ELECTRONICALLY FILED

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 3:11-cv-2397-JAP-LHG

AL FALAH CENTER, TAREK ABDELKADER, YASSER ABDELKADER, ZAHID CHUGHTAI, BABAR FAROOQI, NABEELA FAROOQI, AYESHA KHAN, OMAR MOHAMMEDI, AMINA MOHAMMEDI and SARA WALLIS,

Plaintiffs

v.

TOWNSHIP OF BRIDGEWATER, TOWNSHIP OF BRIDGEWATER PLANNING BOARD, PATRICIA FLANNERY, IN HER CAPACITY AS MAYOR OF THE TOWNSHIP OF BRIDGEWATER, ALAN FROSS, STEPHEN RODZINAK, BARBAR KANE, JOANNE KANE, N. JANINE DICKEY, ROBERT ALBANO and GLENN PETILLO IN THEIR CAPACITY AS MEMBERS OF THE TOWNSHIP OF BRIDGEWATER PLANNING BOARD; THE TOWN COUNCIL OF THE TOWNSHIP OF BRIDGEWATER, AND HOWARD NORGALIS, DAN HAYES, ALLEN KURDYLA, MATTHEW MOENCH, AND CHRISTINE HENDERSON ROSE, IN THEIR CAPACITY AS MEMBERS OF THE TOWN COUNCIL OF THE TOWNSHIP OF BRIDGEWATER,

Defendants.

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

This is a land use case. Plaintiffs challenge the validity of Ordinance 11-03 ("11-03") which added a road access condition for four classes of land use: houses of worship, country clubs, open air clubs and schools. **Ex. 1**[1]. The purpose of 11-03 is to protect and preserve residential character and neighborhoods against adverse impact of these assemblage uses. 11-03 advances sound planning and statutorily recognized zoning purposes under the New Jersey Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-1et. seq. Ex. 2 at pp. 53-57 Plaintiffs contend that its purpose was religious discrimination. Notwithstanding exhaustive discovery, plaintiffs have no evidence to support their assertions. Defendants move for summary judgment to dismiss the Second Amended Complaint. ("SAC").

STATEMENT OF FACTS

The Township is home to twenty-one (21) houses of worship for many and diverse religions. Ex. 26 at pp30-51; Ex. 3 at T 104:3-7. Plaintiffs worship and conduct other religious activities in the Township of Bridgewater (Township). Ex. 4 at T 17:20-25; T 18:1-4; Ex. 15 at T17-20, 25, 36; Ex. 32 T 17. Plaintiff Al Falah Center's website states:

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[1] "Ex. ____" herein refers to the Exhibits attached to the Certification of Howard D. Cohen, Esq. submitted herewith.

> Bridgewater is a community that welcomes a rich variety of faiths; it is already home to seventeen Christian Churches, a convent, and a Jewish Synagogue, two Hindu Temples and one Sikh Temple. .

Ex. 6; Ex. 14 T64:2-6.

On January 6, 2011 plaintiffs through Chughtai Foundation filed an application for preliminary site plan and conditional use approval with the Township Planning Board ("Planning Board"). The application proposed to use property known as the Redwood Inn, a former catering establishment and pre-existing nonconforming use, in the Township's R-50 Residential Zoning District, as a house of worship for daily and weekly prayers, holiday services, K-8 elementary school, daycare center, weekend religious education and community services and activities. Ex. 7.

During the pendency of this application, the Planning Board directed the Township Planner to prepare a Reexamination Report pursuant to N.J.S.A. 40:55D-89 regarding houses of worship. The Reexamination Report was presented to the Planning Board and adopted on February 8, 2011. Ex. 8. It recommended, among other things, that where schools, country clubs, open air clubs and houses of worship are to be located in residential zones, these uses should be required to have their principal access from a state highway, county roadway or from four specified municipal roadways in the Township. ("Access roads"). Numerous state

and county roads traverse the Township. Ex. 2, Figs. 1, 11. The four specified municipal roads in 11-03 are:

> Garretson Road from County Club Road to U.S. Route 202 – 206 overpass;
> Country Club Road from New Jersey State Highway Route 28 to Garretson Road;
> Milltown Road from U.S. Route 22 to U.S. 202;
> Prince Rogers Avenue from County Route 629 (North Bridge Street) to the Interstate Route 287 overpass..

Ex. 1.

Collectively, these roads comprise forty linear miles and eighty miles of lot frontage in the Township. Ex. 8 at p. 7.

On February 17, 2011, the Township Council, pursuant to N.J.S.A. 40:55D-62, introduced 11-03. 11-03 implemented the recommendation for the road access condition in the Reexamination Report. Ex. 8 at pp. 7-8. Pursuant N.J.S.A. 40:55D-26(a) and 64, 11-03 was referred to the Planning Board who recommended adoption of 11-03. Ex. 9. On March 14, 2011, a public hearing was held by the Township Council on 11-03 pursuant to N.J.S.A. 40:55D-62(a). 11-03 was adopted and supported by a Resolution. Ex. 1; Ex. 10. The Ordinance became effective on April 5, 2011.

11-03 does not prohibit houses of worship in any zone (Ex.1; Ex. 10) and does not prohibit plaintiffs from building a mosque on the Redwood Inn site. Ex. 4 T 136:16-25; 137:1-10.

The operative effect of 11-03, as applied to Plaintiffs' application, was to require Plaintiffs to seek conditional use variance approval pursuant to N.J.S.A. 40:55D-70(d)(3) from the Zoning Board of Adjustment ("Zoning Board"). Plaintiffs' land use attorney, Lloyd Tubman (Tubman) admits the availability of this remedy. Ex. 11 at T 90:18-25; 91:1-7. Plaintiffs refused to pursue such relief notwithstanding the Zoning Board's offer to hear such an application, if filed, on May 24, July 16, 26, August 3, 16, 23, 30, September 20 and 27, 2011. Ex.12; Ex. 13. Instead, Plaintiffs filed this lawsuit claiming that 11-03 violated their federal and state constitutional rights and federal and state statutes and law.

Discovery shows no basis to support Plaintiffs' claims.

Plaintiffs have produced no testimony that anti-Muslim or discriminatory statements reflecting religious animus were made by any Defendants or other representatives of the Township. Plaintiffs admit no such statements were made. Ex. 3 at T54: 12-25; 55:1-2; Ex. 4 at T 142:11-25; 143-144; 145: 1-3; Ex. 5 at T 59:13-25; 60: 18-25; 61:1-12.; Ex. 11 at T73:12-25; 74:1-11; Ex. 14 at T 72-74. In fact, Plaintiffs admit the Township welcomed them and was helpful in their efforts to locate a house of worship. Ex. 5 at T 24-27:1-15; T44:17-25; 45:1-10. 11-03 was adopted when the "time of decision" rule was in effect under New Jersey law. This rule permits governing bodies to change land use ordinances during the

pendency of a land use application. Such regulations have been upheld by the Courts. Ex. 11 at T 54:5-9; Ex. 14 at T99:7-25: T100:1-6.

The federal Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc (RLUIPA) does not immunize houses of worship, such as plaintiff Al Falah Center, from the requirement to apply for variances. Ex. 11 at T114:7-13.

The Zoning Board is an independent, quasi judicial body. None of its members include any of the defendants and no one who holds elective office or is employed by the municipality can serve on the Zoning Board. N.J.S.A. 40:55D-69 The Zoning Board, when adjudicating a conditional use variance for a house of worship, which is an inherently beneficial use, must apply a four part guide under Sica v. Board of Adjustment of the Township of Wall, 127 N.J. 154; 602 A. 2d 30 (1992). This guide was designed by the New Jersey Supreme Court to provide a measured consideration of a variance application, including provision for reasonable conditions to accompany crafted variance approval. A reduced level of proof for a conditional use variance was also devised by the New Jersey Supreme Court in Coventry Square v. Westwood Zoning Bd. of Adj. 138 N.J. 285; 650 A. 2d 340 (1994) also applied to such applications. Ex. 11 at T 111-113; 115:1-6.

There is no evidence the Zoning Board has prejudged plaintiffs' application or that making an application for conditional use variance approval would be a futile act. Ex. 11 at T 120:11-15. The remedy of applying to the Zoning Board for

conditional use approval does not constitute a constitutional, federal or state statutory violation. Had plaintiffs availed themselves of the nine (9) dates offered by the Zoning Board to hear an application, if filed, the conditional use variance application would have long since been adjudicated.

Plaintiffs challenge 11-03 as invalid and lacking a sound planning and zoning purpose. The evidence is to the contrary. Plaintiffs land use consultant, Carlos Rodrigues (Rodrigues) does not dispute that the Township's planning policies, embraced in its planning documents since 1976, continuously express the objective of preserving and protecting residential character and neighborhoods in what was historically known as the Washington Valley Sector and later became the R-40 and R-50 Residential Zoning Districts. Ex. 2 at pp. 15-37; Fig. 2; Ex. 17. The Redwood Inn site is located in the R-50 District. Ex. 16 at T 115:4-25: 116:1-25; 107:12-17; Ex. 17. Rodrigues admits: the R-50 District is distinctly residential; the Redwood Inn site is surrounded by residential development; the overwhelming development within a half mile radius of the Redwood Inn is residential; and there are no non-residential uses. Ex. 16. at T 161:20-24: 259:19-25; 260:1-9. Aerial photographs produced by Rodrigues and his testimony document the evolution of the distinctly residential character of the area surrounding the Redwood Inn site. Ex. 16 at T 388-391; Ex. 18 - Ex. 25).

