UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

AL FALAH CENTER, et al., Plaintiffs, v. TOWNSHIP OF BRIDGEWATER, et al., Defendants.	Civil Action No. 3:11-cv-2397 (MAS) (LHG) *Electronically Filed*

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

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PRELIMINARY STATEMENT

Pursuant to Rules 7(b) and 62 of the Federal Rules of Civil Procedure, and Rule 8(a)(1) of the Federal Rules of Appellate Procedure, Defendants Township of Bridgewater, Township Council of Bridgewater, and the Planning Board of the Township of Bridgewater (collectively the "Township") move for an Order staying the Court's September 30, 2013 Order issuing a preliminary injunction pending the Township's appeal of that Order.

The Township has a strong likelihood of success on appeal because the Court did not have subject matter jurisdiction to enter the preliminary injunction. If a stay is not issued and Plaintiffs (collectively "Al Falah") obtain approvals and begin to construct their mosque, the Township's appeal will likely be mooted causing irreparable harm to the Township's right to have meaningful review of this Court's decision.

Further, the balancing of the equities and the public interest favor the issuance of a stay. Neither Ordinance 11-03 nor any other action by the Township has prevented Al Falah from exercising its First Amendment rights. While Al Falah apparently has no objection to proceeding with the process established by the Municipal Land Use Law ("MLUL"), *N.J.S.A.* § 40:55D-1 *et seq.,* for obtaining an approval of an application for a development of a conditional use and preliminary site plan, it apparently objects to applying for a conditional use variance in

accordance with the procedures established by the MLUL. Requiring the Planning Board to hold hearings on Al Falah's conditional use and site plan application even though Ordinance 11-03, which divests the Planning Board of jurisdiction, has not been invalidated would be harmful to the Township. By the time the merits of the appeal are resolved, the mosque may well be constructed based on a Planning Board approval that will become invalid as a matter of law if the Township succeeds on its appeal. Finally, the Court's Order issuing a preliminary injunction implicates fundamental federalism issues, which transcend Al Falah and the Township.

An Order staying the preliminary injunction and maintaining the status quo is appropriate in light of the significant legal questions arising out of the Court's Order.

LEGAL ARGUMENT

THE COURT SHOULD ISSUE A STAY OF ITS SEPTEMBER 30, 2013 ORDER PENDING AN APPEAL BY THE TOWNSHIP.

When considering this motion for a stay pending appeal, the Court must balance: (i) the Township's likelihood of success on the merits; (ii) whether the Township will suffer irreparable injury if the stay is denied; (iii) whether the issuance of a stay will cause substantial harm to Al Falah; and (iv) the public interest. *See Hilton v. Braunskill,* 481 U.S. 770, 776 (1987); *Susquenita Sch. Dist.*

v. Raelee, 96 F.3d 78, 80 (3d Cir. 1996). In addition, the significance of the issues that will be raised in the Township's appeal is also an important consideration:

> An order maintaining the status quo is appropriate when a serious legal question is presented, when little harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury.

Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977). Application of these factors here favors the issuance of a stay.

A. The Township Has a Strong Case on The Merits On Appeal Because the Court Did Not Have Subject Matter Jurisdiction to Enter A Preliminary Injunction.

Article III of the Constitution limits federal court jurisdiction to "Cases" and "Controversies." Federal courts enforce the case-or-controversy requirement through several justiciability doctrines. *Allen v. Wright*, 468 U.S. 737, 750 (1984); *Coastal Outdoor Adver. Group, LLC v. Twp. of Union*, 676 F. Supp. 2d 337, 344 (D.N.J. 2009), *aff'd*, 402 Fed. Appx. 690 (3d Cir. 2010). One of those doctrines is ripeness. *See Toll Brothers, Inc. v. Township of Readington*, 555 F.3d 131, 137 (3d Cir. 2009). "Its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Lab. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds, Califano v. Sanders*, 430 U.S. 99 (1977); *Taylor Inv., Ltd. v. Upper Darby*

Township, 983 F.2d 1285, 1290 (3d Cir.), *cert. denied,* 510 U.S. 914 (1993); *Armstrong World Inds. v. Adams,* 961 F.2d 405, 411 (3d Cir. 1992).

