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

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

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

In January 2011, Plaintiffs applied to the Planning Board of the Township of Bridgewater for a site plan and conditional use approval to convert the Redwood Inn, a former banquet hall, into a mosque. The Redwood Inn is in a residential zone, and houses of worship are conditionally permitted uses in such zones. Because Plaintiffs' application showed that they could easily meet all the conditions for a house of worship on the property, the Planning Board was required to approve it and should have done so. Instead, the Township Council, acting in response to Plaintiffs' application and the anti-Muslim animus it incited, in March 2011, enacted Ordinance 11-03, the subject of this lawsuit. Ordinance 11-03 changed the rules so that houses of worship would be conditionally permitted only on designated roads that did not include Mountain Top Road, where the Redwood Inn is. This change abrogated 75 years of settled zoning policy that had permitted or conditionally permitted houses of worship on *all* roads in Bridgewater's residential zones.

PRIOR PROCEEDINGS AND FACTUAL RECORD

On May 18, 2011, Plaintiffs filed a motion for a preliminary injunction together with their First Amended Complaint. Defendants responded with a motion to dismiss the complaint arguing that the Plaintiffs had not exhausted their administrative remedies because they had not sought a zoning variance from the

Bridgewater Zoning Board of Adjustment. Defendants then argued that the First Amended Complaint pled a challenge to Ordinance 11-3 "as applied", not on its face, and that the failure to seek a variance meant that Plaintiffs' case was not ripe for review. This same argument—that Plaintiffs' pleading does not allege a challenge to Ordinance 11-03 on its face—is at the core of two of Defendants' arguments on their present motion for summary judgment (Def. Mem. Pts. IX and XIA) and is embedded in others (*e.g.* Def. Mem. 20).

After full briefing, the Court (Hon. Joel A. Pisano) heard oral argument on Defendants' motion on June 29, 2011. Although not mentioned in Defendants' summary judgment papers, Judge Pisano denied Defendants' motion and found under binding precedent (*County Concrete Corp. v. Twp. of Roxbury*, 442 F.3d 159 (3d Cir. 2006)) that Al Falah's was a facial challenge and not a challenge to Ordinance 11-03 as applied. Therefore Al Falah was not required to seek a variance in order to obtain relief in this Court.[1]

Following that ruling, discovery proceeded and on August 31, 2012, the Plaintiffs filed a Second Amended Complaint. On October 12, Plaintiffs filed the renewed motion for a preliminary injunction now before the Court. Doc. 79.

At the same time, Defendants filed this motion for a summary judgment. In violation of Local Civil Rule 56.1, Defendants have not accompanied their motion

[1] A fuller discussion of Judge Pisano's ruling and its effect on this motion appears at pp. 4-9 below.

with a statement of what they contend are undisputed facts. Pursuant to that Rule, Plaintiffs are filing their own Supplemental Statement of Material Facts In Dispute. Plaintiffs do so under the severe handicap of not knowing what facts Defendants actually contend are undisputed.

ARGUMENT[2]

I. DEFENDANTS' MOTION SHOULD BE DISMISSED FOR FAILURE TO FILE A RULE 56.1 STATEMENT

Local Civil Rule 56.1 provides, "On motions for summary judgment, the movant shall furnish a statement which sets forth material facts as to which there does not exist a genuine issue, in separately numbered paragraphs citing to the affidavits and other documents submitted in support of the motion." Many district courts have similar rules. *See* 10A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2719 n.6 (3d ed. 2012). This Rule seeks to put the opposing party on notice of the facts the movant contends are undisputed and to provide the Court a focused means of determining just what facts really are undisputed. The Court—like other district courts—considers this Rule important enough that "[a] motion for summary judgment unaccompanied by a statement of material facts not in dispute shall be dismissed." The Court has repeatedly stated that motions failing to comply with the Rule are to be dismissed unless the

[2] The point headings used in this brief do not correspond with the point headings in Defendants' moving brief. To avoid confusion, we have identified in each point's heading the portions of Defendants' moving brief to which it responds.

noncompliance is shown not to have been in bad faith. *Rumbas v. Borough of Lawnside*, 2008 U.S. Dist. LEXIS 60712 at *20 n.12 (D.N.J. Aug. 6, 2008) (Simandle, J.); *see also Comose v. N. J. Transit Rail Operations, Inc.*, 2000 U.S. Dist. LEXIS 20790, at *4 (D.N.J. Oct. 6, 2000) (Rodriguez, J.) (*citing Hoch v. Phelan*, 796 F. Supp. 130, 131 (D.N.J. 1992) (Sarokin, J.)).

Defendants' failure to file a Rule 56.1 statement cannot have been inadvertent. They are represented by able counsel well-versed in federal practice. The failure is part of a strategy to divert the Court's attention from the substantial evidence of discrimination and other statutory and constitutional violations presented by Plaintiffs in support of their preliminary injunction motion.

We urge the Court not to excuse Defendants' failure to file a Rule 56.1 statement and to dismiss the motion on that ground. As explained in our Rule 56.1 statement and below, the motion should be denied if considered on the merits.

II. AS THIS COURT HAS ALREADY RULED, AL FALAH'S CHALLENGE IS TO ORDINANCE 11-03 ON ITS FACE; AND PLAINTIFFS ARE NOT REQUIRED TO SEEK A VARIANCE FROM THE ZONING BOARD OF ADJUSTMENT (RESPONDING TO POINTS III, IX, XI.A)

In sections III, IX and XI of their memorandum, Defendants argue that Plaintiffs have asserted an "as applied" (rather than facial) challenge to Ordinance 11-03, and that the case is not ripe for review because Plaintiffs have not sought a variance from Bridgewater's Zoning Board of Adjustment. This

mischaracterization of the complaint is repeated throughout Defendants' memorandum. *See* Def. Mem. 4-6, 17-22, 32-33, 47-48, 49-54. According to Defendants, "[p]laintiffs have never expressly pled that Ordinance 11-03 is facially invalid." *Id.* at 18. At most, according to them, Plaintiffs "have made vague allegations in the 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." *Id.*

Defendants fail to disclose that that they already raised this very argument in their motion to dismiss the Amended Complaint and argued these very points before Judge Pisano. After reviewing the same paragraphs of the Amended Complaint and the same cases that Defendants cite here, Judge Pisano determined that under controlling Third Circuit precedent, *County Concrete Corp. v. Township of Roxbury*, 442 F. 3d 159 (3d Cir. 2006), the complaint raised a facial challenge to Ordinance 11-03:

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

Chow Dec. Ex. M at 49:16-25.[3] He denied Defendants' motion to dismiss "without prejudice", as he said, to make clear that he was not foreclosing Defendants from making substantive arguments about the variance process if they believed such arguments were relevant to Plaintiffs' entitlement to relief on the merits.[4] He certainly did not mean that his ruling on what the complaint alleged (which allegations have not changed) should be treated as if it never happened.

Defendants do not argue that Judge Pisano was wrong or that there is any basis for reviewing or changing Judge Pisano's decision. He relied on *County Concrete* which was, and remains, the controlling Third Circuit precedent. It has been cited repeatedly for the proposition that, in a land use case, the "finality" rule does not apply when the land use law is challenged on its face, as Judge Pisano found to be the case here.[5] All the arguments Defendants make now in their

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[3] Plaintiffs have adopted the following citation format for record citations: (1) deposition testimony is cited as "[Name] Tr. [page and line reference]," (2) deposition exhibits are cited as "PX_" for documents marked in depositions taken by Plaintiffs and "DX_" for documents marked in depositions taken by Defendants, and (3) declarations and accompanying exhibits, including the declarations that were originally submitted in support of Plaintiffs' motion when first filed in May 2011, are cited as "[Name] Dec." All cited deposition exhibits and deposition transcript excerpts are attached to the Declaration of Yue-Han Chow filed in support of Plaintiffs' motion for a preliminary injunction (Doc. 79-7–21), or the Supplemental Declaration of Yue-Han Chow filed herewith.

[4] Defendants in fact make such arguments, for example, that the availability of the ZBA process means that the Ordinance did not impose a substantial burden on Plaintiffs' religious practice. Def. Mem. 26. We refute those arguments elsewhere (*see* pp. 23-28 below), but we do not contend that Defendants are foreclosed from making them by Judge Pisano's ruling denying their motion to dismiss.