Plaintiffs mischaracterize 11-03 as predicated upon traffic. It is not. It is grounded in the master planning history of the Township whose common thread since 1976 has been and continues to be protection and preservation of residential character and neighborhoods. 11-03 is the latest iteration of that planning and zoning purpose. Ex. 2 at pp. 15-37.

Township's planning policies in its master planning documents directed growth toward that portion of the Township, which together with portions of Raritan and Somerville, comprise a Designated Regional Center ("Regional Center") under the New Jersey State Development and Redevelopment Plan ("State Plan") adopted pursuant N.J.S.A. 52:18A-196 et seq. Ex. 2 at pp. 20-25; Fig. 2. Rodrigues, who worked ten (10) years for the New Jersey Office of State Planning and its successor, the Office of Smart Growth (charged with overseeing the State Plan), acknowledges that one of the central elements of the State Plan is to direct growth toward Centers and protect and preserve the Environs, defined by the State Plan as areas outside Centers. Rodrigues admits the R-50 District is entirely outside the Regional Center and that portion of the Township within the Regional Center has a different land use character than the R-50 District. Ex. 16 at T98:4-16; 151:16-25; 152:1-21. Rodrigues also acknowledged he could not state that the Township's planning policies and ordinances are inconsistent with the Somerset County Regional Center Master Plan Ex. 16 at T 328:7-16; 329:17-24.

Rodrigues does not dispute the Township's long-standing planning policies to protect and preserve residential character and neighborhoods in the R-50 District, documented and discussed at length in reports submitted by defendants' planning consultant, Francis P. Banisch III (Banisch) Ex. 2; Ex. 26). Rodrigues acknowledges he did not review all of the Township's master planning documents dating back to 1976. Ex. 16 at T 104:23-25; 105:1-2; 106:1-10. He also admits he did not inspect or analyze any of the municipal access roads designated under 11-03, (Ex. 16 at T 260-261), all of which are in or form the perimeter of the Regional Center and none of which are in the R-50 District. Ex. 16 at T 269-270; Ex. 2, Fig. 2.

Rodrigues did no planning analysis of the municipal access roads identified in 11-03, had no knowledge of their adjoining land uses and was unable to refute the planning rationale for their inclusion in 11-03, described and documented in the Banisch Reports. Ex. 16 at T 260-261; Ex. 2; Ex. 26. Plaintiffs also have not disputed winding, steep and narrow roads to and from the Redwood Inn which mitigate against their inclusion in 11-03 described and documented by Banisch Ex. 26.

The 2011 Reexamination Report's recommendation for the road access condition and its implementation in 11-03 took into account the fact that houses of worship have evolved to serve a regional constituency, contrasting their origins as

neighborhood-based. Plaintiffs admit Al Falah's regional objectives. Ex. 3 at T 16-17; Ex. 27.

No evidence has been adduced to support plaintiffs' claim that 11-03 is facially invalid. In fact, the report by the Township's Engineering Manager, Colleen Clarke, PE, ("Clarke report") identifies three properties, conforming with 11-03, where a house of worship and related uses, such as those proposed by Al Falah Center, can be located. Her report is unrefuted. (Ex. 28).

Plaintiffs have no evidence to support their claim that 11-03 treats them on less than equal terms than comparable non-religious assemblies or institutions. Instead, plaintiffs incorrectly attempt to equate government facilities, including parks and buildings, which are immune from zoning, with secular and non-secular uses that are subject to zoning regulations like 11-03. Ex. 29.

Even as to plaintiffs' erroneous attempt to place the Township parks and government buildings on the same footing as the four uses regulated under 11-03, plaintiffs do not refute that those parks and government buildings on access roads under 11-03 are distinctly different from those on non-designated roads. Unlike government buildings and parks with flood-lighted fields on the designated roads, there are no government buildings or parks with lighted fields on non-designated roads. Ex. 16 at T499; 507:23-25; 508-509; Ex. 29.

In the end, discovery shows that plaintiffs have no facts to support their claims and the Second Amended Complaint must be dismissed .

LEGAL ARGUMENT

POINT I

SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment is appropriate where the Court is satisfied that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 330 (1986). A genuine issue of material fact exists only if the evidence is such that a reasonable jury could find for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). When the Court weighs the evidence presented by the parties, the Court is not to make credibility determinations regarding witness testimony. Sunoco, Inc. v. MX Wholesale Fuel Corp., 565 F. Supp. 2d 572, 575 (D.N.J. 2008). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255.

However, to defeat a motion for summary judgment, the nonmoving party must present competent evidence that would be admissible at trial. See Stelwagon Mfg. Co. v. Tarmac Roofing Sys., 63 F. 3d 1267, 1275 n. 17 (3d Cir. 1995). The nonmoving party "may not rest upon the mere allegations or denials of "its

pleadings and must present more than just "bare assertions [or] conclusory **[*5]** allegations or suspicions" to establish the existence of a genuine issue of material fact. Fireman's Ins. Co. of Newark, N.J. v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982) (citation omitted); see Fed. R. Civ. P. 56(e). "A party's failure to make a showing that is 'sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' mandates the entry of summary judgment." Watson v. Eastman Kodak Co., 235 F.3d 851, 857-58 (3d Cir. 2000) (quoting Celotex Corp., 477 U.S. at 322).

POINT II

11-03 COMPORTS WITH THE REQUIREMENTS OF THE NEW JERSEY MUNICIPAL LAND USE LAW

Under the general powers granted by Article III of the New Jersey Constitution, the legislative branch of government has been granted the authority to regulate land use. Paruszewski v. Tp. of Elsinboro, 154 N.J. 45, 52; 711 A. 2d 273 (1998). Article IV, Section 6, para. 2 of the New Jersey Constitution authorizes the Legislature to delegate some of that regulatory power to municipalities. Pursuant to that authority, the Legislature enacted the Municipal Land Use Law of 1975, N.J.S.A. 40:55D-1 et seq. The MLUL grants municipalities exclusive powers to enforce the law (N.J.S.A. 40:55D-18), and to

adopt and enforce zoning ordinances, (N.J.S.A. 40:55D-62). (Paruszewski at 52; 711 A. 2d at 276-277).

"Under the MLUL, municipalities are charged with the general goal of 'guid[ing] the appropriate use or development of all lands in this state, in a manner which will promote the public health, safety, morals, and general welfare." (N.J.S.A. 40:55D-2(a)). (Paruszewski at 53; 711 A. 2d at 277).

To accomplish this goal, the MLUL delegates power to three municipal agencies – the governing body, the planning board, and the zoning board of adjustment that "work to develop, enforce and grant relief from the municipality zoning scheme." (Paruszewski at 53; 711 A. 2d at 277, citing William M. Cox, New Jersey Zoning and Land Use Administration § 1-2 (1997.)

Where a municipality has, under the MLUL, enacted a master plan which has a land use element, it may adopt zoning ordinances. (N.J.S.A. 40:55D-28 and 40:55D-62.). The governing body in the municipality, here the Township Council, is the legislative body (N.J.S.A. 40:55D-4) empowered to enact zoning ordinances (N.J.S.A. 40:55D-62).

A reexamination of the master plan shall be completed at least once every ten years from the previous reexamination (N.J.S.A. 40:55D-89). The minimum content of an reexamination report is set forth in the MLUL (N.J.S.A. 40:55D-89a-e). There is no statutory limitation on the number of times that a reexamination

report can be completed.

On January 24, 2011 the Planning Board requested the Township Planner, Scarlett Doyle, ("Doyle") to prepare a Reexamination Report regarding houses of worship. Doyle prepared the Reexamination Report which was adopted, pursuant N.J.S.A. 40:55D-89, by the Planning Board on February 8, 2011 after hearing public comment, notwithstanding such comment was not required by statute.

The Reexamination Report recommended that a zoning ordinance amendment be adopted to better control four (4) land uses to reduce their assemblage impact on residential neighborhoods and assure preservation and maintenance of residential character. Specifically, the Reexamination Report recommended that schools, county clubs, open air clubs and houses of worship within residential zones be required to have principal access from a state highway, a county roadway or from designated municipal roadway segments within the Township . . .". Ex. 8 at pp. 7-8.

On February 17, 2011 the Township Council, pursuant to N.J.S.A. 40:55D-62 introduced 11-03, which incorporated the road access condition recommendation. The proposed Ordinance was referred to the Planning Board pursuant to N.J.S.A. 40:55D-26(a) and 64. Although not required by statute, the Planning Board heard public comment and thereafter recommended adoption of 11-03 to the Township Council, concluding that 11-03 was consistent with the

general purposes, objectives and intent of the Master Plan. Ex. 9.

On March 14, 2011 the Township Council held a public hearing on 11-03. After extensive public comment, the Ordinance was adopted, supported by Resolution setting forth the reasons for its adoption pursuant to N.J.S.A. 40:55D-62. Ex. 1; Ex. 10. 11-03 became April 5, 2011

The Reexamination Report and 11-03 comport with the requirements of the MLUL.

The Banisch reports, (Ex. 2; Ex. 26; Ex. 29) support and demonstrate the planning rationale of 11-03 to preserve and protect residential character and neighborhoods, a long-standing policy memorialized in the Township's master planning documents spanning almost forty years, dating back to 1976. Such evidence is admissible to counter Plaintiffs' claims. (Brown v. City of Pittsburgh, 583 F. 3d 263, 280 (3d Cir. 2009) ("Whatever level of scrutiny we have applied in a given case, we have always found it acceptable for individual legislators to base their judgments on their own study of the subject matter of the legislation, their communications with constituents, and their own life experience and common sense so long as they come forward with the required showing in the courtroom once a challenge is raised.") (quoting Phillips v. Borough of Keyport, 107 F. 3d 164, 178 (3d Cir. 1997 (en banc)).