Here, the Township has a strong likelihood of success on the merits on appeal because the Court did not have subject matter jurisdiction when it entered the preliminary injunction. Simply put, the Court erred in relying on *County Concrete Corp. v. Twp. of Roxbury*, 442 F.3d 159 (3d Cir. 2006), to determine that Al Falah's claims were ripe. Judge Pisano denied the Township's motion to dismiss on this issue without prejudice, and thus, the Court's ruling is not law of the case. (Dkt. Entry 82-5 p. 51 of 77 Tr. 49:16-50:6). Independent of Judge Pisano's ruling, the Court must still satisfy itself that it has subject matter jurisdiction over Al Falah's claims. *See Liberty Mut. Ins. Co. v. Ward Trucking Corp.,* 48 F.3d 742, 750 (3d Cir. 1995) ("The general rule [is] that federal courts have an ever-present obligation to satisfy themselves of their subject matter jurisdiction and to decide the issue sua sponte[.]").

Recognizing that its as-applied claims were not ripe and that a facial challenge would require invalidation of Ordinance 11-03, Al Falah sought 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." [Dkt Entry 79-1 p. 10 of 66]. Al Falah

itself recognized that invalidation of Ordinance 11-03 was a necessary predicate to the relief that it sought (i.e., an injunction directing the Planning Board to process its site plan application) because the Ordinance had divested the Planning Board of jurisdiction to consider Al Falah's application. *See Meszaros v. Planning Bd. of City of South Amboy*, 371 N.J. Super. 134, 140 (App. Div. 2004); *Perlmart v. Lacey Tp. Planning Board*, 295 N.J. Super. 234, 241 (App. Div. 1996). The Court, however, declined to invalidate Ordinance 11-03.

Despite this very different procedural and factual history, Al Falah has argued that its claims closely resemble those in *County Concrete* where the Township of Roxbury enacted an allegedly facially invalid zoning ordinance. When examined, however, the purported similarity is chimerical. In *County Concrete*, the finality rule of *Williamson County Regional Planning Com. v. Hamilton Bank*, 473 U.S. 172 (1985), did not bar the plaintiff's claims because there was "no question … about how the regulations at issue [applied] to the particular land in question." *County Concrete*, 442 F.3d at 167; *see also*, *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 739 (1997).

County Concrete involved a radical change of zoning from industrial to low-density residential use: County Concrete had operated a sand and gravel mining business for 20 years when its properties were rezoned from industrial to "RR

Rural Residential" and "OS Open Space." *See County Concrete Corp. v. Twp. of Roxbury,* 2009 U.S. Dist. LEXIS 2578, at *3-*4 (D.N.J. March 30, 2009). As a result of rezoning, a sand and gravel mining use that had been operating for 20 years became a prohibited use, and County Concrete would have had to obtain a (d)(1) use variance to continue its operations. *See N.J.S.A.* §40:55D-70(d)(1) (setting forth criteria for obtaining a variance for "a use or principal structure in a district restricted against such use of principal structure"). If County Concrete had submitted an application for a (d)(1) use variance, the Roxbury Zoning Board of Adjustment would have been prohibited by law from granting a variance because such a decision would have improperly usurped the authority of the Roxbury Town Council. *See Feiler v. Fort Lee Bd. of Adjustment*, 240 N.J. Super. 250, 255 (App. Div. 1990), *certif. denied,* 127 N.J. 325 (1991) (reversing grant of use and bulk variances which allowed the construction of high-density residential towers in a district zoned for two-family detached homes); *see also, Kinderkamack Road Assoc. LLC v. Mayor and Council of Borough of Oradell,* 421 N.J. Super. 8, 12 (App. Div. 2011) ("use variances may be granted only in exceptional circumstances").