[5] *See, e.g.*, *CMR D.N. Corp. v. City of Philadelphia*, 829 F. Supp. 2d 290 (E.D. Pa. 2011); *Lapid Ventures, LLC v. Twp. of Piscataway*, 2011 WL 2429314 (D.N.J. June 13, 2011) (Martini, J.); *Ohad Assocs., LLC v. Twp. of Marlboro*, 2011 WL 310708 (D.N.J. Jan. 28, 2011) (Thompson, J.); *RHJ Medical Ctr., Inc. v. City of*

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summary judgment motion were briefed and argued at length before Judge Pisano (including whether New Jersey incorporates a doctrine similar to what *County Concrete* announced—which it does).[6] The cases cited by Defendants here were discussed.[7] We respectfully refer the Court to our memorandum of law in opposition to Defendants' motion to dismiss (Doc. 29 at 8-11), to the oral argument before Judge Pisano, and to his oral decision. Chow Supp. Dec. Ex. M.

Defendants cite *Brown v. City of Pittsburgh*, 586 F.3d 263 (3d Cir. 2009), for the proposition that a facial challenge to Ordinance 11-03 requires proof that it could not be lawfully applied under any circumstances. Def. Mem. 18-20. This principle has its roots in earlier decisions by the Circuit and the Supreme Court.

Footnote continued from previous page
DuBois, 754 F. Supp. 2d 723 (W.D. Pa. 2010); *Waterfront Renaissance Assoc. v. City of Philadelphia*, 701 F. Supp. 2d 633 (E.D. Pa. 2010); *RLR Investments, LLC v. Town of Kearny*, 2009 WL 1873587 (D.N.J. June 29, 2009) (Cavanaugh, J.); *Stockham Interests, LLC v. Borough of Morrisville*, 2008 WL 4889023 (E.D. Pa. Nov. 12, 2008); *New Horizon Inv. Corp. v. Mayor & Mun. Council of Twp. of Belleville*, 2008 WL 4601899 (D.N.J. Oct. 15, 2008) (Sheridan, J.); *Warren v. New Castle Cnty.*, 2008 WL 2566947 (D. Del. June 26, 2008); *Cornell Co. v. Borough of New Morgan*, 512 F. Supp. 2d 238 (E.D. Pa. 2007).

[6] *See Riggs v. Twp. of Long Beach*, 101 N.J. 515, 525-526, 503 A.2d 284, 290 (1986) (requiring application for variance would not answer the question of whether the ordinance impermissibly affects only the plaintiffs' property, and would not have any bearing on whether the ordinance was arbitrary, unreasonable, or unconstitutional) (citations omitted)).

[7] *Brown v. City of Pittsburgh*, 586 F.3d 263 (3d Cir. 2009), discussed in the text immediately following, was first cited in Defendants' reply brief and later at oral argument. The remaining cases cited by the Defendants either challenged a regulation "as "applied" (*e.g.*, *Albanian Associated Fund v. Twp. of Wayne*, 2007 WL 2904194 (D.N.J. Oct. 1, 2007) (Sheridan, J.), *Lighthouse Inst. for Evangelism v. City of Long Branch*, 100 F. App'x. 70, 77 (3d Cir. 2004), and *Church of Scientology of Georgia, Inc. v. City of Sandy Springs*, 843 F. Supp. 2d 1328, 1361 (N.D. Ga. 2012)) or, like *Brown*, involved areas of law that had nothing to do with the issues addressed in *County Concrete*.

See, e.g., Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 796-98 (1984); *Hohe v. Casey*, 956 F.2d 399, 404 (3d Cir. 1992); *McGuire v. Reilly*, 260 F.3d 36, 47 (1st Cir. 2001). It is applied primarily in freedom of expression cases like *Brown* or cases challenging a law as unconstitutionally vague or broad. *Id.* This principle was certainly well-known to the litigants and the Third Circuit which did not mention the principle when it decided *County Concrete*. And it was certainly known to Judge Pisano when Defendants urged it upon him without success.

In whatever other contexts this principle might make sense, it makes no sense here and, as far as we are aware, has never been applied in a similar case. The complaint alleges, and the evidence overwhelmingly shows, that the Township passed Ordinance 11-03 in order to stymie Al Falah's application before the Planning Board which would have had to approve it. The Township accomplished its goal by passing an Ordinance that removed jurisdiction from the Planning Board and forced Al Falah to seek a variance before the ZBA where the rules are substantially more burdensome and make it very difficult if not impossible for Al Falah to obtain approval. (*See* pp. 23-28,below.) The passage of the Ordinance, in the circumstances described in detail in Plaintiffs' preliminary injunction papers and Rule 56.1 Statement, supports Al Falah's claims in this case—*i.e.*, that the Township discriminated against Al Falah on the basis of religion, imposed a

substantial burden on its exercise of religion, has treated religious uses on less than equal terms than secular uses, etc. Whether some other entity such as a country club, open air club, school or even some other religious entity which did not have an application pending before the Planning Board and was not in the Township's cross-hairs could mount a challenge to the Ordinance is irrelevant to Al Falah's case. This Ordinance, passed in these circumstances, cannot be constitutionally applied to Al Falah's application. The allegations in the complaint, now supported by substantial evidence, are what led Judge Pisano correctly to rely on *County Concrete* and reject Defendants' arguments.

Rather than explaining why *County Concrete* is not good law or why Judge Pisano's ruling was wrong, Defendants pretend that neither happened. "[A]s a matter of comity, a successor judge should not lightly overturn decisions of his predecessors in a given case." *Fagan v. City of Vineland*, 22 F.3d 1283, 1290 (3d Cir. 1994); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (courts should be loath to revisit their own or a coordinate court's decisions absent extraordinary circumstances); *TCF Film Corp. v. Gourley*, 240 F.2d 711, 713-14 (3d Cir. 1957) (one district court judge may only overturn a decision of another district court judge in the same case in exceptional circumstances).

III. COMPLIANCE WITH THE NEW JERSEY MUNICIPAL LAND USE LAW AND ITS FORMER "TIME OF DECISION" RULE IS NOT A DEFENSE TO PLAINTIFFS' RLUIPA AND CONSTITUTIONAL CLAIMS (RESPONDING TO POINT II)

Defendants' efforts to mischaracterize this case begin with the first sentence of their brief: "This is a land use case." Defendants assert that they are entitled to summary judgment because Ordinance 11-03 supposedly comports with the requirements of New Jersey's Municipal Land Use Law ("MLUL"), and particularly with the "time of decision" rule that was still part of the MLUL as of March 14, 2011. Def. Mem. 11-17. As demonstrated at pages 46-48, below, Ordinance 11-03 violates the MLUL because it is arbitrary and capricious. But even if one assumed *arguendo* that the Ordinance complies fully with the MLUL, that would not support Defendants' motion as to Plaintiffs' claims under RLUIPA or, indeed, any of their claims other than the claim under the MLUL itself.

This is *not* a "land use case." It is a *religious discrimination* case in which Plaintiffs principally rely on RLUIPA. Congress enacted RLUIPA as a civil rights statute, not a national land use code. It generally left land use regulation with state and local governments as it has always been. *See Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 354 (2d Cir. 2007) (rejecting argument that RLUIPA violates the Tenth Amendment by impermissibly compelling state and local governments to enact particular land use regulations). Congress chose to override state and local regulation only where it unacceptably interferes with religious

exercise. *Id.* Congress took that step because it found that local governments in fact were discriminating against religious exercise through misuse of land-use regulatory authority. *See* 146 Cong. Rec. S7774-01 (daily ed. July 27, 2000) (Ex. 1, Joint Statement of Sen. Hatch and Sen. Kennedy).

Because RLUIPA is a federal statute, Plaintiffs' claims under it cannot be defeated by arguing that Ordinance 11-03 was validly enacted under state law. The Supremacy Clause, U.S. Const. Art. VI, gives Congress the authority to override state law. *See, e.g., PLIVA, Inc. v. Mensing*, 131 S.Ct. 2567, 2577 (2011). Unlike some federal statutes, RLUIPA presents no interpretive problems about whether or to what extent Congress intended to exercise that authority. RLUIPA does so unequivocally, and to the full limit of Congress' constitutional authority. Its prohibitory provisions state, "No government shall impose or implement a land use regulation" imposing a substantial burden on religious exercise, etc. 42 U.S.C. §§ 2000cc(a)(1), 2000cc(b)(1), 2000cc(b)(2), 2000cc(b)(3). It defines "government" to include both the states and their political subdivisions. 42 U.S.C. § 2000cc5.(4). Congress exercised its authority to override state law as fully as the Constitution permits, stating that RLUIPA "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3.(g).

If a local land use regulation violates one of the several prohibitions stated at 42 U.S.C. §§ 2000cc(a)-(b), it is irrelevant whether the regulation was enacted in compliance with procedural or substantive requirements of state law. The text of RLUIPA does not provide any defense based on compliance with state law. No court interpreting RLUIPA has suggested that such a defense is warranted, and multiple courts have held local laws invalid under RLUIPA without any suggestion that they were procedurally deficient under state law. *E.g.*, *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163 (9th Cir. 2011); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004); *Grace Church of North Cnty. v. City of San Diego*, 555 F. Supp. 2d 1126 (S.D. Cal. 2008).