A. 11-03 WAS ADOPTED IN ACCORDANCE WITH THE TIME OF DECISION RULE

At the time 11-03 was adopted, a doctrine known as the "time of decision" rule was in effect in New Jersey. Generally, the time of decision rule means that where an application or appeal is pending before a board or before the governing body, the last enactment controls the decision on the municipal level.

The Appellate Division in Burcam Corp. v. Planning Bd. of Medford, 168 N.J. Super. 508, 512; 403 A. 2d 921, 923 (App. Div. 1979) stated the rule as follows:

> In the area of land use, a municipality may change its regulating ordinances after an application has been filed and even after a building permit has been issued and, as long as the applicant has not substantially relied upon the issuance of the building permit, it is subject to the amended ordinance. This is so even where the municipality amends its ordinance in direct response to the application.

The New Jersey Supreme Court cited Burcam with approval in Manalapan Realty v. Township Committee, 140 N.J. 366, 378-379 (1995). In Manalapan, the Court sustained ordinance amendments, enacted during the pendency of a site plan review application, which effectively barred the location of a Home Depot as an anchor store in a proposed commercial development:

> Because the enactment of, or amendment to, a zoning ordinance is a legislative act, the Township's governing body is permitted to enact an amendment in response to objections to a proposed use of land as long as the amendment is consistent with the Municipal Land Use

> Law (MLUL). … consequently, even if Home Depot was a permitted use under the prior ordinance, the Township was free to change the ordinance in direct response to [the] site plan application that included Home Depot as an anchor tenant.

The time of decision rule has been upheld in regard to houses of worship. House of Fire v. Zoning Bd. Of Clifton, 379 N.J. Super. 526, 541; 879 A. 2d 1212, 1222-1223. (App. Div. 2005)

11-03 is grounded in the Township's long-standing planning and zoning policies dating to its 1976 Master Plan and continuing to this day to protect and preserve residential character and neighborhoods. These policies advance numerous recognized zoning policies under the MLUL, N.J.S.A. 40:55D-2, including:

> (a) to encourage municipal action to guide the appropriate the use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare.
>
> (c) to promote the establishment of appropriate population densities and concentrations that will contribute to the well being of persons, neighborhoods, communities and regions and preservation of the environment.
>
> (g) To provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private according to their respective environmental requirements in order to meet the needs of all New Jersey citizens.
>
> (h) To encourage the location and design of transportation routes which will promote the free flow of traffic

while discouraging location of such facilities and routes which result in congestion or blight.

No evidence has been offered by plaintiffs which disputes the documented planning policies of the Township and their advancement of recognized zoning purposes under the MLUL.

The Reexamination Report and 11-04 comport with the requirements of the MLUL.

POINT III

11-03 IS A FACIALLY VALID EXERCISE OF THE TOWNSHIP'S PLANNING AND ZONING AUTHORITY.

To assess the facial validity of 11-03, it is important to understand what 11-03 does i.e., require that schools, houses of worship, county clubs and open air clubs have principal access on a federal, state or county highway or on one of the designated municipal road segments.

It is also important to understand what 11-03 does not do. It does not prohibit use of the Redwood Inn site for a mosque or prevent Plaintiffs from conducting any of their proposed activities on the site in the event that a mosque is built. It does not prohibit Plaintiffs from engaging in any religious conduct. It does not require Plaintiffs to compromise any religious tenets.

Since the Redwood Inn site is not on an access road under 11-03, the operative effect of 11-03 is merely to require Plaintiffs to make application for site planning and conditional use variance approval before the Zoning Board, pursuant to N.J.S.A. 40:55D-70(d)(3). Plaintiffs concede this. SAC para. 41; Ex. 31. While Plaintiffs assert that such variance relief could not be obtained, no evidence exists to support that assertion. Plaintiffs have never made such an application notwithstanding nine (9) dates offered for that purpose.

Plaintiffs have never expressly pled that Ordinance 11-03 is facially invalid. At most they have made vague allegations in their First Amended Complaint (paragraphs 79, 88, 92, 101, and 113) (Ex. 30) repeated in the SAC (paragraphs 80, 89, 93, 102, and 114) Ex. 31.

Discovery has now been completed and Plaintiffs still have produced no evidence beyond those vague allegations.

> As a general matter this Court "will not invalidate a statute on its face simply because it may be applied unconstitutionally, but only if it cannot be applied consistently with the Constitution." … Thus, plaintiff['s] facial challenge will succeed only if [the statute in question] "is unconstitutional in every conceivable application, or … it seeks to prohibit such a broad range of protected conduct that it is constitutionally 'overbroad.'"

Brown v. City of Pittsburgh, 586 F. 3d 263, 269 (3d Cir. 2009) quoting Hohe v. Casey, 956 F. 2d 399, 404 (3d Cir.1992), (emphasis in original).

> "This standard is consistent with the Supreme Court's declaration in United States v. Salerno that a successful facial challenge requires the challenger to "establish that no set of circumstances exists under which the act would be valid." 481 U.S. 739, 745, 107 S. Ct. 2095, (1987) More recently, the Court has suggested that the bar may be slightly lower. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 128 S. Ct. 1184 (2008). Nonetheless, even under the Washington State Grange formulation, "a facial challenge must fail where the statute has a plainly legitimate sweep." Id. (internal quotation marks omitted); see McCullen v. Coakley, 571 F. 3d 167, 164 (1st Cir. 2009) ("Howsoever worded, this standard imposes a very heavy burden on a party who mounts a facial challenge to a state statute.").

(Brown at 269).

Plaintiffs' alleged facial challenge to 11-03 fails for the following reasons:

1. Plaintiffs have not plead any facts that would "establish that no set of circumstances exist under which the [Ordinance] would be valid." (See, Brown at 269).
2. Plaintiffs have produced no evidence from any witness, nor have they produced any expert report that would establish that no set of circumstances exists under which the ordinance would be valid. (Id.)
3. 11-03, grounded in the Township's longstanding planning and zoning policies to preserve and protect residential character and neighborhoods accords with recognized zoning purposes under the MLUL, and has a "plainly legitimate sweep." (Id.).

4. Plaintiffs cannot establish that 11-03 cannot be applied consistently with the Constitution as no final decision has been rendered by the Zoning Board as to whether and to what extent Plaintiffs can use the Redwood Inn site to conduct their religious activities.

Plaintiffs' failure to carry their burden of demonstrating that there is no set of circumstances under which 11-03 would be valid is sufficient to compel dismissal of any alleged facial claims. The alleged facial claims also fail because 11-03 is intended to, and does, work to protect the Township's residential districts - a "plainly legitimate sweep". (Brown at 269).

The 2011 Reexamination Report and 11-03 reaffirm the Township's long history of protecting the character of and quality of life within its residential districts. 11-03 is a reasonable regulation on houses of worship. It still allows for them in all residential zones. The road access condition is a reasonable and rational response to preserving and protecting the quiet enjoyment of residential neighborhoods. (See Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) ("a quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs.")

RLUIPA did not "relieve religious institutions from applying for variances, special permits or exceptions, where available without discrimination or unfair delay." 146 Cong. Rec. S7774-01, S7776 (daily ed. July 27, 2000). "Nothing in the

RULIPA entitles [a religious land developer] to establish a church anywhere it wants." Petra Presbyterian Church v. Vill. of Northbrook, 409 F. Supp. 2d 1001, 1007 (N.D. Ill. 2006). It is undisputed that Plaintiffs never sought variance approval even though nine dates were offered for the purpose of hearing such an application. Ex. 12; Ex. 13.

The Third Circuit has held that in enacting RULIPA, it was not Congress' intent "to force local governments to give any and all religious entities a free pass as to locate wherever any secular institution or assembly is allowed." Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F. 3d 253, 268 (3d Cir. 2007) ("Lighthouse III"). See also, Vision Church v. Vill. of Long Grove, 468 F. 3d 975, 991 (7th Cir. 2006) (holding that special use designations are "instruments of municipal planning that allow city officials to retain review power over land uses that, although presumptively allowed, may pose special problems" and that conditioning an intense use on obtaining a special use permit, which is analogous to obtaining a conditional use variance, is "justified by legitimate, non-discriminatory municipal planning goals."

A church "has no constitutional right to be free from reasonable zoning regulations nor does a church have a constitutional right to build its house of worship where it pleases." Messiah Baptist v. County of Jefferson, 159 F. 2d 820, 824-825 (10th Cir. 1988).

The zoning and planning history of the Township in regard to protection of its residential districts and the zoning purposes of 11-03 establish beyond doubt its "plainly legitimate sweep."

The Clarke Report demonstrates that there are three (3) parcels of land on which facilities of the size and type intended by plaintiffs, i.e. house of worship, weekday and weekend religious schools including K-8 elementary school, daycare, large worship events such as an EID estimated by plaintiffs as five hundred (500) attendees, and diverse community activities, can be accommodated in compliance with 11-03. Ex. 28.

Plaintiffs have failed to demonstrate that 11-03 is unconstitutional in every conceivable application or that it seeks to prohibit such a broad range of protected conduct that it is constitutionally overbroad. The Clarke Report, (Ex. 28) which remains unrefuted, demonstrates that 11-03 can be applied in a manner that comports with its requirements without the need for a variance. Even as to the Redwood Inn site, 11-03 does not prohibit plaintiffs from use of that site, since they have the statutory right to apply to the Zoning Board for site plan and conditional use variance approval which they have not done.