When County Concrete commenced suit, its claims were ripe because the extent that the zoning ordinance limited development of County Concrete's

properties was definitively known. *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986) ("Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it."); *see also, Suitum,* 520 U.S. at 739 (holding that because land use board had **no discretion** over how landowner could use her property "no occasion exists for applying *Williamson County's* [finality] requirement"). In order to obtain a (d)(1) use variance, County Concrete would have had to demonstrate "special reasons" and also would have been obliged to satisfy an "enhanced quality of proof" by securing "clear and specific findings by the board of adjustment that the variance sought [was] not inconsistent with the intent and purpose of the master plan and zoning ordinance." *See Medici v. BPR Co.,* 107 N.J. 1, 21-22 (1987); *Kinderkamack*, 421 N.J. Super. at 12-13. Quite logically, the Roxbury Board of Adjustment could not have made a factual finding that a sand and gravel mining operation would not substantially impair Roxbury's Master Plan and zoning ordinance when the properties had just been rezoned from industrial to low density residential. *See Price v. Himeji, LLC*, 214 N.J. 263, 285 (2013) (a zoning board of adjustment "may not, in the guise of a variance proceeding, usurp the legislative power reserved to the governing body of the municipality to amend or revise the [zoning] plan").

Unlike the ordinance in *County Concrete*, the nature and extent that Ordinance 11-03 limits development on Al Falah's property is not known because an application for a (d)(3) conditional use variance for Al Falah's mosque, which as a matter of law is an inherently beneficial use, has never been submitted. *See House of Fire Christian Church v. Zoning Bd. of Adjustment of Clifton,* 379 N.J. Super. 526, 535 (App. Div. 2005). In *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), the Court "held that where the regulatory regime offers the possibility of a variance from its facial requirements, a landowner must go beyond submitting a plan for development and actually seek such a variance to ripen his claim." *Suitum*, 520 U.S. at 736-37 (analyzing *Hodel*).

An automatic denial of an application for a (d)(3) conditional use variance would not and could not have been a *fait accompli* as Al Falah has urged. A (d)(3) variance is a very different type of variance than what was at issue in *County Concrete.* If Al Falah had filed an application for a variance, the stringent special reason standards for obtaining a (d)(1) use variance (as was applicable in *County Concrete*) would not have been applicable. *See TSI East Brunswick, LLC v. Zoning Bd. of Adjustment of E. Brunswick*, 215 N.J. 26, 43 (2013) (holding that enhanced quality of proofs standard required under *Medici* for evaluation of the negative criteria in consideration of a (d)(1) use variance has no application to an

application for a (d)(3) variance); *Coventry Square, Inc. v. Westwood Zoning Bd. of Adjustment*, 138 N.J. 285, 287 (1994) (holding that proof of special reasons for a (d)(3) variance must only be "sufficient to satisfy the board of adjustment that the site proposed for the conditional use … continues to be an appropriate site for the conditional use notwithstanding the deviations from one or more conditions imposed by the ordinance."). "[T]he proofs required for a (d)(3) conditional use variance are notably less stringent" than the proofs required for a (d)(1) use variance because a conditional use by definition is not a prohibited use. *See CBS Outdoor, Inc. v. Borough of Lebanon,* 414 N.J. Super. 563, 580 (App. Div. 2010); *see also, Coventry Square,* 138 N.J. at 287*; Grubbs v. Slothower,* 389 N.J. Super. 377, 386 (App. Div. 2007).

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

Communication, Inc. v. Bd. of Adjustment of Twp. of Bedminster, 337 N.J. Super. 398, 415 (App. Div.), *certif. denied,* 169 N.J. 607 (2001).

Thus, any contention that the submittal of an application for a (d)(3) variance would have been futile is pure conjecture. *See Vision Church v. Vill. of Long Grove,* 468 F.3d 975, 990-91 (7th Cir. 2006), *cert. denied,* 522 U.S. 940 (2007) (rejecting argument that church need not have to apply for a special use permit on basis that Board's discretion was unbridled where "Board's discretion [was] narrowly circumscribed by … the various factors to be considered … in addressing an application for a special use permit."); *see also, Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 449 (2008) ("In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases.").

Simply put, the Township has a strong case on the merits on appeal because the nature and extent that Ordinance 11-03 limits development on Al Falah's property is not presently known. *See Murphy v. New Milford Zoning Comm'n,* 402 F.3d 342, 348 (2nd Cir. 2005) ("only if a property owner has exhausted the variance process will a court know precisely how a regulation will be applied to a particular parcel."). Further, the Court's decision to issue a preliminary injunction was based on factual findings in connection with Al Falah's Substantial Burdens Claim under

the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which is an as-applied challenge to Ordinance 11-03. (Dkt. Entry 94 at 41-44). The Court, however, determined that Al Falah's as-applied claims were not ripe for judicial review. *Id. at* 10 n. 5.