Defendants argue that Ordinance 11-03 conformed with one specific rule formerly imposed by the MLUL, the "time of decision" rule. This argument would not support their motion for summary judgment even if New Jersey had never changed that rule. As it happens, New Jersey did change it, and the timing of the enactment of Ordinance 11-03 relative to the effective date of that change is among the strongest items of circumstantial evidence in Plaintiffs' case. *See* Doc. 79-1 at 6-37; Pltf. 56.1 Statement ¶ 1.37.

Defendants also try to suggest that the legislative history of RLUIPA supports their argument that Plaintiffs should be required to seek a variance before they can seek relief under RLUIPA. At pages 20 and 48 of their memorandum

they quote a statement by Senators Hatch and Sen. Kennedy that RLUIPA does not "relieve religious institutions from applying for variances, special permits or exceptions, *where available without discrimination or undue delay*." (Emphasis added.) The emphasized language rebuts any suggestion that Congress intended to permit municipalities to do what Bridgewater is trying to do here. Al Falah has never contended that RLUIPA exempts religious institutions from filing routine land-use applications required by regulations that do not violate federal law; Al Falah in fact filed such an application with the Planning Board. But Ordinance 11-03, which absent relief from this Court effectively precludes religious use of the Redwood Inn, does violate federal law. And its discriminatory effect is double-barreled: it not only precludes the Planning Board from granting the conditional use permit that it would have granted routinely under prior law, but it makes virtually impossible the grant of a variance because a variance, if sought, can be granted only after a finding of consistency with the purpose of the ordinance. *See* pp. 23-28, below. As for the "undue delay" that Congress sought to avoid, any attempt by Al Falah to seek a variance here would certainly encounter such delay. *See* p. 28, below.

Defendants' arguments about how Ordinance 11-03 complies with the MLUL are equally unavailing when applied to Plaintiffs' claims under the federal constitution (which, like RLUIPA, prevails over contrary state law under the

Supremacy Clause) and the New Jersey Constitution (to which the MLUL is subordinate).[8]

IV. THE RECORD IS REPLETE WITH EVIDENCE OF DEFENDANTS' DISCRIMINATORY INTENT IN ENACTING ORDINANCE 11-03 (RESPONDING TO POINT VI)

A fundamental issue in this case, cutting across all of Plaintiffs' claims, is whether Defendants enacted Ordinance 11-03 with discriminatory intent. In theory a defendant in such a case might seek summary judgment by arguing, "Under the law, discriminatory intent is not material; even if it is assumed for purposes of analysis that discriminatory intent might be proved, I still win." But Defendants do not so argue, and the law would not support them if they did. Discriminatory intent therefore is material, and the Court could grant summary judgment only if it found that there is no genuine issue as to whether Defendants enacted Ordinance 11-03 with discriminatory intent.

The evidentiary record on discriminatory intent is set forth in detail in Plaintiffs' Renewed Motion For A Preliminary Injunction (Doc. 79-1 at 4-38) and Plaintiffs' Supplemental Statement of Material Facts In Dispute filed herewith (Pltf. 56.1 Statement ¶¶ 1.1-1.113), and is summarized in Plaintiffs' Memorandum in Support of Plaintiffs' Motion for A Preliminary Injunction (Doc. 13 at 3-13).

[8] *See New Jersey Freedom Org. v. City of New Brunswick*, 7 F. Supp. 2d 499 (D.N.J. 1997) (Lechner, J.) (finding that ordinance requiring assembly permits, though validly enacted, was nevertheless unconstitutional); *Dowling v. Twp. of Woodbridge*, 2005 WL 419734 (D.N.J. Mar. 2, 2005) (Bassler, J.) (same regarding ordinance requiring pre-registration of certain public demonstrations).

The law permits discriminatory intent to be inferred from circumstantial evidence, as Plaintiffs demonstrated at pages 40-45 of their preliminary injunction memorandum and as the Defendants expressly conceded under questioning from Judge Pisano at the hearing on Defendants' motion to dismiss:

> THE COURT: First of all, the argument the plaintiffs make is that while there may not be direct evidence of discrimination by members of the Planning Board or the Town Council or the Mayor or any Township agents, that it is permissible to take into the mix the circumstances under which the ordinance was enacted. I don't think you'll disagree with that as a general statement?
>
> MR. COHEN: No, I don't.

Chow Supp. Dec. Ex. M at 28:6-13. Defendants' present motion argues that Plaintiffs cannot prevail on their discrimination claims because they "have produced no testimony that anti-Muslim or discriminatory statements reflecting religious animus were made by Defendants or other representatives of the Township." Def. Mem. 4, 37. But this sort of evidence is not necessary. *See, e.g.*, Doc. 79-1 at 41-43, discussing *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977).

Plaintiffs' motion for a preliminary injunction demonstrates that the circumstantial evidence of discriminatory intent is strong enough to establish a likelihood of success on the merits. That evidence certainly is strong enough to

preclude summary judgment in favor of Defendants. As Defendants concede, in determining whether a genuine issue of material fact requires denial of a summary judgment motion, the Court is required to assume the credibility of the evidence presented by the non-moving party and to draw all reasonable inferences in favor of that party. Applying that standard to the present record, Defendants' motion should be denied.

V. ORDINANCE 11-03 SUBSTANTIALLY BURDENS PLAINTIFFS' RELIGIOUS EXERCISE (RESPONDING TO POINT IV)

A. Plaintiffs' Religious Exercise Has Been Substantially Burdened

The Township says, "There is no evidence that the Township inhibited in any way Plaintiffs' religious exercise." Def. Mem. 26 (emphasis in original). This statement is without merit in light of (1) RLUIPA's statement that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose," 42 U.S.C. § 2000cc-5.(7)(B), and (2) the evidence showing Ordinance 11-03 has paralyzed, rather than merely "inhibited," Al Falah's effort to establish a religious home on its property. This evidence is summarized in Plaintiffs' Rule 56.1 Statement at ¶¶ 2.1-2.25 and below.

1. Plaintiffs Are Religiously Homeless

Plaintiffs are members of the Bridgewater area community who have joined together in prayer at inadequate rental facilities for many years. They are

"religiously homeless"—a Muslim community without a mosque. For over a decade they searched for a suitable site for a mosque in the Bridgewater area. *See* T. Abdelkader Dec. ¶ 6; Chughtai Dec. ¶¶ 5-6; Wallis Supp. Dec. ¶¶ 8, 10.

The Purchase of the Redwood Inn—In 2010, Plaintiffs found the Redwood Inn. The building is well-suited for conversion to a mosque; what would become the main prayer hall faces Mecca, the direction of prayer in Islam. The property was familiar to Plaintiffs because the local Muslim community had for many years rented the Redwood Inn to host their semi- annual Eid holiday services. *See* T. Abdelkader Dec. ¶ 7; Chughtai Dec. ¶ 8; Wallis Supp. Dec. ¶ 28.

The Redwood Inn offered a unique combination of attributes—a reasonable price, the ability to convert the property into a mosque without the need for a variance, and the ability to renovate the existing building in phases, with a prayer space up and running relatively quickly. Not wanting to miss this opportunity, in October 2010 the Chughtai Foundation, established by Plaintiff Zahid Chughtai, signed a contract to purchase the Redwood Inn. The Foundation assigned its rights under the contract to Al Falah, which closed the transaction and acquired full title to the property in April 2012. *See* T. Abdelkader Dec. ¶¶ 7-9; Chughtai Dec. ¶ 8; Wallis Supp. Dec. ¶ 28; Chughtai Tr. 87:16-25; Mohammedi Tr. 18:2-7.

The Mosque Is a Spiritual Home—A mosque is the spiritual home for Muslims and serves as the cornerstone of the Muslim faith and community. It is

where Muslims gather in communal prayer as the Qur'an enjoins. It is where Muslims educate themselves and their children in the tenets and practice of Islam, and serves as the center of charitable and social activities and the venue for religious celebrations and funeral services. Establishing a mosque is therefore the most important activity for any community in Islam. It is said that when the Prophet Muhammad and his followers were chased out of Mecca and arrived in Medina, the first thing they did, even before looking for a place to sleep, was to find a site for their mosque. *See* T. Abdelkader Dec. ¶¶ 5, 16-18; Chughtai Dec. ¶¶ 4-5; Wallis Supp. Dec. ¶¶ 8, 11.