Thus, any claim that 11-03 is facially invalid must be dismissed.

POINT IV

11-03 DOES NOT IMPOSE A SUBSTANTIAL BURDEN ON PLAINTIFFS' FREE EXERCISE OF THEIR RELIGION

Plaintiffs have alleged as an element of Count I (Free Exercise of Religion - United States Constitution), Count II (Free Exercise of Religion - New Jersey Constitution), and Count V (RLUIPA, 42 U.S.C.§ 2000cc(a)), that adoption of Ordinance 11-03 has substantially burdened their religious exercise. Ex. 31. To prevail on a claim under the substantial burden provision of RLUIPA, a plaintiff must first demonstrate that the regulation at issue actually imposes a substantial burden on religious exercise. (Civil Liberties for Urban Believers, v. City of Chicago, 342 F. 3d 752, 761 (7th Cir. 2003) (hereinafter "CLUB"). RLUIPA defines "religious exercise" as encompassing "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," including "the use, building or conversion of real property for the purpose of religious exercise." 42 U.S.C § 2000cc–5(7).

Although Plaintiffs allege "substantial burden" freely in the SAC, that standard is not to be taken lightly. "Application of the substantial burden provision to a regulation inhibiting or constraining any religious exercise, including the use of property for religious purposes, would render meaningless the term 'substantial' because the slightest obstacle to religious exercise incidental to the regulation of

land use -- however minor the burden it were to impose -- could then constitute a burden sufficient to trigger RLUIPA's requirement that the regulation advance a compelling government interest by the least restrictive means." (CLUB at 761) (Emphasis in original).

For these reasons it has been held that "in the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary and fundamental responsibility for rendering religious exercise -- including the use of real property for the purpose thereof within the regulated jurisdiction generally -- effectively impracticable." (CLUB at 762). (See, Albanian Associated Fund v. Twp. of Wayne, 2007 U.S. Dist. LEXIS 73176 at *26-*27 (D.N.J. 2007).

The standard set forth in CLUB was utilized by the Third Circuit in the context of review of denial of an application for a preliminary injunction, where the City of Long Beach denied a house of worship a zoning permit because the proposed use of the affected property as a church was not a permitted use in the zone where the property was located. Lighthouse Inst. For Evangelism Inc. v. City of Long Beach, 100 Fed. Appx. 70, 77 (Third Cir. 2004) ("Lighthouse I"). The Court in Lighthouse I held that the plaintiff did not establish a likelihood of success on its "substantial burdens" RLUIPA claim because it had operated for years in a rented location within the district "and thus its opportunity for religious

exercise was not curtailed by the Ordinance," ... and it was "undisputed that the [house of worship] could have operated as a church by right in other districts in the City." (Lighthouse I at 77).

Since then the Third Circuit has further considered the definition of "substantial burden" in the context of the "Institutionalized Persons" provision of RLUIPA. Washington v. Klem, 497 F. 3d 272 (3d Cir. 2007). Washington involved a Pennsylvania Department of Corrections restriction on the number of books inmates have in their cells and whether such restriction burdened an inmate's religious exercise.

In that context, the Third Circuit adopted the "disjunctive test":

> 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts of his religion in order to receive a benefit; OR 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs.

(Washington at 280) (emphasis in original).

As the standard enunciated in Washington is confined to the Institutionalized Persons provisions of RLUIPA (Washington at 280), it did not alter the Third Circuit's Lighthouse I standard. "[W]hat is clear, [however] ... is that establishing a substantial burden under either standard requires more than merely inhibiting or

constraining any religious exercise." (Albanian Associated Fund at *26-27). October 1, 2007). Plaintiffs' claims of substantial burden fail under any standard.

Plaintiffs also cannot prove that 11-03 imposes a substantial burden on their religious exercise as they have failed and refused to avail themselves of their right to prosecute an application for a variance before the Zoning Board. There is no evidence that the Township inhibited in any way Plaintiffs' religious exercise. Plaintiffs admit the Redwood Inn site holds no religious significance such that Plaintiffs' ability to exercise their religion would be burdened by not having access to that particular property. Ex. 4 at T171:7-13. Moreover, 11-03 does not zone houses of worship out of the Township. They remain permitted in all zoning districts. It does nothing more than add an access road condition for such uses in residential zoning districts and does not prohibit such uses to the extent they wish to locate on a non-designated road to seek variance relief before the Zoning Board - relief specifically referenced in RLUIPA's legislative history as not constituting a violation. Bared to its essentials, Plaintiffs want immunity from the variance remedy, something that flies in the face of RLUIPA's legislative intent. Plaintiffs cannot demonstrate substantial burden and Counts I, II and V of the SAC alleging substantial burden must be dismissed.

A. EVEN IF PLAINTIFFS DEMONSTRATE SUBSTANTIAL BURDEN, THEIR CLAIMS STILL FAIL AS 11-03 ADVANCES A COMPELLING GOVERNMENT INTEREST BY THE LEAST RESTRICTIVE MEANS

Even if Plaintiffs, despite their failure and refusal to apply for site plan and conditional use variance approval to the Zoning Board and admitted absence of a final decision from the Township on such application, were able to demonstrate an instance of substantial burden, the Township has demonstrated a "compelling interest" for 11-03. It remains undisputed that the Township has a long history of planning policies that advance recognized zoning purposes under the MLUL to protect its residential neighborhoods and direct growth to the Regional Center, which encompasses the municipal road segments designated in 11-03. The road access condition in 11-03 is nothing more than a further evolution of those policies. The condition is grounded in sound planning and is intended to locate houses of worship and other assemblages on roads that are better suited to the regional or potential regional character of these assemblages. Plaintiffs' regional objectives are admitted in their testimony and documents. Ex. 3 at T 16-17 ; Ex. 27. That 11-03 accomplishes this purpose is clear when the land-use character of the municipal designated roadways is analyzed. Ex. 26 at pp. 3-16.

11-03 furthers the Township's compelling interest in preserving and protecting its residential neighborhoods by the least restrictive means of the road

access condition. 11-03 does not prevent Plaintiffs from conducting their religious activities on the Redwood Inn site as Plaintiffs have the opportunity to seek and obtain conditional use variance approval from the Zoning Board; does not impose any additional bulk requirements; and does not prohibit houses of worship from locating anywhere in the Township.

B. UNDER THE MLUL AND CASE LAW AL FALAH CENTER IS AN INHERENTLY BENEFICIAL USE AND TO THE EXTENT IT SEEKS TO USE THE REDWOOD INN SITE HAS A LESSER BURDEN OF PROOF THAN A CONDITIONAL USE THAT IS NOT INHERENTLY BENEFICIAL AND/OR A PROHIBITED USE IN AN APPLICATION FOR CONDITIONAL USE VARIANCE APPROVAL

Under the MLUL and case law, a house of worship is considered an "inherently beneficial use", a term defined in the MLUL as "a use which is universally considered of value to the community because it fundamentally serves the public good and promotes the general welfare." N.J.S.A. 40:55D-4. (See, House of Fire v. Zoning Bd. of Clifton, 379 N.J. Super. 526, 535; 879 A. 2d 1212, 1217 (App. Div. 2005)). If a use is inherently beneficial, it presumptively satisfies the positive criteria for grant of a use variance in an application to the Zoning Board. Smart SMR v. Fair Lawn Bd. of Adj., 152 N.J. 309, 323 (1998).

As 11-03 requires only a conditional use variance application for a location on a non-designated road, Plaintiffs need only show that their use of the Redwood

Inn site as a house of worship is justified, to obtain the Township's permission for such use notwithstanding a deviation from the road access condition of 11-03.

> Thus, our courts generally have treated a conditional use that does not comply with all the conditions of the ordinance as if it were a prohibited use, imposing on the applicant the same burden of proving special reasons as it would impose on applicants for use variances. In our view, that standard is plainly inappropriate and does not adequately reflect the significant differences between prohibited uses, on the one hand, and conditional uses that do not comply with one or more of the conditions imposed by an ordinance, on the other hand.... Accordingly, the standard of proof of special reasons to support a variance for one or more conditions imposed on a conditional use should be relevant to the nature of the deviation from the ordinance. The burden of proof required to sustain a use variance not only is too onerous for a conditional-use variance; in addition, its focus is misplaced. The use-variance proofs attempt to justify the board of adjustment's grant of permission for a use that the municipality has prohibited. Proofs to support a conditional-use variance need only justify the municipality's continued permission for a use notwithstanding a deviation from one or more conditions of the ordinance.

(Emphasis added). Coventry Square, 138 N.J. 285, 297-98; 650 A. 2d 340, 346 (1994).

Plaintiffs' application, if made to the Zoning Board, is also governed by Sica v. Board of Adj., Twp. of Wall, 127 N.J. 152; 603 A.2d 30 (1991).The New Jersey Supreme Court in Sica laid out a four-part guide that a zoning board applies when adjudicating a variance application:

1. Identify the public interest at stake;

2. Identify the detrimental effect that will ensue from the grant of the variance;

3. The Board may reduce the detrimental effect by imposing reasonable conditions on the use;

4. The Board should weigh the positive and negative criteria and determine whether, on balance, the grant of the variance would cause a substantial detriment to the public good.

That guide was designed to temper the Zoning Board's adjudication of this type of application as the Supreme Court recognized that while there may be some impairment of residential character associated with a non-residential use in a residential zone, such effect need not result in a denial. (Sica, at 166; 603 A. 2d at 37).The Supreme Court also noted that in reducing the potential detrimental effect by imposing reasonable conditions on the use, "the weight of accorded the adverse effect should be reduced by the anticipated effect of those restrictions. (Id.).