Until the extent that Ordinance 11-03 limits development on Al Falah's property is known, this Court lacks subject matter jurisdiction over this matter. *See Suitum,* 520 U.S. at 736-37, *Hodel,* 452 U.S. at 297; *see also Nuveen Municipal Trust v. Withumsmith Brown, P.C.,* 692 F.3d 283, 293 (3d Cir. 2012) (court should hold that it lacks jurisdiction when there are doubts regarding jurisdiction).

B. The Township Will Be Irreparably Harmed Absent the Issuance of a Stay Pending Appeal.

"Generally, a stay pending appeal 'is preventative, or protective; it seeks to maintain the status quo pending a final determination of the merits of the suit.'" *Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, 593 F. Supp. 2d 156, 159 (D.D.C. 2009) (quoting *Washington Metro., supra.*), *aff'd,* 566 F.3d 219 (D.C. Cir. 2009). In this matter, if the preliminary injunction at issue is not stayed by the time the merits of the Township's appeal are resolved by the Third Circuit, the mosque may well be fully approved or even largely completed thus eliminating the Township's ability to ever effectively defend Ordinance 11-03.

Specifically, the Court has entered a preliminary injunction that mandates that the Planning Board resume consideration of Al Falah's site plan application without reference to Ordinance 11-03, which would otherwise divest the Planning Board of jurisdiction to consider the application. (Dkt Entry 94 at 2). *See Meszaros*, 371 N.J. Super. at 140; *Perlmart*, 295 N.J. Super. at 241. If this Order is not stayed pending appeal and Al Falah obtains the ability to construct its mosque, the Township is likely to be irreparably harmed because the very right that an appeal of a preliminary injunction is designed to protect -- the right to have meaningful review of the District Court's decision -- could be mooted and the appeal could be nullified. For example, in *Harris v. City of Philadelphia*, 47 F.3d 1311 (3d Cir. 1995), the Third Circuit dismissed a portion of the City's appeal as moot because the thing that the City had been mandated to do -- turn over a certain document -- had already been done prior to the Third Circuit hearing the merits of the City's appeal of the preliminary injunction. *Harris*, 47 F.3d at 1325-26.

Mootness of this matter is likely to occur because it is axiomatic that equity abhors waste; thus, Courts will not typically order completed or near completed buildings to be demolished or substantially modified. *See Palmetto Builders v. Unireal, Inc.*, 342 F. Supp.2d 468, 474 (D.S.C. 2004) (despite a finding in favor of the plaintiff for copyright infringement on all elements of preliminary injunction

standard, court refused to halt construction of home that was nearly finished due to economic waste that would be visited on infringers); *Sparaco v. Lawler, Matusky, Skelly Engineers,* 60 F. Supp.2d 247, 258 (S.D.N.Y. 1999) (refusing to enjoin completion of near finished building despite finding of copyright infringement). Thus, if the Township is eventually successful in defending its Ordinance but Al Falah's mosque is completed or nearly completed in the interim, the Defendants will have been left with no remedy.

Once rung the bell cannot be unrung; once built the building cannot be unbuilt. The Township's loss of its right to have a meaningful appeal of this Court's preliminary injunction is an irreparable harm that should be prevented by granting a stay pending the resolution of the appeal.

Further, a stay pending an appeal should be issued because mandating the Planning Board to hold hearings on Al Falah's site plan application when Ordinance 11-03, which divested the Planning Board of jurisdiction, has not been invalidated would be harmful to the Township. *See Meszaros*, 371 N.J. Super. at 140; *Perlmart*, 295 N.J. Super. at 241. By the time the merits of the appeal are resolved, the mosque may well be constructed based on a Planning Board approval that would be invalid as a matter of law if the Third Circuit were to reverse this Court's Order.