Without a mosque it is difficult, if not impossible, for Plaintiffs to live an Islamic life. For instance, the Qu'ran enjoins Muslims to come together in communal prayer five times daily—before sunrise (Fajr), just after midday (Dhuhr), late afternoon (Asr), just after sunset (Maghrib), and late evening (Isha). Without a mosque at the Redwood Inn property, it is next to impossible for Plaintiffs to follow these fundamental tenets of Islam, as travel to and from the nearest established mosque is simply too burdensome. *See* Chughtai Dec. ¶¶ 4, 6; Wallis Supp. Dec. ¶ 11; Chughtai Tr. 20:5-21:6; Wallis Tr. 28:7-19.

The most important of these communal prayers is the mid-day prayer on Fridays, the Muslim holy day. This special prayer is called Jummah. Because Al Falah does not have a mosque in which to conduct Jummah prayers, it has rented a

hall from the Green Knoll Fire Company, which is located on Foothill Road in Bridgewater, since February 2011. The monthly rent for the hall was initially $320, but more than doubled to $715 in October 2011. Lacking feasible alternatives, Al Falah renewed its rental agreement at this increased rate. The Fire Company has declined Al Falah's requests for a longer-term lease, so Plaintiffs face the uncertainty of renegotiating the agreement every six months. The Fire Company told Al Falah not to identify the fire house as the location of Al Falah's Jummah prayers. This has caused ongoing confusion among congregants and potential visitors to Al Falah's Jummah prayer services. Al Falah's arrangement with the Fire Company accommodates only Jummah prayers, leaving the Al Falah community with no mosque for the other communal prayers prescribed by the Qu'ran. *See* Chughtai Dec. ¶¶ 4, 6, 10; Wallis Supp. Dec. ¶¶ 11-12, 14-15.

Special communal prayers also take place in the evenings during Ramadan, the ninth month of the Islamic calendar, during which Muslims fast from dawn until sunset each day. For the last two years, Al Falah has been able to rent facilities from the Christ Presbyterian Church, but this is not a substitute for a year-round mosque. *See* Chughtai Dec. ¶ 5; Wallis Supp. Dec. ¶ 16.

Communal prayer is also a central component of Islam's two most important holiday celebrations—Eid ul-Fitr and Eid ul-Adha. Al Falah has been required to rent facilities for these important holiday celebrations. In 2011, two local hotels

where Al Falah had rented space in the past became unavailable at the last minute; Al Falah was forced to rent facilities from a middle school in Basking Ridge for its Eid celebrations. Al Falah rented a high school gymnasium in Bernards Township for its 2012 Eid celebrations. A high school gymnasium is not the kind of clean, spiritual and peaceful space that is conducive to prayer, but many otherwise appropriate rental locations in the Bridgewater area are prohibitively expensive. Others are unavailable to Al Falah because renters are required to use the venue's in-house or preferred catering services, which often either do not offer religiously appropriate Halal food or are too expensive. Expense aside, the size and layout of several of the local facilities that Al Falah has been forced to rent in the past for holiday prayers were unsuitable. For instance, a hall Al Falah once rented in a neighboring town made it necessary for women to pray in closets or near bathrooms, which is degrading and unacceptable for Islamic religious practices. *See* Chughtai Dec. ¶ 5; Wallis Supp. Dec. ¶¶ 17, 19.

Because Al Falah must rely on rental facilities to hold Ramadan and Eid services, it has no guarantee that it will be able to find suitable locations for future prayer services or religious festivals. The ever-changing location of Al Falah events causes a great deal of stress for Al Falah and its community, which has come to rely on Al Falah to provide them a place to pray for holiday services and religious festivals. *See* Wallis Supp. Dec. ¶¶ 18, 20.

It is also extremely time consuming for Al Falah's congregation to worship at rented facilities instead of a mosque and Islamic Center of their own. Worshippers are often required to arrive at least an hour early to set up the rental facility appropriately, and stay an hour late to clean and restore the facility to its original condition. Compounding this burden, some of the rental facilities that Al Falah relies on require worshippers to travel longer distances than would be required if Al Falah were permitted to worship at its property, the Redwood Inn. *See* Wallis Supp. Dec. ¶ 26.

Religious Education For the Youth—Al Falah's ability to provide religious education to the youth of its community has also been burdened by its lack of a permanent religious home. Al Falah provides Sunday Islamic school to children between the ages of 5 and 18. The curriculum includes Qur'anic and Islamic Studies, and Arabic language instruction. Because Al Falah does not have a mosque, it is required to rent classroom facilities to accommodate its Weekend Islamic School. For the last two years, Al Falah has rented classroom facilities from a middle school in neighboring Basking Ridge. The rent for these classroom facilities—approximately $15,000 a school year—imposes a serious burden on Al Falah's finances. Al Falah would not incur this expense if it had a mosque. *See* Wallis Supp. Dec. ¶¶ 24-25.

Lack of a Spiritual Leader (Imam)—The lack of a permanent religious home has prevented Al Falah from finding a dedicated Imam, or spiritual leader, for its community. An Imam not only leads the prayers and gives sermons, but also serves as a mentor and role model for the community. An Imam is available to clarify issues of religious doctrine and to offer guidance to those in spiritual crisis or confusion, as well as provide pastoral counseling to individuals, couples, and the bereaved. An Imam would also take a leadership role in fundraising activities to sustain the mosque itself, and serve as the community's ambassador to other faith communities. Without an Imam, Al Falah lacks the stability of a religious leader and community advisor and the sound religious guidance of a trained professional. *See* Wallis Supp. Dec. ¶¶ 21-23.

Because Al Falah does not have an Imam, it has been forced to rely on its congregants and guest speakers to give sermons at Jummah prayers and holiday celebrations. The burden placed on these untrained volunteers is heavy, as they are charged with preparing a sermon and responsible for ensuring that the religious guidance they offer is correct and sound. Arranging for a different stand-in Imam each week imposes a significant burden on Al Falah. *See* Wallis Supp. Dec. ¶ 22.

Burial of the Dead—The recent sudden passing of the father of two named Plaintiffs—Yasser and Tarek Abdelkader—provides a poignant example of the burdens imposed on Plaintiffs as a result of their inability to proceed with the

conversion of the Redwood Inn to a mosque. In Islam, the deceased are to be buried as quickly as possible, and every effort is made to complete necessary rituals and burial on the day of passing. Immediately prior to burial, Muslims participate in a communal, ritual prayer—Janazah—within a mosque. Because Al Falah has no mosque to call home, what should have been a time of prayer and reflection for the Abdelkaders within the comfort of their own religious sanctuary was instead spent scrambling to make accommodations for funeral services for their father at a distant and unfamiliar mosque. T. Abdelkader Dec. ¶¶ 12-21; Wallis Supp. Dec. ¶ 29.

2. Requiring Al Falah To Seek a Variance Would Compound The Burden on Plaintiffs and Would Put Al Falah At a Serious Disadvantage (Responding to Point IV.B)

Defendants assert that Plaintiffs are not substantially burdened in their exercise of religion because they could seek a variance from the ZBA to build a mosque at the Redwood Inn property notwithstanding Ordinance 11-03. Def. Mem. 26, 28-30. A variance proceeding would be subject to rules wholly different from those that apply before the Planning Board. Al Falah would be required to ask the ZBA for permission to depart from the requirements of a recently enacted ordinance that was designed to prevent the very use for which Al Falah would be seeking permission. As explained below, New Jersey law imposes significant, perhaps insurmountable, burdens in a situation like this.

Al Falah's position was very different when it was seeking site plan approval from the Planning Board before Ordinance 11-03 was enacted. Where a use is conditionally permitted, as was Al Falah's planned use of the Redwood Inn property as a house of worship, the Planning Board's job is to determine whether the conditions for the use are met. If they are, the Planning Board must grant the applicant permission to proceed with the proposed project. As stated in a leading treatise on New Jersey land use regulation,

> [I]f the planning board finds compliance with the specified standards of the ordinance for the specific proposed conditional use, it will be required to approve the application. This must be done within 95 days from the date of certification of a complete application. Failure to act within the statutory period constitutes a statutory approval of the application.

William M. Cox & Stuart R. Koenig, *New Jersey Land Use, Zoning & Administration*, 468-69 (citing N.J. STAT. ANN. § 40:55D-67); *see Exxon Co., U.S.A. v. Livingston Twp.*, 199 N.J. Super. 470, 477, 489 A.2d 1218, 1222 (App. Div. 1985).

In a proceeding before the ZBA, the burden is on the applicant to demonstrate why a variance is appropriate. *Medici v. BPR Co.*, 107 N.J. 1, 25, 526 A.2d 109, 121 (1987). The law limits the ZBA's power to grant conditional use variances under N.J. STAT. ANN. § 40:55D-70(d)(3), which is the type of variance that Defendants argue Al Falah should be required to seek. "Because there is a

strong legislative policy favoring land use planning by ordinance rather than by variance, the grant of a 'd' variance will always be the exception rather than the rule." Cox & Koenig, *supra*, at 182.