As an inherently beneficial use subject only to the standards governing conditional use variance approval under Coventry Square, tempered further by the protections afforded by Sica, Plaintiffs have no legitimate basis upon which to assert that adoption of 11-03 rises to the level of a substantial burden.

POINT V

PLAINTIFFS HAVE FAILED TO PROVE A VIOLATION OF EQUAL PROTECTION UNDER THE UNITED STATES CONSTITUTION OR NEW JERSEY CONSTITUTION

Plaintiffs allege that Defendants have treated Plaintiffs differently than similarly situated persons or entities on the basis of religious beliefs. SAC, Counts III and IV; Ex. 31. Plaintiffs allege that among other things, "Defendants enacted a zoning ordinance that arbitrarily established a different standard for Plaintiffs' proposed development than those that have been applied, and will continue to be applied, to similar proposed land uses by non-Muslim houses of worship and by secular property owners." SAC, Count III, para. 93; Count IV, para. 100, Ex. 31.[2]

"The first inquiry a court must make in an equal protection challenge to a zoning ordinance is to examine whether the complaining party is similarly situated

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[2] Defendants recognize that New Jersey "rejects the multi-tiered analysis of federal equal protection doctrine and instead employs a balancing test." "In striking the balance, [the Court considers] the nature of the affected right, the extent to which the government restriction intrudes upon it, and the public need for the restriction." Gardner v. New Jersey Pinelands Comm'n. 125 N.J. 193, 219-220; 593 A. 2d 251, 264 (1991).(Citations omitted). As the respective Constitutions both focus on the "unequal treatment of those who should be treated alike" (Gardner at 219), defendants combine their argument under analysis of the federal Constitution. (The factors to be balanced are "implicit, if not explicit, in federal analysis of the due process and equal protection clauses.") (United Property Owners v. Borough of Belmar, 343 N.J. Super. 1, 18; 777 A. 2d 950, 960 (App. Div 2001). (Citations omitted).

to other uses that are either permitted as of right, or by special permit, in a certain zone. Congregation Kol Ami v. Abington Twp., 309 F. 3d 120, 137 (3d Cir. 2002). Plaintiffs here "must demonstrate that [they are] similarly situated to other [conditionally] permitted entities by demonstrating that it is similarly situated in relation to the Township's purpose..." in adopting 11-03. (Id. at 139) "If, and only if, the entities are similarly situated, " ... "it becomes 'incumbent on the [Township] to provide a rational basis for [the] apparent unequal treatment of similarly situated entities." (Id. at 137-138). (Citation omitted), (Emphasis added). The Township may justify its different treatment of the two, "perhaps by citing to the different impact that such entities may have on the asserted goal of the zoning plan." (Id. at 137).

Initially, Plaintiffs' claim must fail as no final decision has been rendered by the Zoning Board as to whether and to what extent Plaintiffs can use the Redwood Inn site for religious purposes. Thus the only distinction Plaintiffs can draw at this moment is that by virtue of 11-03, they are required to apply for a variance. The legislative history of RLUIPA is clear that Plaintiffs are not relieved of this requirement. 146 Cong. Rec. S7774-01, S7776 (daily ed. July 27, 2000).

In all events, Plaintiffs' claim of disparate treatment does not make out a violation of Equal Protection. Plaintiffs have not identified any specific entity to

which they are similarly situated "in relation to the Township's purpose" in adopting Ordinance 11-03. For this reason too, their claim must fail.

Plaintiffs identify themselves as being treated in a dissimilar manner under 11-03. This is not true. They are treated no differently than any other house of worship that seeks to locate on a non-designated road. Both may seek conditional use variance approval for such use.

Plaintiffs' attack on the road condition requirement of 11-03 as violating their Equal Protection rights boils down to an assertion that this condition can never be imposed on a house of worship use. If this argument were accepted, it would completely neutralize a municipality's delegated power to plan and zone to address the changing nature of land uses.

Even if the Court accepts Plaintiffs' sweeping inclusion of "similar proposed land uses" and houses of worship, past and future as exemplars of similarly situated entities, they still have presented no evidence of how they are dissimilarly treated in terms of the Township's purpose. Again, Plaintiffs' claims must fail.

And even if Plaintiffs articulate a specific entity to which they are similarly situated for purposes of meeting their initial burden, their claim still fails because 11-03 has a rational basis, i.e., protection and preservation of residential character and neighborhoods, rooted in planning policies dating back to 1976.

"Like other economic and social legislation, land use ordinances that do not classify by race, alienage, or national origin, will survive an attack based on the Equal Protection Clause if the law is "reasonable, not arbitrary" and bears "a rational relationship to a (permissible) state objective." Congregation Kol Ami v. Abington Twp., 309 F. 3d 120, 133 (3d Cir. 2002) (quoting Village of Belle Terre v. Boraas, 416 U.S. 1, 8, (1974).

"In view of the enormously broad leeway afforded municipalities in making land use classifications ... it is strongly arguable the Township's decision to group churches together with schools, hospitals, and other institutions is rationally related to the needs of these entities, their impact on neighboring properties and their inherent compatibility or incompatibility with adjoining uses. If so, the ... standard of review [for Equal Protection claims] in land use cases will be met." (Kol Ami at 143).

Whether a rational basis test is employed under the United States Constitution or a balancing test is employed under the New Jersey Constitution, 11-03 meets the test and Counts III and IV of the SAC must be dismissed.

POINT VI

THE TOWNSHIP HAS NOT DISCRIMINATED AGAINST PLAINTIFFS ON THE BASIS OF RELIGION OR RELIGIOUS DENOMINATION

Under RLUIPA's nondiscrimination provision, 42 U.S.C. § 2000cc(b)(2), governments are prohibited from discriminating on the basis of "religion or religious denomination." Although it would seem redundant to an Equal Terms claim, the Third Circuit thus far, "treat[s] the two subsections as both incorporating the 'similarly situated' analysis." Albanian Associated Fund at *31 citing Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 406 F. Supp. 2d 507 (D.N.J. 2005) (Lighthouse II) ; Lighthouse Institute for Evangelism v. City of Long Branch, 100 Fed. Appx. 70, 77 (3d Cir. 2004) (Lighthouse I).

In a recent case, a District Court applied a test it characterized as that associated with a "selective enforcement claim," holding that in a RLUIPA nondiscrimination claim, a plaintiff must show: "(1) that it was treated differently from other similarly situated religious assemblies or institutions, and (2) that the [Township] unequally applied a facially neutral ordinance for the purpose of discriminating against [the plaintiff]" on the basis of religion or religious denomination. Church of Scientology of Georgia, Inc. v. City of Sandy Springs, 843 F. Supp. 2d 1328, 1361 (N.D. Ga. 2012).

Here Plaintiffs fail to establish the elements of a RLUIPA nondiscrimination claim as they have not identified the "similarly situated religious assemblies or institutions" to which they should be compared. Instead, they lump together all 21 houses of worship in the Township and assert that 11-03 "establishes different standards for Plaintiffs' proposed development than those that have been applied in the past." (SAC, Count VI, para. 114 Ex. 31).

The only additional condition placed upon houses of worship and the three other assembly uses in 11-03 is the road access requirement. The Clarke report (Ex. 28) demonstrates that Plaintiffs can comply with 11-03 and construct a house of worship and other religious facilities in the Township. Alternatively Plaintiffs can apply for a conditional use variance to build on the Redwood Inn site. For Plaintiffs to argue that 11-03 should not apply to them is to argue that under RLUIPA, no municipality could ever change its zoning ordinances in a way that differentiated between established houses of worship and those yet to be built. Plaintiffs will find no case law to support that proposition. "Otherwise, compliance with RLUIPA would require municipal governments not merely to treat religious land uses on an equal footing with nonreligious land uses, but rather to favor them in the form of an outright exemption from land-use regulations. Unfortunately for [Plaintiffs], no such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise." CLUB at 762.

Even if Plaintiffs were able to establish that they have been treated differently than existing houses of worship, they cannot establish that the reason for the road access condition was to purposely discriminate against them on the basis of their religion or religious denomination. No such evidence exists.

Plaintiffs admit the rich religious diversity in the Township. Their own website lauds the Township for that fact. Ex. 6. They have lived, worshipped, conducted other religious activities and educated their children in their faith in the Township for many years - often with help from the Township, including from those officials they now accuse of purposely discriminating against them because of their religion. Plaintiffs have not and cannot produce a shred of evidence to establish purposeful discrimination and Count VI of the SAC must be dismissed.

POINT VII

THE TOWNSHIP HAS NOT PLACED UNREASONABLE LIMITATIONS ON WHERE HOUSES OF WORSHIP CAN LOCATE

RLUIPA prohibits a land regulation that "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. § 2000cc(b)(3)(B). (Emphasis added).

Plaintiffs allege that Defendants have violated this provision "by imposing and implementing a land use regulation that unreasonably limits religious

assemblies, institutions, or structures in residential zones within the Township of Bridgewater." (SAC Count VII, para. 121, Ex. 31).(Emphasis added).

11-03 does not prohibit the use of land for religious purposes anywhere in the Township, much less does it prohibit such from the residential districts. If a religious landowner cannot or chooses not to conform to 11-03 that landowner can apply for a conditional use variance - with all of the advantages of an inherently beneficial use - to use their land for religious purposes. (See Point IV. B, supra).