C. The Balance of the Equities Favors a Stay Pending Appeal.

The balance of the equities favor a stay pending appeal for two reasons. First, basic principles of Federalism favor the issuance of a stay where Al Falah has not submitted an application for a variance. Second, Al Falah's claims of irreparable harm based on First Amendment injury are misplaced. Neither Ordinance 11-03 nor any other action by the Defendants prevents Al Falah from exercising its religious rights today in the exact manner that it exercised them prior to the submittal of its application for development for conditional use and preliminary site plan on January 6, 2011.

1. Basic Principles of Federalism Favor the Issuance of A Stay Where Al Falah Has Not Submitted an Application For a Variance.

Williamson County established specific ripeness requirements applicable to land use disputes, which are based on a consideration of the equities. *See Murphy*, 402 F.3d at 347. Determining whether a case is ripe generally requires a Court to "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *See Abbott Labs.*, 387 U.S. at 149; *Birdman v. Office of the Governor,* 677 F.3d 167, 173 (3d Cir. 2012). The "fitness of the issues for judicial decision" prong of a ripeness inquiry "recognizes the restraints Article III places on federal courts" and "requires a weighing of the

sensitivity of the issues presented and whether there exists a need for further factual development." *Murphy,* 402 F.3d at 347. On the other hand, the "hardship to the parties" prong "injects prudential considerations into the mix, requiring [a court] to gauge the risk and severity of injury to a party that will result if the exercise of jurisdiction is declined." *Id.*

Recognizing these principles, courts have applied *Williamson County's* finality rule to challenges to land use decisions arising under RLUIPA and the First Amendment. *See Gutay Christian Fellowship v. County of San Diego,* 670 F.3d 957, 980 (9th Cir. 2011), *cert. denied,* 133 S. Ct. 423 (2012) (RLUIPA claim); *Miles Christi Religious Order v. Twp. of Northville,* 629 F.3d 533, 541-42 (6th Cir. 2010), *cert. denied,* 131 S. Ct. 3071 (2010) (RLUIPA and First Amendment claims); *Congregation Anshei Roosevelt v. Planning & Zoning Bd. of Roosevelt,* 338 Fed. Appx. 214, 2009 U.S. App. LEXIS 16266 (3d Cir. July 29, 2009) (RLUIPA claim); *Murphy,* 402 F.3d at 350 (RLUIPA and First Amendment claims). The Third Circuit and other Circuits have also applied *Williamson County's* finality rule to Equal Protection challenges to land use decisions. *See Grace Cmty. Church v. Lenox Twp.,* 544 F.3d 609, 618 (6th Cir. 2008) (RLUIPA and Equal Protection claims); *Taylor Inv.,* 873 F.2d at 1294-95 (Equal Protection

claim); *Unity Ventures v. County of Lake,* 841 F.2d 770, 774-76 (7th Cir. 1988), *cert. denied,* 488 U.S. 891 (1988) (Equal Protection claim).

Thus, aside from the issue of jurisdiction it implicates, *Williamson County* and its progeny also instruct that a balancing of the equities favors staying the preliminary injunction against the Township. The Court's Order implicates fundamental federalism issues, which transcend Al Falah and the Township. *See Raines v. Byrd,* 521 U.S. 811, 818 (1997) (There is "[n]o principle ... more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."); *Toll Bros.,* 555 F.3d at 137 ("In cases involving state or local government," the case or controversy limit on federal jurisdiction also "serves to protect and preserve the principle of dual sovereignty embedded in our founding charter."). The Third Circuit has expressly noted that "[t]here is much at stake in the task of ensuring proper jurisdictional bases for each and every claim -- particularly when courts are called upon to review a state or local legislative enactment." *Storino v. Borough of Pt. Pleasant Beach,* 322 F.3d 293, 300 (3d Cir. 2003). Such is the case here because "zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province

of state and local legislative authorities." *See Warth v. Seldin,* 422 U.S. 490, 508 n. 18 (1975); *Storino,* 322 F.3d at 300.

In sharp contrast, no harm would be occasioned upon Al Falah if the Court were to issue a stay. Al Falah has (and always has had) the option of applying for a (d)(3) conditional use variance. The Bridgewater Zoning Board of Adjustment advised Al Falah that it would schedule hearings on eight days between July and September 2011. [Dkt Entry 77-4 p. 45 of 73]. *See Gutay*, 670 F.3d at 976 ("We cannot determine if the Church has suffered a 'substantial burden' under RLUIPA until at least one permit application has been submitted."); *see also, Murphy*, 402 F.3d at 348.