The New Jersey statute governing the grant of variances provides that the applicant must show both the "positive criteria" (that there are "'special reasons' for the grant of the variance") and the "negative criteria" (that the variance "can be granted without substantial detriment to the public good" and that the proposed use "will not substantially impair the intent and the purpose of the zone plan and zoning ordinance"). N.J. STAT. ANN. § 40:55D-70(d); *Sica v. Bd. of Adjustment of Twp. of Wall*, 127 N.J. 152, 156, 603 A.2d 30, 32 (1992).[9] Defendants make much of Plaintiffs' alleged ease in meeting the "positive criteria" because it is an "inherently beneficial use" and therefore, "it presumptively satisfies the positive criteria for grant of a use variance in an application to the Zoning Board." Therefore, "[p]laintiffs have no legitimate basis upon which to assert that adoption of 11-03 rises to the level of a substantial burden." Def. Mem. 28, 30.

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[9] N.J. Stat. Ann. § 40:55D-70(d) reads in part:

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

However, Defendants ignore that N.J. STAT. ANN. § 40:55D-70(d) was amended in 1997 to make explicit that no variance can be granted unless the negative criteria are overcome, "including a variance…involving an inherently beneficial use." 1997 N.J. Sess. Law Serv. ch. 145 (West); Cox & Koenig, *supra* at 191. Thus, in any application for a variance before the ZBA, Al Falah would have to show that a mosque on the site of the Redwood Inn "*will not substantially impair the intent and purpose of the zone plan and zoning ordinances*." N.J. STAT. ANN. § 40:55D-70(d) (emphasis added).[10] Al Falah would have to establish that "the specific project at the designated site is reconcilable with the municipality's legislative determination that the condition should be imposed on all conditional uses in that zoning district." *Coventry Square v. Westwood Zoning Bd. of Adjustment*, 138 N.J. 285, 299, 650 A.2d 340 (1994). The very point of Ordinance 11-03 was to deal with the proposed mosque on the Redwood Inn site. How, then, is Al Falah supposed to prove that having a mosque on that site would not impair the purpose of the Ordinance? The Defendants do not suggest a way and simply ignore the requirement to meet this burden.

[10] "In other words, the applicant must prove that 'the grant of the variance can be reconciled with the zoning restriction from which the applicant intends to deviate.'" *Riddhi Siddhi Assocs. LLC v. Voorhees Twp. Zoning Bd. of Adjustment*, 2010 WL 2794070 at *6 (N.J. Super. Ct. App. Div. July 2, 2010) (unpublished) (citations omitted).

Defendants also ignore that their own conduct in this litigation has supplied ammunition to objectors (and there would be many) to any variance application filed by Al Falah. The Township has paid for and sponsored expert reports arguing that a mosque on the site of the Redwood Inn will compromise neighborhood "character" or integrity. *See, e.g.,* PX102 at 61-62, PX103, PX149. Objectors surely would use these reports, flawed though they are, as evidence that a variance permitting a mosque on that site should be denied. Banisch 7/18/12 Tr. 49:7-50:3.

Defendants also ignore that the ZBA does not have the last word in the Township's variance process. Under Bridgewater's laws, "[a]ny interested party" may appeal to the Township Council from a ZBA decision approving a use variance. Bridgewater Municipal Code § 126-75; *see Comm. for a Rickel Alternative v. City of Linden*, 111 N.J. 192, 199-203, 543 A.2d 943, 947-49 (1988). Bridgewater's Township Council enacted Ordinance 11-03 with Al Falah's proposed conversion of the Redwood Inn directly in its sights. It also has sponsored a litigation expert's report in this action asserting that Al Falah's proposed mosque at the Redwood Inn would compromise the "character" of the neighborhood. PX103 at 17. And, although the Township Council would have to make its decision based on the record before the ZBA, the Council need not defer to a decision by the ZBA to grant a variance. The Council's review is *de novo*. *See* N.J. STAT. ANN. 40:55D-17; *Evesham Twp. Zoning Bd. of Adjustment v.*

Evesham Twp. Council, 86 N.J. 295, 300, 430 A.2d 922 (1981). This is because the "governing body is perhaps uniquely qualified to determine whether granting the requested variance would substantially impair the ordinance or the master plan." *Rickel Alternative*, 111 N.J. at 203, 543 A.2d at 949. Here, all five members of the Township Council voted in favor of Ordinance 11-03. PX48. Four of those members still sit on the Township Council, and the fifth member who voted in favor of Ordinance 11-03 is now the mayor of Bridgewater. Chow Supp. Dec. Ex. N.

Finally, Defendants ignore that requiring Al Falah to participate in the ZBA process would compound the injuries the Township already has inflicted. Al Falah expended considerable money and resources putting together a fully conforming site plan application. A new proceeding before the ZBA would require expenditures, and it would undoubtedly subject Al Falah and its proponents to a repeat of the same public demonstration and personal insult, humiliation, and intimidation that has already occurred. T. Abdelkader Tr. 97:2-12; Wallis Tr. 9:6-13; Wallis (5/18/11) Dec. ¶¶ 6-26; Y. Abdelkader Dec. ¶ 7, 10-15. It would be a long, tortuous process. In 2004, the Hindu Temple applied for a variance. It took the Temple five years to obtain one—and that was only after years of contentious hearings before the ZBA, suits in both state and federal court, and an investigation by the Department of Justice. Chow Dec. Ex. L; Savo Tr. 41:22-44:12.

3. There Are No Alternative Properties Available to Al Falah

Defendants also argue, incorrectly, that the Ordinance imposes no substantial burden on Al Falah because it could sell the Redwood Inn property and find an alternative site in Bridgewater for a mosque. Def. Mem. 9.

In their defense of this case Defendants have every interest in showing, if they can, that Ordinance 11-03 leaves Al Falah with feasible alternative sites for a mosque. They have had more than a year to scour all 32 square miles of their town to find such an alternative. Defendants have identified only three sites that they contend would be permitted locations for a mosque under Ordinance 11-03. Def. Mem. 22. As Plaintiffs have pointed out in their Renewed Motion For A Preliminary Injunction (Doc. 79-1 at 48), only two of these sites are on the market. Steeves Dec. ¶¶ 4-5. The land acquisition costs alone for these sites—$2,850,000 and $21,000,000, respectively (*Id.* at A-B)—make them economically infeasible, even accepting the speculative assumption that Al Falah could sell the Redwood Inn and recoup its purchase price. The absence of "economically feasible alternatives" demonstrates substantial burden. *See Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 352-53 (2d Cir. 2007).[11] Moreover, even if one of

[11] *See also Islamic Ctr. of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 299 (5th Cir. 1988) ("By making a mosque relatively inaccessible within the city limits… the City burdens their exercise of their religion."); *Barr v. City of Sinton*, 295 S.W.3d 287, 301, 305 (Tex. 2009) (rejecting city's argument that a religious halfway house suffered no substantial burden because it could move elsewhere); *Church of the Hills v. Twp. of Bedminster*, 2006 WL 462674, at *6 (D.N.J. Feb. 24, 2006) (Chesler, J.) ("[T]he Court cannot agree with the Defendants[']] assertion that

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these two sites was economically feasible, "RLUIPA does not contemplate that local governments can use broad and discretionary land use rationales as leverage to select the precise parcel of land where a religious group can worship." *Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 992 n.20 (9th Cir. 2006) (citation omitted).

We explained above (*see* pp. 23-28) and will not repeat here how the ZBA process and the law under which it operates would impose its own substantial burdens on Al Falah. Courts apply common sense meaning to substantial burdens and "a burden need not be found insuperable to be held substantial." *Westchester Day Sch.*, 504 F.3d at 349 (citation omitted).

B. The Township's Inconsistent Justifications For Ordinance 11-03 Do Not Establish a Compelling Governmental Interest (Responding to Points II, III, IV.A, XI.B)

"One way to evaluate a claim of compelling interest is to consider whether in the past the governmental actor has consistently and vigorously protected that interest." *Grace Church of North Cnty. v. City of San Diego*, 555 F. Supp. 2d 1126, 1140-41 (S.D. Cal. 2008) (citation omitted). Defendants continually assert that Ordinance 11-03 is "grounded in the master planning history of the Township whose common thread since 1976 has been and continues to be protection and

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'[t]he fact that the Plaintiffs cannot engage in worship with their entire congregation at the same time and place does not and cannot establish a substantial burden.'") (citations omitted).

preservation of residential character and neighborhoods." Def. Mem. 6, 7, 9-10, 13, 14, 16-17, 19, 20, 27-28, 33, 39-40, 45. The evidence, however, demonstrates that the concerns about traffic and neighborhood "character" proffered by the Township were discovered only after Township officials decided behind closed doors that the Planning Board should not approve a mosque at the Redwood Inn.