This case is not unlike Vision Church, United Methodist v. Village of Long Grove, 468 F. 3d 975 (7th Cir. 2006). The Court in Vision held that a zoning ordinance that imposed restrictions on construction of churches, including size and capacity limitations, and which required a special use permit for construction of new churches, did not substantially burden religion or violate the unreasonable limitations provision of RLUIPA. (Vision at 981, 991-996). "In this case, we cannot conclude that requiring Vision to obtain a special use permit to build and operate its church in a residential district 'unreasonably limits religious assemblies, institutions or structures within a jurisdiction.'" (Id.).

Vision's primary argument on appeal was that the zoning board's discretion in a special use permit was unbridled and therefore its consideration and denial of Vision's application was unreasonable. The Court disagreed, stating: "This is not a case where the 'state [has] delegated essentially standardless discretion to non-

professionals operating without procedural safeguards.' ... The Board's discretion is narrowly circumscribed by the Village's zoning regulations, which set forth the various factors to be considered by the Board in addressing an application for a special use permit." (Vision at 990-991), (citation omitted).

The Court continued:

> "[e]ven if the zoning regulations were to grant the Board undue discretion, this does not demonstrate the violation of RLUIPA § 2(b)(3)B. The requirement that churches obtain a special use permit is neutral on its face and is justified by legitimate, non-discriminatory municipal planning goals. As a general matter, special use designations are instruments of municipal planning that allows city officials to retain review power over land uses that, although presumptively allowed, may pose special problems. In this case in particular, the special use designation is substantially related to the municipal planning goals of limiting development, traffic and noise, and preserving open space; these goals, in turn, are reflected in the Village's Comprehensive Plan "which seeks to ensure that the semi-rural atmosphere of the community is maintained while simultaneously permitting a wide variety of quality development and character with the existing motif of the community."
>
> To carry out this goal, the Village has also required many secular institutions, including "[s]chools, elementary and high, including playgrounds and athletic fields," "[u]tility and public service uses," and "[n]ursing homes," to be approved as a special use in a residential district. Like these institutions, religious assemblies have a reasonable opportunity to build within the Village, provided that the requirements for a special use permit have been fulfilled.

The Township here has a long history of planning to protect its residential character and neighborhoods - a legitimate planning goal and zoning purpose under the MLUL. 11-03 is a legitimate planning tool and is in furtherance of the

Township's long-standing planning policies of protecting residential character and neighborhoods. Plaintiffs and all other houses of worship have the opportunity to construct facilities in accordance with 11-03; or, if they cannot, or choose not to, they can construct facilities in any zoning district in the Township subject to a conditional use variance application to the Zoning Board, which is subject to the strictures of the MLUL, Coventry Square and Sica. These facts and settled case law are fatal to Plaintiffs' claim of unreasonable limitation and Count VII of the SAC must be dismissed.

POINT VIII

11-03 DOES NOT VIOLATE THE EQUAL TERMS PROVISION OF RLUIPA

Plaintiffs allege that Defendants have violated Section 2(b)(1) of RLUIPA ("Equal Terms") "by imposing and implementing a land use regulation in a manner that treats religious assemblies or institutions on less than equal terms than comparable nonreligious assemblies or institutions, including, without limitation, the use of Township, County, State or other governmental entities' property for nonreligious assemblies." (SAC at Count VII, para. 128, Ex. 31). Contrary to Plaintiffs'

assertion, the undisputed facts demonstrate that 11-03 does not violate the Equal Terms section of RLUIPA.[3]

A plaintiff asserting a claim under the RLUIPA Equal Terms provision must show:

> (1) it is a religious assembly or institution, (2) subject to a land use regulation, which regulation (3) treats the religious assembly on less than equal terms with (4) a nonreligious assembly or institution (5) that causes no lesser harm to the interests the regulation seeks to advance.

Lighthouse III, 510 F.3d 253, 270 (citation omitted). Plaintiffs have failed to meet that burden.

The road access condition in 11-03 was not limited to houses of worship. It also applies to schools, country clubs and open air clubs, all of which are assembly uses.[4]

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[3] 42 U.S.C. §2000cc(b)(1) provides: "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution".

[4] Other assembly type uses such as theaters, auditoriums and conference centers are not germane to this inquiry, as they are permitted in certain zoning districts, but not these residential zones. See e.g. Sections 126-310.1 A(1) and 312 A(1) of the zoning ordinance. In other words, they are treated less favorably than houses of worship.

It is clear then that 11-03, on its face, treats religious assemblies for house of worship use on no less than equal terms than comparator nonreligious assembly uses.

Plaintiffs assert that the "comparable nonreligious assemblies or institutions" to which the house of worship use is to be compared for purposes of assessing whether it is being treated on no less than equal terms should be broader than the schools, country clubs and outdoor recreational facilities that are specifically governed by 11-03. Plaintiffs allege that the comparators should also include "…the use of Township, County, State or other governmental entities' property for nonreligious assemblies." SAC at Count VIII para. 128, Ex. 31. Plaintiffs' allegation misreads both the statute and the case law that interprets it.

For purposes of determining whether there has been a violation of the Equal Terms requirement, a plaintiff must do more than simply attempt to identify any nonreligious assembly use that enjoys better terms under an ordinance or regulation. Instead, the required comparison is to "a secular comparator that is similarly situated as to the regulatory purpose of the regulation in question…." Lighthouse III, supra, 510 F. 3d at 264. Quite simply, governmental uses, even if they have some characteristics of the assembly uses that are subject to 11-03, are not similarly situated to houses of worship, both because of the different manner in

which they are regulated under New Jersey law, and because the regulatory purposes underlying 11-03 are not similarly applicable to governmental uses.

It has long been the law in New Jersey that the State, or any public corporation or authority created by it to carry out any of its functions, is not bound by local zoning regulations. Rutgers v. Piluso, 60 N.J. 142, 150; 286 A. 2d 697, 701 (1972) (citation omitted). Where immunity from local zoning regulation is claimed by any agency or authority occupying a superior position in the governmental hierarchy, it is presumed that immunity was intended absent express statutory language to the contrary. Aviation Services v. Bd. of Adjustment of Hanover Tp. 20 N.J. 275, 282; 119 A. 2d 761, 764 (1956) (citations omitted). This immunity extends to counties. See Hill v. Borough of Collingswood, 9 N.J. 369, 375; 88 A. 2d 506, 509-510 (1952) (county parks); Mayor & Council of Town of Kearny v. Clark, 213 N.J. Super 152, 157; 516 A. 2d 1126, 1128 (1986) (siting of county jail). In terms of municipalities, absent a specific statutory provision to the contrary, it is clear that a municipal governing body, through its zoning power, has the authority to determine where to locate its own facilities within its own borders.

"Our present Municipal Land Use Law, N.J.S.A. 40:55D-1-163 does not alter this concept and accordingly does not restrain the power of a municipality to determine where to locate municipal facilities within its borders." Hills of Troy v. Parsippany, 392 N.J. Super. 593, 601; 921A. 2d 1169, 1173 (Law Div. 2005)

(citation omitted). Indeed, the MLUL reinforces this basic principle by the special treatment it mandates as part of the planning process, as well as the principle of immunity from local zoning regulation for superior governmental authorities. Pursuant to N.J.S.A. 40:55D-31a:

> Whenever the planning board has adopted any portion of the master plan, the governing body or other public agency having jurisdiction over the subject matter, before taking action necessitating expenditure of any public funds, incidental to the location, character or extent of such project, shall refer the action involving such specific project to the planning board for review and recommendation in conjunction with such master plan and shall not act thereon, without such recommendation or until 45 days have elapsed after such reference without receiving such recommendation. This requirement shall apply to action by a housing, parking, highway, special district, or other authority, redevelopment agency, school board or other similar public agency, State, county or municipal....

The statute makes clear that the zoning requirements and development review process applicable to non-governmental development applicants does not extend to governmental uses. There is no requirement that development projects by these State, County and municipal governmental entities be in compliance with the provisions of the municipal zoning ordinance, and although they are required to be submitted to the planning board, it is only for "review and recommendation" in conjunction with the master plan, and the planning board has no authority to approve or disapprove an application, or to impose any conditions. In fact, other than making the required submission, the governmental entity in question is

required to do no more than wait 45 days from the date of submission before making any expenditure of public funds to implement the project. Presumably, the governmental entity would be subject to a requirement of reasonableness in terms of not arbitrarily overriding all legitimate local interests. (See discussion in Rutgers v. Piluso, supra, 60 N.J. at 153-54; 286 A. 2d 702-703).

Clearly then for purposes of the Equal Terms comparator, the governmental assembly uses identified by the Plaintiffs are not valid comparators, because they are not similarly situated. As a practical matter, because of their immunity from local zoning, the Township cannot regulate the location of or zoning standards for State, county or other governmental entity uses involving nonreligious assemblies, which means that they are effectively permitted (or that they cannot be denied) in all zones and at all locations in the Township.

Governmental uses are not secular comparators that are similarly situated to religious assembly uses for purposes of the equal terms comparison under RLUIPA. Nor are they similarly situated in terms of the purposes underlying the enactment of 11-03. As detailed in the Banisch reports 11-03, and the treatment of houses of worship and other assembly uses in general, is based upon the long-standing planning policy to preserve the residential character of what was known as the Washington Valley Sector and is now the R-40 and R-50 Zoning Districts, and to direct growth to the area designated as a Regional Center. Ex. 2; Ex. 26.

11-03 does not apply to municipal uses, including ones that might have some attributes of assembly uses because the Township itself has complete control over these uses; and if they are located in proximity to residential uses, it is able to conduct them in a manner so as not to disturb the residential character of an area, or undermine the regulatory purposes that motivated the adoption of 11-03.[5] It has no such ability with uses conducted by third parties, and can only rely upon the standards contained in 11-03. Thus, the Township's governmental uses are not similarly situated to houses of worship in terms of the regulatory purposes underlying 11-03 and the other provisions of the zoning ordinance applicable to houses of worship.

