The Court should enter a preliminary injunction (1) declaring Ordinance 11-03 void and enjoining Defendants from enforcing it, and (2) directing the Planning Board to resume consideration of the Application for use of the Redwood Inn without consideration of the invalid Ordinance.

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Respectfully submitted,

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