Ordinance 11-03 was an abrupt break from past practices. For as long as Bridgewater has had a zoning ordinance, the Township has professed as one of its goals (through its Master Plans, Master Plan Reexamination Reports, and other planning documents) the preservation of neighborhood "character." At the same time, Bridgewater has had a zoning regime that has permitted houses of worship on all roads in residential zones. DX83; PX111. None of the Township's planning documents state or suggest that maintaining this regime would in any way compromise the integrity or character of residential neighborhoods.

The Township Council itself recognized that the passage of Ordinance 11-03 was inconsistent with the Township's prior practices. That is why it passed a "reasons resolution," which New Jersey law mandates whenever the governing body enacts a zoning ordinance inconsistent with its master plan land use element. N.J. STAT. ANN. § 40:55D-62; Banisch 7/18/12 Tr. 65:11-67:6.

In addition to the abrupt about-face concerning the locations of houses of worship based on roadway access, there are other, more specific inconsistencies

between Ordinance 11-03 and what appears in the Township's historical planning documents and past practices. Here are some examples:

1. The 1990 Master Plan Reexamination Report, the only planning document that specifically mentions the Redwood Inn, does not suggest that this non-conforming commercial use compromised the character of the surrounding neighborhood. PX56A at AFC-BWT 20, 27. In fact, it recognized the possibility of modest expansions of the Redwood Inn. *Id.*

2. One of the supposed justifications for Ordinance 11-03, discovered by the Township at the very end of the process of passing it, relates to traffic safety. This professed concern directly contradicts the 2010 Master Plan Amendment to the Circulation Element completed just six months earlier concluding that whatever traffic safety concerns Bridgewater face, they were on roads nowhere near the Redwood Inn. PX58 at 14-16; Banisch 7/26/12 Tr. 379:8-382:21. Indeed, the traffic safety problems identified were on or near some of the roadways that Ordinance 11-03 deems permitted ("Permitted Roads"). There were eight fatal crashes on county and state roads (all of which are Permitted) and on the Permitted section of Milltown Road; 18 pedestrian/cycle crashes on state and county roads; and 2,009 crashes (nearly 26% of all crashes in Bridgewater) on state roads. PX58 at 14-16. In addition, one of the Permitted local roads narrows to one lane under a low railroad overpass that restricts the ability of emergency vehicles to drive

through it. Chow Dec. Ex. I; Doyle Tr. 187:22-190:5. Finally, many of the Permitted Roads also exhibit the same characteristics of winding, steep slopes and limited visibility which the Township's litigation expert believed were true of the local roads excluded from Ordinance 11-03. Banisch 7/26/12 Tr. 362:11-378:5; PX126; Wallis Second Supp. Dec. ¶¶ 3-4; Y. Abdelkader Second Supp. Dec. ¶¶ 3-4.

3. The Township's planning documents profess concern about environmental matters (Def. Mem. 7, 16), which Defendants' litigation expert states is a justification for Ordinance 11-03 (despite no mention of this in the 2011 Reexamination Report or other reports or resolutions attendant to the passage of Ordinance 11-03). PX102 at 2, 4, 15, 16, 18, 23, 28, 41, 47, 50, 55, 56, 61-62. In spite of this professed concern, many of the Permitted Roads run near or through critical habitats, 100-year floodplains, areas with steep slopes, wetlands, and highly erodible lands. Banisch 7/18/12 Tr. 120:8-134:25.

4. According to Defendants' litigation expert, Bridgewater's planning documents demonstrate a desire to direct development to the Regional Center. Yet of the 19 Permitted Roads under Ordinance 11-03 identified in the maps submitted by the Defendants' litigation expert, he concedes that 12 of them are either entirely or partially outside the Regional Center. *Id.* at 431:12-436:22.

5. Ordinance 11-03 purportedly distinguished between Permitted Roads that could accommodate the noise and traffic associated with certain assembly uses and roads that could not. Yet only months earlier, the Township classified certain Permitted Roads as having the same function as certain Non-Permitted Roads. PX58 at 5; Banisch 7/18/12 Tr. 236:1-246:4. For example, the Township's 2010 Master Plan Amendment to the Circulation Element lists three Permitted Roads and twelve Non-Permitted Roads (including Mountain Top Road) together in the same category as "Residential Collector Roads." *Id.*

6. Defendants argue that Ordinance 11-03 directs traffic and noise away from residential neighborhoods by allowing only certain assembly uses to be located on certain roads. Def. Mem. 8, 9-10, 16-17, 20, 27-28. Yet since the enactment of Ordinance 11-03, the Township has completed the expansion of Crim Fields—a municipal athletic complex located in the R-50 zone a little over a mile from the Redwood Inn on a road where a house of worship is not conditionally permitted under Ordinance 11-03. In 2011, the Township added a fifth soccer field to the complex and expanded the parking lot. Y. Abdelkader Supp. Dec. ¶¶ 3-8. The Bridgewater Soccer Association refers to this facility on its website as the "Crim Soccer Park." *Id.* at ¶ 9, Ex. D. The same website provides driving directions that invite players, parents and spectators—no doubt including those from other municipalities—to drive through the same streets that Ordinance 11-03

decrees must remain unsullied by houses of worship and the traffic they generate.

7. The Township's Amendment to Open Space and Recreation Plan Element, drafted only a year before the enactment of Ordinance 11-03, does not express the same concern for protecting residential neighborhoods from noise and traffic associated with assembly uses. In this planning document, the Planning Board proposes a number of Concept Plans "for a review of the development constraints and opportunities for active recreation use." PX97 at 40. Two of these Concept Plans are for new recreational parks to be located in the same neighborhood as the Redwood Inn. *Id.* at 72-74, 87-89. One Concept Plan proposes to build multipurpose fields for soccer, lacrosse, field hockey, and general practices and games, and a baseball/softball field. *Id.* at 89. The other Concept Plan proposes to build a sledding hill and ice skating pond, with a pedestrian link to Crim Fields and the parking there. *Id.* at 74. Parking with access to this facility would be on Mountain Top Road, where the Redwood Inn is located. *Id.* In neither concept plan does the Planning Board suggest that the added traffic from additional parking is even an issue for discussion.

8. The focus of Ordinance 11-03 was on houses of worship (and Al Falah's proposed mosque in particular). When the Reexamination Report was authorized by the Planning Board, only houses of worship were mentioned. Later, in an attempt to hide this focus, the Township included other uses in the Report

and in the Ordinance. Not surprisingly, because there was no serious study or deliberation, even with respect to these other uses, there are inconsistencies between the Ordinance and the prior planning documents. For example, the Township included open air clubs in Ordinance 11-03, presumably because open air clubs draw people from outside of the neighborhood, generate noise, are open throughout the week, and thus endanger neighborhood "character." Banisch 7/18/12 Tr. 71:3-72:14. The Township's 2005 Master Plan Amendment and Reexamination Report expressed a contrary view—that these same open air clubs "contribute to the overall quality of life" and that they "help relieve pressure on the existing Bridgewater Township parks and recreation facilities." PX47 at 145. They are so beneficial that "[t]heir status should be encouraged and stabilized by ordinance, where appropriate .... The intent is to vest the existing uses as permitted principal and accessory uses." *Id.*; Banisch 7/26/12 Tr. 292:4-295:13.

These and other inconsistencies came about because the Township was interested only in acting quickly so that the Planning Board would not have to approve the mosque. The Township had neither the time nor the desire to do a serious study of whether there were problems with houses of worship in Bridgewater, what they might be, or what measures might solve them. The primary support for Ordinance 11-03 was the 2011 Reexamination Report. That Report was, in the words of its author, a "quickie". Doyle Tr. 59:16, 90:14-17.

She did virtually nothing to support its conclusions about supposed problems. *Id.* at 67:12-68:22. Defendants' litigation expert acknowledged that if he had been asked to draft the Reexamination Report he would have wanted to know the location of the existing assembly uses, the capacity of the existing houses of worship to accommodate worshippers, the services offered by the houses of worship, and where the congregants were coming from. Banisch 7/18/12 Tr. 167:4-176:22. None of this was studied in preparing the 2011 Reexamination Report. Doyle Tr. 67:12-68:22. The Township Planner, the author of the Reexamination Report, admitted that the primary justification for the recommendation—the supposed change in the size and function of houses of worship—was not really new. These "changes" had been in existence for at least "decades." *Id.* at 75:9-84:11. The treatise cited by both the Township Planner and Defendants' litigation expert had been describing the increased size and use of houses of worship as early as 1981. PX30; Banisch 7/18/12 Tr. 210:23-215:6; PX114.