Plaintiffs' argument that the Township violated RLUIPA by enactment of a land use regulation in a manner that treated its proposed religious assembly use on less than equal terms with nonreligious assembly or institutional uses fails as a matter of law. Count VIII of the SAC must be dismissed.

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[5] As noted by Banisch, the Township has done just that, as its active recreational sites not in or adjoining the Regional Center are unlighted, protecting the quiet night time character of adjoining residential neighborhoods. Ex. 28 at 9. Plaintiffs submitted no rebuttal report and have not refuted these facts. Plaintiffs' planning consultant admits that he did not inspect any of the Township's parks (Ex. 16 at T499), and those that have lighted fields are confined to the Regional Center. Ex. 16 at T508-509.

POINT IX

THERE BEING NO EVIDENCE TO SUPPORT A FACIAL ATTACK ON 11-03, PLAINTIFFS'AS APPLIED CLAIMS ARE NOT RIPE AND MUST BE DISMISSED

The facts of this case mandate dismissal on ripeness grounds because Plaintiff has not availed itself of the process that would result in its receipt of a final determination from the government regarding the use of its property for a house of worship in the residential district. Murphy v. New Milford Zoning Comm'n., 402 F. 3d 342, 347 (2d Cir. 2005); Congregation Anshei Roosevelt v. Planning and Zoning Board of Borough of Roosevelt, 338 Fed. Appx. 214, 218-19 (3d Cir 2009), House of Fire Christian Church v. Zoning Bd. of Adjustment of Clifton, 379 N.J. Super. 526, 547; 879 A. 2d 1212 (App. Div. 2005), , ("Because the Church's application must be reconsidered by the Board, 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.").(See Murphy, 402 F.3d at 353 ("[F]ailure to pursue a variance prevents a federal challenge to a local land use decision from becoming ripe."); see also, Congregation Anshei Roosevelt supra, (Id.). RLUIPA also disfavors federal court intervention in religious land use cases before the religious landowner has fulfilled the requirements of the local

government's process. The legislative history states that RLUIPA was not intended to "relieve religious institutions from applying for variances, special permits or exceptions, where available without discrimination or unfair delay." See 146 Cong. Rec. S7774-01, S7776 (daily ed. July 27, 2000) (Joint Statement of Sen. Orrin Hatch and Sen. Edward Kennedy). Plaintiffs' failure to file a variance application and take advantage of the nine dates that the Zoning Board made available for review of any such application makes the as applied claims in the SAC unripe for federal judicial review and the SAC must be dismissed.

POINT X

THE INDIVIDUAL DEFENDANTS NAMED IN THEIR OFFICIAL CAPACITIES MUST BE DISMISSED FROM THE SAC

Plaintiffs name as Defendants each member of the Planning Board, each member of the Township Council and the Mayor, each in, and only in, their official capacity.

> "Official capacity suits...'generally represent only another way of pleading an action against an entity of which an officer is an agent.' As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.

Bass v. Attardi, 868 F. 2d 45, 51 (3d. Cir. 1989), quoting Kentucky v. Graham, 473 U.S. 159, 165-66, (1985); "It is not a suit against the official personally, for the real party in interest is the entity. ... A plaintiff seeking to recover on a damages judgment in an official capacity suit must look to the government entity itself." Kentucky v. Graham, at 166 (emphasis in original), and, "[t]here is no longer a need to bring official-capacity actions against local government officials ... for local government units can be sued directly for damages and injunctive or declaratory relief." Id. at 167, citing Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690, n. 55 (1978).

Here, members of the Planning Board, the Township Council and the Mayor have all been named as Defendants in their official capacities. There are no allegations against any of the individual Defendants in their personal capacities. Under Bass, Kentucky v. Graham and Monell, supra, there is neither the need nor the basis to sue the individual defendants in their official capacities and the claims against them must be dismissed.

POINT XI

PLAINTIFFS' STATE LAW CLAIMS MUST BE DISMISSED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

In addition to their federal constitutional claims, Plaintiffs have pleaded allegations of violations of the MLUL, the New Jersey Constitution, Art 1, Section

3; and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12.5 ("NJLAD") (collectively, the "State Law Claims"). The State Law Claims cannot serve as a basis for invoking federal jurisdiction and cannot overcome the lack of ripeness and other infirmities that require all such claims be dismissed as a matter of law.

Because Plaintiffs are unable to establish the facial invalidity of 11-03, leaving them with only as applied claims, all of their remaining State law claims (Counts II, IV, IX, X and XI) must be dismissed due to Plaintiffs' failure to exhaust their administrative remedies and other express limitations under federal and state law.

A. FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES REQUIRES DISMISSAL OF COUNTS II, IV AND IX OF THE SAC

The doctrine of exhaustion requires dismissal of Counts II, IV and IX of the SAC because plaintiffs have failed to exhaust administrative remedies by seeking conditional use variance approval from the Zoning Board.[6] New Jersey law is clear that it is premature to consider as applied challenges to zoning ordinances, whether based upon an allegation of Constitutional infirmity or a claim that 11-03

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[6] Counts II and IV are pled pursuant to N.J.S.A. 10:6-2 ("Actions permitted under the 'New Jersey Civil Rights Act'"), and Count IX separately challenges the validity of 11-03 as being arbitrary, capricious and unreasonable as applied against plaintiffs' property and the proposed uses of the same.

is arbitrary, capricious or unreasonable, unless and until the plaintiffs exhaust their administrative remedies by filing and prosecuting a variance application.

"When it is claimed that a zoning ordinance is constitutionally invalid as applied to a plaintiff's property, a trial court should ordinarily decline to consider such an attack on the ordinance until the plaintiff has exhausted his variance remedy under N.J.S.A. 40:55D-70." 966 Video v. Mayor & Tp. Committee, 299 N.J. Super. 501, 514; 691 A 2d 435, 441 (App. Div. 1997) citing Route 15 Associates v. Jefferson Tp., 187 N.J. Super. 481, 488-489; 455 A. 2d 518 (App. Div. 1982). This is because:

> ...when, as here, the zoning ordinance is not claimed to be invalid in its entirety but only to be arbitrary and unreasonable in its application to the owner's land, and relief in that circumstance may be obtained from a local board of adjustment, the trial court should ordinarily decline to adjudicate an attack upon the ordinance until after the owner has exhausted his remedy to seek relief from the local board of adjustment,

Deal Gardens, Inc. v. Bd. of Trustees of Loch Arbor, 48 N.J. 492, 497; 266 A. 2d 607, 610 (1967) quoting Justice Brennan in Conlon v. Board of Public Works Paterson, 11 N.J. 363, 370; 94 A. 2d 660, 664 (1953). Exhaustion is particularly important when a court is faced with an as-applied challenge to municipal zoning as there is no other way of knowing what action a zoning board – the agency vested with expertise in such matters - would take if plaintiffs applied for a

variance. Only through filing and prosecution of a variance application before the Zoning Board can it be seen whether or not a variance would be granted.

Exhaustion serves several important interests. It permits claims to be heard in the first instance by an agency (here, the Zoning Board) possessing expertise in the area, allows for the development of a full factual record, and the Zoning Board's decision may obviate the need for resort to the courts. City of Atlantic City v. Laezza, 80 N.J. 255, 265; 403 A. 2d 465, 470 (1979). This is consistent with the New Jersey Supreme Court's direction that state courts "should not reach a constitutional question unless its resolution is imperative to the disposition of litigation." Randolph Town Ctr., L.P. v. County of Morris, 186 N.J. 78, 80; 891 A. 2d 1202 (2006).

Before delving into the constitutionality of a zoning ordinance as applied to their property, plaintiffs are required to first make efforts to remedy the situation by obtaining a zoning variance. Failure to exhaust such remedies would result in a situation where, as here, Plaintiffs have not presented an application to the Zoning Board or sought variance relief from the applicable zoning regulations. As Plaintiffs to date have made no effort to seek relief by way of an application before the Zoning Board, it is premature for this Court to consider the constitutionality of 11-03 as applied to Plaintiffs' property absent such efforts. Federal law follows the same approach. (See Point IX, supra.).

The same rationales apply to constitutional claims involving land use disputes that are brought under the New Jersey Civil Rights Act. These too require the exhaustion of administrative remedies through the pursuit of variance relief under the MLUL before a court will even consider converting a zoning dispute into civil rights litigation. See, e.g., 41 Maple Associates v. Common Council of the City of Summit, 276 N.J. Super. 613, 619-620; 648 A. 2d 732, 735-736 (App. Div. 1994) (holding a claim brought pursuant to §1983, the federal analogue of the NJLAD, was correctly dismissed because it was not ripe for adjudication without a showing that the plaintiffs had attempted to remedy the deprivation of their land use rights through available administrative and judicial proceedings.) Here, Plaintiffs admittedly have failed to seek a conditional use variance and thus are unable to satisfy the mandatory exhaustion requirement that is a prerequisite for pursuing a cause of action alleging that 11-03, as applied to their property, violated their rights under the New Jersey Constitution and under N.J.S.A. 10:6-2.