Al Falah's claims are apparently predicated on an objection to proceeding with the process established by the MLUL for obtaining a conditional use variance -- an objection that is based on the incorrect premise that Al Falah had a constitutional right to obtain approval for its mosque under the procedures established by the zoning law in effect at the time of the submission of its application. While Al Falah apparently has no objection to proceeding before the Planning Board, it apparently objects to applying for a conditional use variance in accordance with the procedures established by the MLUL. Al Falah has no constitutional or legal right to a particular procedure in order to obtain approval to

construct its mosque. *See Crane v. Hahlo*, 258 U.S. 142, 147 (1928) ("No one has a vested right in any given mode of procedure; and so long as a substantial and efficient remedy remains or is provided due process of law is not denied by a legislative change."); *see also, Manalapan Realty L.P. v. Twp. Committee*, 140 N.J. 366, 378 (1995) ("That a municipality may change its zoning ordinance during the pendency of a site plan application is beyond question … even if the ordinance is amended in direct response to a particular application."); *House of Fire*, 379 N.J. Super. at 542 (same).

Having to file an application for a (d)(3) conditional use is not tantamount to a denial of First Amendment rights. *See Crane,* 258 U.S. at 147; *see also House of Fire,* 379 N.J. Super. at 547 ("it is not possible, at this stage of the proceedings, to conclude that requiring the Church to comply with the conditional use ordinance (or to successfully seek variance relief therefrom) is anything more than an inconvenience to the Church."). To the extent that Al Falah refuses to follow the procedure established by the MLUL for obtaining a (d)(3) variance, any injury that it may incur is of its own making.

2. RLUIPA Precedent Weighs the Equities in Favor of the Township.

Al Falah and the Court relied upon *Opulent Life v. City of Holly Springs*, 697 F.3d 279 (5th Cir. 2012), for the proposition that any violation of RLUIPA

constitutes irreparable harm to the religious applicant such that the applicant would have a substantial equity in an immediate injunction. The better reasoned case for purposes of this matter is the Seventh Circuit's decision in *River of Life Kingdom Ministries v. Vill. Of Hazel Crest*, 585 F.3d 364 (7th Cir. 2009), *vacated and aff'd on reh'g*, 611 F.3d 367 (7th Cir. 2010) (en banc). There, what was "[a]t stake . . . [was] the Church's ability to move forward with its plans to relocate to Hazel Crest, and to carry out its neighborhood redevelopment plans in the interim, while the case is pending in the district court." *River of Life*, 585 F.3d at 374-75. *River of Life* is thus identical to this matter in that in both cases the plaintiff sought a preliminary injunction that would permit it to move forward with plans to build a church building at a specific location. *Id.*

In *River of Life*, the Seventh Circuit examined the preliminary injunction question and, even while assuming that the religious applicant could succeed on the merits, held that the balance of the equities favored denying the preliminary injunction. *Id.* at 376-77. The Seventh Circuit rejected the church's absolutist position that courts "should presume irreparable harm because [the Church] alleged a violation of RLUIPA, which protects the constitutional right of religious exercise in the land use context." *Id.* While violations of the First Amendment are typically understood to constitute irreparable harm, the court reasoned that "the

intersection between RLUIPA and the First Amendment is only partial." *Id.* Thus, a putative violation of RLUIPA is not identical to a violation of the First Amendment and a court "cannot presume that RLUIPA and First Amendment violations are one and the same, a plaintiff alleging irreparable harm as a result of a RLUIPA violation must explain how the challenged law or regulation affects his religious exercise." *Id.* (emphasis added).

Rather, the plaintiff must explain how "the inability to relocate to the [chosen location] inhibits its religious exercise or otherwise creates irreparable harm." *Id.* (citing *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 274 (3d Cir. 2007), *cert. denied,* 543 U.S. 1120 (2008)). The Seventh Circuit accepted the church's proofs on harm because the church made a showing that the execution of its ministry was tied to being able to build its building in the specific location at issue in order to be a focal point in ministering to the surrounding poor. *Id.* at 375-76.