C. Ordinance 11-03 Is Not The Least Restrictive Means of Furthering The Township's Purported Interest In "Preserving and Protecting" Residential Neighborhoods (Responding to Points IV.A, VII)

When they decided that the proposed ordinance was "necessary," neither the Planning Board nor the Council considered less drastic alternatives to ameliorate the supposed traffic problems and other effects of houses of worship on

surrounding neighborhoods. Bogart Tr. 128:7-132:20. The Reexamination Report itself lists some, though by no means all, such measures: buffer screening requirements, maximum percent of improved lot coverage, parking in front yard areas, signage, and minimum lot areas for residences supporting houses of worship. PX45 at 13; Doyle Tr. 88:19-90:20; Banisch 7/18/12 Tr. 159:7-165:10. Although the Reexamination Report recommended a study of these alternatives, the Township ignored that recommendation. The Report did not consider calibrating the size of houses of worship with particular roads as a few New Jersey townships (including neighboring Bedminster) had done. Chow Dec. Ex. G. Instead the Planning Board recommended (and the Council adopted) a predetermined radical "solution" that guaranteed Al Falah's application could not be approved by the Planning Board regardless of building size, the number of worshippers, the number of cars going to and from the facility, or any other parameter.

VI. ORDINANCE 11-03 VIOLATES RLUIPA'S EQUAL TERMS PROVISION (RESPONDING TO POINT VIII)

Defendants agree that the central issue in an equal terms case is: to what secular uses a religious use should be compared in determining whether the religious use is treated on less than equal terms. They also agree that, under *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253 (3d Cir. 2007), *cert. denied*, 553 U.S. 1065 (2008)) the required comparison is "to a

secular comparator…that is similarly situated as to the regulatory purposes of the regulation in question…." Def. Mem. 42. *Id.* (quoting *Lighthouse*). According to what the Township said the time of passage, the regulatory purpose of Ordinance 11-03 was to protect the character of residential neighborhoods by preventing "undue intrusion from traffic, noise, light and degraded air quality." PX45 at 6.[12]

Plaintiffs believe that this stated purpose was a pretext but here assume *arguendo* that it was genuine. Municipalities do not build houses of worship. But they do build or operate, among other facilities, public libraries, town meeting halls, municipal swimming pools, and other sports facilities. With respect to the asserted regulatory purpose of Ordinance 11-03, the Township does not contend, nor could it, that that these municipal facilities differ from houses of worship.

If the Township were really interested in studying, for example, the level of traffic generated by municipal facilities (or houses of worship), it could have started by looking at readily available data published by the Institute of Transportation Engineers (the "ITE"). These data come from empirical surveys of traffic generation at different categories of land use throughout the United States;

[12] The 2011 Reexamination Report identified the objective of what became Ordinance 11-03 as follows:

> OBJECTIVE: TO PRESERVE THE DEVELOPMENT CHARACTER AND QUALITY OF BRIDGEWATER TOWNSHIP. Maintaining the unique image and preserving the character of individual neighborhoods are primary objectives. Bridgewater Township needs to maintain and improve residential neighborhoods without undue intrusion from traffic, noise, light and degraded air quality.

PX45.

and for some land uses the data is more robust than for others. Chow Supp. Dec. Ex. T at ix. These data are the well-recognized starting point for traffic engineers studying traffic generation. Banisch 9/19/12 Tr. 59:4-8. The ITE reports on data for houses of worship as well as for municipal facilities such as libraries, city parks, soccer complexes, county parks, government office complexes, government office buildings, and recreational community centers. PX156; PX157; PX158; PX159; PX160; PX161; PX162; PX163; PX164; DX102; DX103. These data demonstrate that many municipal facilities generate substantially greater traffic volume than houses of worship. Chow Supp. Dec. Ex. Q at 2 (Rodrigues Supp. Planning Report (7/27/12)); Banisch 9/19/12 Tr. 62:5-17, 68:7-70:2, 71:2-72:2, 72:6-11, 72:18-24, 73:17-74:11.

The Township's primary answer to this comparison is that municipal facilities are different because "the Township cannot regulate the location of or zoning standards for State, county or other governmental entity uses involving non religious assemblies…." Def. Mem. 45. The Court need not consider state or county facilities because municipal facilities alone are a valid comparator.[13] And,

[13] Accordingly, many of the cases that Defendants rely on are irrelevant—*Hill v. Borough of Collingswood*, 9 N.J. 369, 375-76, 88 A.2d 506, 509-10 (1952) (county park land not subject to municipal zoning); *Aviation Servs., Inc. v. Bd. of Adjustment of the Twp. of Hanover*, 20 N.J. 275, 281-83, 119 A.2d 761, 765-67 (1956) (municipality's airport located within the boundaries of a nearby township not subject to the township's zoning ordinance); *Rutgers v. Piluso*, 60 N.J. 142, 150-52, 286 A.2d 697, 701-03 (1972) (state university immune from local land use regulations); *Mayor & Council of the Town of Kearny v. Clark*, 213 N.J. Super.

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as the Defendants concede, "… 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." *Id.* at 43.

The authority to zone is granted to the governing body of a municipality by Section 62 of the MLUL. N.J. STAT. ANN. § 40:55D-62. Section 62 says that authority applies to all land within the municipality without reference to whether it is publicly or privately owned.[14] Section 31 of the MLUL, cited by the Township requires public agencies, including the Township, to submit its plans to the local planning board for non-binding review and comment. N.J. STAT. ANN. § 40:55D-31. Section 31 does not limit the Township's zoning power, which resides in the governing body (*i.e.*, the Township Council) and not the Planning Board.

Bridgewater has in fact subjected its own facilities to the zoning ordinance in Ordinance 11-03 itself.[15] For example, in the R-50 zone (where the Redwood Inn is located), municipal buildings, parks, playgrounds and other municipal

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152, 156-57, 516 A.2d 1126, 1127-28 (App. Div. 1986) (county not subject to town's zoning law). Def. Mem. at 43.

[14] "The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and buildings and structures thereon." N.J. STAT. ANN. § 40:55D-62a.

[15] In contrast, in *Hills of Troy Neighborhood Association, Inc. v. Township of Parsippany-Troy Hills*, 392 N.J. Super. 593, 921 A.2d 1169 (2005), which Defendants cite, the Township of Parsippany-Troy Hills had expressly exempted "any municipally owned, operated or controlled building, structure, facility or use, either existing or proposed" from the purview of its zoning law. Bridgewater did just the opposite here—Section 126-305 Bridgewater's zoning ordinance makes clear that "municipal buildings, parks, playgrounds or other municipal facilities" are subject to the Township's zoning.

facilities deemed necessary by the governing body are "permitted uses". In that same zone, houses of worship are not permitted uses. They are instead "conditional uses", and one condition is that they have "principal access to a public street as required by § 126-131B [which is the codification of Ordinance 11-03]."[16] This same difference in treatment is repeated for other residential zones—e.g., R-40, R-20, and R-10. Chow Supp. Dec. Ex. U.

The difference in treatment under Bridgewater's zoning law could not be more stark. Municipal facilities such as public libraries, town meeting halls, municipal swimming pools, and other sports facilities are permitted on all roads within the Township's residential zones without regard to road access. Houses of worship in those same zones must meet the condition that they have access to a Permitted Road.

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[16] **§126-305. R-50 Single-Family Residential Zone.**
In the R-50 Zone, the following uses are permitted:
A. Principal permitted uses.
(1) Single-family detached dwellings.
(2) Country clubs, outdoor recreation facilities which have principal access to a public street as required by § 126-131B.
(3) Any form of agriculture or horticulture, including the storage or sale of farm products where produced.
(4) *Such municipal buildings, parks, playgrounds or other municipal facilities as are deemed necessary and appropriate by the governing body.*
...
C. Conditional uses.
(1) Essential services.
(2) Schools which has principal access to a public street as required by §126-131B.
(3) Cluster developments.
(4) *Houses of worship which have principal access to a public street as required by §126-131B.*
Chow Supp. Dec. Ex. O (emphasis added).

The Township's answer seems to be that it will exercise self-restraint when it comes to locating these comparable municipal uses in the future. Def. Mem. 46. This is no answer at all. The point of RLUIPA is to ensure that local laws treat religious uses on equal terms with comparable secular uses. A promise of self-restraint in the future is not a defense under RLUIPA. As a result of Ordinance 11-03, there are now multiple locations throughout Bridgewater where municipal facilities are permitted without condition and houses of worship are not. That is all RLUIPA requires a plaintiff to show. It does not require a showing that the Township has already built or plans to build one of these comparators. Although in *Lighthouse* both parties disputed whether comparators had been built, the Court ignored that dispute and decided that there was a violation of RLUIPA based on what the law there permitted. *See* Doc. 79-1 at 52. And *Lighthouse* further holds that once unequal treatment is shown, a plaintiff need not show substantial burden, and the Township cannot claim that there is a compelling governmental interest. *Lighthouse Inst. for Evangelism*, 510 F.3d at 269.