Moreover, exhaustion of administrative remedies is particularly appropriate in this matter because it will enable the parties to create a full factual record pertaining to the potential development and use of the site by an agency fully knowledgeable of local conditions and the particular restrictions at hand. Lang v. Zoning Board of Adjustment, 160 N.J. 41, 58; 733 A. 2d 464, 474 (1999) (citing Kramer v. Board of Adjustment of Sea Girt, 45 N.J. 268, 296-297; 212 A. 2d 153,

169 (1965)). A full factual record also will assist the Court in addressing the constitutional questions raised by plaintiffs should judicial action ultimately be required. Abbott v. Burke, 100 N.J. 269, 299; 495 A. 2d 376, 392 (1985) (treatise citation omitted). Federal law is the same.

None of the four exceptions to the exhaustion requirement are present here. See, Garrow v. Elizabeth Gen. Hosp. & Dispensary, 79 N.J. 549, 561; 401 A. 2d 533, 539 (1979) (exhaustion not required when (i) only a question of law is involved; (ii) administrative remedies would be futile; (iii) irreparable harm may result; or (iv) the public interest requires a prompt judicial decision). The court should reject any assertion that exhaustion would be futile under these circumstances. Defendants reject Plaintiffs' conclusory allegation, unsupported by any facts, that 11-03 fails to offer a realistic possibility for a conditional use variance, particularly as Plaintiffs' religious use would be accorded "inherently beneficial" use status under prevailing precedent. See e.g., House of Fire v. Zoning Bd., 379 N.J. Super. 526, 535 (App. Div. 2005). Plaintiffs cannot show that 11-03 prohibits religious uses or rules out any development of plaintiffs' property, for religious purposes or otherwise, without first pursuing their application before the Zoning Board.

B. PLAINTIFFS CANNOT PROVE THAT ORDINANCE 11-03 IS ARBITRARY, CAPRICIOUS AND UNREASONABLE

Even if Plaintiffs' claim that 11-03 is arbitrary, capricious and unreasonable escapes the requirement of exhaustion, which it should not, their claim fails substantively.

The law governing review of a challenged zoning ordinance is well settled. There is a strictly circumscribed judicial role in reviewing zoning regulations enacted by a municipality. Harvard Enterprises, Inc. v. Bd. of Adjustment, 56 N.J. 362, 368; 266 A. 2d 588, 591-592 (1970); Pascack Assoc. v. Mayor of Washington, 74 N.J. 470, 481; 379 A. 2d 6, 11 (1977); Bow & Arrow Manor v. Town of West Orange, 63 N.J. 335, 343; 307 A. 2d 563, 567 (1973). A zoning ordinance is presumed valid and may only be overturned if the ordinance is "clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principals of zoning or the statute. [MLUL]" Bow & Arrow Manor, Id.; see Rumson Estates, Inc. v. Mayor and Council of the Borough of Fair Haven, 177 N.J. 338, 350; 828 A. 2d 317, 325 (2003); Zilinsky v. Zoning Bd. of Adjustment of Verona, 105 N.J. 363, 368; 521 A. 2d 841, 843 (1987); Taxpayers Assoc. of Weymouth Township v. Weymouth Township, 80 N.J. 6, 20; 364 A. 2d 1016, 1023-1024 (1976); Kramer v. Board of Adjustment of Sea Girt, 45 N.J. 268, 296-297; 212 A. 2d 153, 169 (1965). It is a demanding burden for an opponent to meet.

Mt. Olive Complex v. Township of Mt. Olive, 340 N.J. Super. 511, 533; 774 A. 2d 704, 717 (App. Div. 2001). A court should not challenge the wisdom of an ordinance; if the ordinance is debatable, it should be upheld. Bow & Arrow Manor, Id.; Rumson Estates, Id. ("Reviewing courts should not be concerned over the wisdom of an ordinance. If debatable, the ordinance should be upheld."); Zilinsky, Id. ("[a] mere difference of opinion as to how an ordinance will work will not lead to a conclusion of invalidity; 'no discernable reason' is the requisite standard"). The functions of the legislative bodies and the judicial forums are distinct. "The wisdom of a particular course chosen by a governing body is reviewable only at the polls." Wallington Home Owners Assoc. v. Borough of Wallington, 130 N.J. Super. 461, 464; 327 A. 2d 669, 671 (1974); certif. granted 65 N.J. 299 (1974); affd. 66 N.J. 30; 327 A. 2d 669, 671 (1974).

The fundamental question in all zoning cases is whether the requirements of the ordinances are reasonable under the circumstances. Southern Burlington County NAACP v. Township of Mount Laurel (Mt. Laurel II), 92 N.J. 158, 276-277; 456 A. 2d 390, 450-451 (1983).

A municipality's power to zone is derived from authority delegated to it by the Legislature. Rumson Estates, Inc., 177 N.J. at 349; 828 A. 2d 317, 323-324 Manalapan Realty L.P. v. Township Committee of Manalapan, 140 N.J. 366, 380 658 A. 2d 1230, 1236-1238(1995); Riggs v. Long Beach Township, 109 N.J. 601,

610; 538 A. 2d 808, 812 (1988). "[T]he delegation of zoning authority to municipalities 'shall be liberally construed' in a municipality's favor." Rumson Estates, 177 N.J. at 351; 828 A. 2d 323-326 (citing N.J. Const. art. 4, § 7, ¶ 11; D.L. Real Estate Holdings v. Point Pleasant Beach Planning Bd., 176 N.J. 126, 132; 820 A. 2d 1220, 1224 (2003)). An ordinance must advance one of the general purposes of the Municipal Land Use Law, N.J.S.A. 40:55D-2, and must be substantially consistent with the land use plan element and the housing plan element of the master plan. Rumson Estates, Id.; Manalapan Realty, Id.

Riggs v. Long Beach Township, 109 N.J. at 611-13; 538 A. 2d 808, 812-815, identifies four "objective criteria" by which the validity of a zoning ordinance is to be judged:

1. Does the ordinance advance one of the purposes of the MLUL set forth in N.J.S.A. 40:55D-2?

2. Is the ordinance substantially consistent with the Land Use Plan Element and the Housing Plan Element of the Master Plan or designed to effectuate such plan element?

3. Does the ordinance comport with constitutional constraints on the zoning power?

4. Was the ordinance adopted in accordance with statutory and municipal procedural requirements?

Plaintiffs have failed to overcome the presumption of validity accorded 11-03. The evidence is compelling that 11-03 was reasonable and soundly based and

meets each of the pertinent Riggs criteria. For these reasons, Count IX of the SAC must be dismissed.

C. 11-03, A CONDITIONAL USE REGULATION, DOES NOT VIOLATE THE MLUL UNIFORMITY REQUIREMENT

Plaintiffs allege in Count X of the SAC that 11-03 violates the requirement of N.J.S.A. 40:55D-62(a) that regulations in a zoning district be uniform for each class or kind of building or structure or use of land. They assert that because 11-03 allows houses of worship to be located without access to a State highway, County roadway, or designated municipal roadway in some areas of residential districts, but not in others, it violates the statutory requirement for uniformity. (SAC, Exhibit 1 Count X, paras. 138-139). Plaintiffs misunderstand the nature of conditional uses. The MLUL specifically permits the creation of conditional uses, which, by definition, are uses permitted in a particular zoning district "only upon a showing that such use in a specified location will comply with the conditions and standards for the location or operation of such use..." N.J.S.A. 40:55D-3. Thus, the entire concept of a conditional use contemplates that a particular use, such as a house of worship, may meet the conditional use standards and be permitted on some properties within a zoning district, while not on others. This does not violate the MLUL. Count X is without merit as it fails to recognize the compatibility of conditional uses with the uniformity requirement, as the conditional use regulation

at issue here, 11-03, treats equally all classes of uses or structures that fall within its purview.

"[A] conditional use applicant's inability to comply with some of the ordinance's conditions need not materially affect the appropriateness of the site for the conditional use." Coventry Square, 138 N.J. at 297; 650 A. 2d 340, 344-345. See, Rumson Estates, Inc. v. Mayor & Council of the Borough of Fair Haven et al. and Ferraro Builders, LLC v. Borough of Atlantic Highlands Planning Board, et al., 177 N.J. 338, 358-359; 828A. 2d 317, 329-330 (2003), holding that zoning regulations do not violate the MLUL's uniformity principle, N.J.S.A. 40:55D-62(a), when making provision for different conditions within a particular zone. The notion of uniformity does not prohibit classifications within a district so long as they are reasonable and so long as all similarly situated property receives the same treatment.

11-03 does not violate the uniformity requirement of the MLUL. Count X of the SAC fails as a matter of law and must be dismissed.

D. FEDERAL COURTS LACK SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' NJLAD CLAIM

Count XI of the SAC alleges that 11-03 violates New Jersey's Law Against Discrimination, N.J.S.A. 10.5-12.5 ("NJLAD"). This claim need not be addressed substantively as federal courts lack subject matter jurisdiction over such claims.

Exclusive jurisdiction over claims made pursuant to N.J.S.A. 10.5-12.5 lies solely with the New Jersey Superior Court. See, Kessler Institute for Rehabilitation, Inc. v. Mayor and Council of Borough of Essex Fells, 876 F. Supp. 641, 664–65 (D.N.J.1995), which found that claims brought pursuant to N.J.S.A. 10:5-12. 5 are required to be brought in New Jersey state court, not federal court.

No New Jersey federal district court or state superior court has disagreed with Kessler, nor has the New Jersey Legislature amended the NJLAD to afford federal courts with original subject matter jurisdiction to consider such claims. The NJLAD claim is not cognizable before this Court. Count XI of the SAC must be dismissed.

CONCLUSION

For the reasons set forth above, Plaintiffs' Second Amended Complaint must be dismissed with prejudice in its entirety.

Respectfully submitted,

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