Despite this, however, the Seventh Circuit weighed the balance of equities in favor of the municipality. *Id.* at 376-77. The Seventh Circuit reasoned that the because the municipality had a very strong interest in its zoning scheme and the Church's consideration of other properties suggested that its interest in the

particular real property was not absolute, the balance of equities favored denying the preliminary injunction.

Here, Al Falah's arguments vis-à-vis RLUIPA are much weaker than those posed by the applicant in *River of Life*. Indeed, Al Falah has admitted that this specific property had no religious significance to it. (Dkt. Entry 77-3 (Cert. of Howard D. Cohen, Esq. in Support of Summary Judgment, Ex. 4 (Dep.Tr. of Chugtai) at 171:7-23)). Further, Al Falah's alleged injuries are completely divorced from the location in question, there is nothing about this particular property that makes it of special religious value to Al Falah. For example, Al Falah's concerns about being unable to hire a permanent Imam because they have no permanent mosque have nothing to do with this specific location -- rather, they are relevant to any location.

Further, the harm that Al Falah does identify -- the delay in seeking a variance -- is illusory. Before Ordinance 11-03 was enacted Al Falah could not use the Property as a mosque because they had neither the necessary conditional use and site plan approval nor had they reconstructed the building and constructed the site Improvements. After Ordinance 11-03 was enacted Al Falah could not use the Property as a mosque because they had neither necessary variance, conditional use and site plan approval nor had they reconstructed the building and constructed the

site improvements. Al Falah's actual immediate ability to exercise its religion was not impacted by Ordinance 11-03 because what Al Falah argues as the essential factual predicate for its full exercise of its religion -- the existence of a permanent mosque -- has never existed. Given that Al Falah has no connection to the specific location at issue and that altering the zoning plan by preliminary injunction would adversely impact the Township for all the reasons set forth herein, the balance of the equities favors entering a stay of the injunction pending appeal.

D. The Public Interest Favors a Stay Pending Appeal.

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

Furthermore, when a court invalidates the work of a legislative body on constitutional grounds "cautious review" is appropriate because such decisions are

momentous. *Doe v. Gonzales*, 126 S.Ct. 1, 4 (2005) (Ginsburg, J., in chambers) (affirming Second Circuit's entry of a stay of District Court's preliminary injunction which declared an Act of Congress unconstitutional and mandated the executive to take certain actions). Thus the entry of a stay pending appeal is appropriate because it protects the public interest while the necessary careful review of the Court's order occurs. *Id.*

Finally, an even more cautious approach is warranted when an injunction forces the enjoined party to take action. The Third Circuit has explained that "when the preliminary injunction provides for mandatory relief, it is particularly appropriate to weigh the possible harm to other interested parties." *Punnett v. Carter*, 621 F.2d 578, 588-89 (3d Cir. 1980). This is because the "injudicious issuance of an injunction might well result in unnecessary damage to other parties, perhaps as irreparable and more grave than the harm that might ensue from the denial of the injunction." *Id.*

In this matter, the entry of a stay to allow the Third Circuit to review the preliminary injunction on its merits would protect both the right of the Township to have its appeal heard (the mootness issue raised above) and the interest that the citizens of Bridgewater have in ensuring that the objectives of the Master Plan and Zoning Ordinance are not substantially impaired. Courts have long recognized the

importance of local land-use laws like Ordinance 11-03 which is the subject of the Court's preliminary injunction. *See e.g., Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1106 (3d Cir. 1996) (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974)); *Doe v. City of Butler, Pa.*, 892 F.2d 315, 318 (3d Cir. 1989) (acknowledging that states have "a substantial interest in enforcing [their] zoning code and that, under appropriate circumstances, local zoning codes are entitled to considerable amounts of deference"). For the Court to rule Ordinance 11-03 unenforceable in this case was a momentous decision and due care should be taken to ensure that the citizens of the Township – third parties to this action – are protected by the entry of a stay pending the careful review that will be undertaken by the Court of Appeals.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court enter a stay pending the resolution of the Defendants' appeal of the September 30, 2013 Order granting Al Falah's preliminary injunction.

Respectfully submitted,

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