VII. ORDINANCE 11-03 VIOLATES RLUIPA'S UNREASONABLE LIMITATION PROVISION (RESPONDING TO POINT VII)

RLUIPA also bars land use regulation that "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. § 2000cc(b)(3)(B). "As the legislative history evidences, '[w]hat is reasonable must be determined in light of all the facts, including the actual availability of land and

the economics of religious organizations.'" *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 990 (7th Cir. 2006), *cert. denied*, 552 U.S. 940 (2007) (quoting 146 Cong. Rec. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady)).

The Ordinance arbitrarily prohibits houses of worship from over 75% of the previously available roadway frontage in Bridgewater, including the Redwood Inn's location on Mountain Top Road. Banisch 7/26/12 Tr. 308:12-16. The unreasonableness of the Ordinance is apparent from Defendants' inability to identify an alternate site permitted under the Ordinance that is available and affordable. *See* pp. 29-30, above.

VIII. ORDINANCE 11-03 VIOLATES THE FREE EXERCISE GUARANTEES OF U.S. AND NEW JERSEY CONSTITUTIONS (RESPONDING TO POINT IV)

Plaintiffs' showing of the Township's violations of RLUIPA's discrimination, substantial burden, and equal terms provisions is sufficient to establish similar violations of Plaintiffs' right to free exercise of religion under the First Amendment (U.S. Const. amend. I) and N.J. Const. art. I, ¶ 3. The evidence demonstrates that Bridgewater enacted the Ordinance in response to anti-Muslim animus; it imposes a substantial burden on the exercise of Plaintiffs' religion; it is arbitrary and capricious; and it cannot survive strict scrutiny. *See* pp. 14-38, 46-48.

A claim under New Jersey's free exercise clause requires the court to consider whether the law has placed a "significant burden" on plaintiffs' free

exercise of religion. *Jehovah's Witnesses Assembly Hall of S. New Jersey v. Woolwich Twp.*, 223 N.J. Super. 55, 60-61, 537 A.2d 1336, 1339 (App. Div. 1988). The evidence demonstrates "substantial burden" here, as discussed at pp. 16-30 above in the context of RLUIPA.

IX. ORDINANCE 11-03 VIOLATES THE EQUAL PROTECTION GUARANTEES OF U.S. AND NEW JERSEY CONSTITUTIONS (RESPONDING TO POINT V)

As demonstrated above with respect to RLUIPA's equal terms clause, the Ordinance restricts religious uses on streets where secular uses with the same supposedly negative impacts are permitted. While RLUIPA's equal terms clause invalidates such unequal treatment without further inquiry, in this case the Ordinance also violates federal and state constitutional guarantees of equal protection. Under the Fourteenth Amendment the Ordinance is subject to review under the "rational basis" test. Given the record demonstrating that the Township had no evidence that the Ordinance would achieve any legitimate objective, it fails that test. *A fortiori*, the Ordinance also violates New Jersey's constitutional equal protection guarantee, stated in N.J. Const. art. I, ¶ 5 ("No person shall be denied the enjoyment of any civil … right, nor be discriminated against in the exercise of any civil … right … because of religious principles …."), which requires a flexible level of scrutiny based on the rights at issue and hence is less deferential than the federal "rational basis" test. *Lewis v. Harris*, 188 N.J. 415, 441-42 (2006).

X. ORDINANCE 11-03 IS ARBITRARY AND CAPRICIOUS IN VIOLATION OF THE MLUL (RESPONDING TO POINT XI.B)

Under the MLUL a zoning ordinance will be invalidated where, in whole or in application to any particular property, it is "clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the [zoning] statute." *Pheasant Bridge Corp. v. Twp. of Warren*, 169 N.J. 282, 289-90, 777 A.2d 334, 339 (2001), *cert. denied*, 535 U.S. 1077 (2002) (quoting *Bow & Arrow Manor, Inc. v. Town of W. Orange*, 63 N.J. 335, 343, 307 A.2d 563, 567 (1973)).[17]

In *Riya Finnegan LLC v. Twp. Council of S. Brunswick*, 197 N.J. 184, 962 A.2d 484 (2008), the plaintiff filed a site plan application to build a drugstore on its property. The planning board and the zoning board both determined that a drugstore was a permitted use in the "Neighborhood Commercial" zone where the property was located. *Riya Finnegan*, 197 N.J. at 188, 962 A.2d at 487. Protesting neighbors responded by asking the township council to rezone plaintiff's property, claiming that the development would result in "additional traffic, noise, odor, dust,

[17] *See also Bailes v. Twp. of E. Brunswick*, 380 N.J. Super. 336, 348, 882 A.2d 395, 402 (App. Div. 2005), *cert. denied*, 185 N.J. 596, 889 A.2d 443 (2005) (zoning power cannot be exercised arbitrarily); *Riya Finnegan LLC v. Twp. Council of S. Brunswick*, 197 N.J. 184, 191, 962 A.2d 484, 489 (2008) (same); *Home Builders League of S. Jersey, Inc. v. Twp. of Berlin*, 81 N.J. 127, 137-38, 405 A.2d 381, 387 (1979) (same); *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 251, 281 A.2d 513, 518 (1971) ("zoning regulations, like all police power legislation, must be reasonably exercised-the regulation must not be unreasonable, arbitrary or capricious, the means selected must have a real and substantial relation to the object sought to be attained, and the regulation or proscription must be reasonably calculated to meet the evil and not exceed the public need…").

and pollution." *Id.* At a subsequent public hearing where the neighbors again voiced their concerns about the development of plaintiff's property, the township council amended the zoning ordinance, blocking the development of the drug store. *Id.* The township council recognized that the rezoning ordinance "would be inconsistent with the Master Plan." *Id.* at 189, 962 A.2d at 487.

The council in *Riya Finnegan* purported to justify an ordinance that was not consistent with the township's master plan by stating in a resolution that the ordinance would "'significantly protect the health, safety and welfare of the residents and motorists in the area'" and it would "'prevent an intensification of traffic congestion at the intersection' ... [and that] 'increased traffic from the site if it is developed as a commercial facility that is permitted by the C-1 zone will significantly impact the flow of cars and trucks through the Brunswick Acres residential development and past the Brunswick Acres elementary school and park.'" *Id.*[18] The New Jersey Supreme Court found that "the failure to point to any support for the [traffic] concerns expressed by the neighboring residents" made the township's justification for the ordinance "inadequate." *Id.* at 193, 962 A.2d at

[18] The MLUL provides that "all of the provisions of [a] zoning ordinance or any amendment or revision thereto shall either be substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements..." N.J. STAT. ANN. § 40:55D-62(a). A municipal governing body may adopt a zoning ordinance or amendment that is not substantially consistent with the master plan "only by affirmative vote of a majority of the full authorized membership of the governing body, with the reasons of the governing body for so acting set forth in a resolution and recorded in its minutes..." *Id.*

490. It rejected unsubstantiated "generic" concerns about traffic as justification for such a rezoning ordinance, *id.* at 193-94, 962 A.2d at 490, and held that the rezoning ordinance was "arbitrary, capricious and unreasonable." *Id.* at 195, 962 A.2d at 491.

As in *Riya Finnegan*, Al Falah submitted a site plan application complying with then-existing zoning regulations. *Id.* at 188, 962 A.2d at 487; Tubman Dec. Ex. F at 2. As in *Riya Finnegan*, the Township bowed to public pressure and changed a zoning ordinance on the basis of generalized, unsubstantiated "concerns" such as traffic. And as in *Riya Finnegan*, the Township's stated concerns about traffic and neighborhood character were unsupported by any evidence, study or analysis. In fact those "concerns" are contradicted by 75 years of history including zoning ordinances and planning documents. *See* pp. 30-37, above. As a result the Ordinance is arbitrary and capricious under New Jersey law as well as federal law.

XI. THE INDIVIDUAL DEFENDANTS SHOULD NOT BE DISMISSED (RESPONDING TO POINT X)

Defendants argue that the claims against the individual Defendants in their official capacities should be dismissed. The cases they cite to support their argument say only that a plaintiff need not sue both a government entity and its officials individually; none requires dismissal of the individual defendants. There is a sound reason for maintaining a RLUIPA action against both individuals in

their official capacity and the government entity: public accountability. In *Chase v. City of Portsmouth*, 428 F. Supp. 2d 487 (E.D. Va. 2006), another RLUIPA case, the court rejected the same argument made by Defendants:

> Naming [officials] specifically in the case, even though damages cannot be obtained from them, does provide a certain level of public accountability. In cases such as these, where elected officials are alleged to have violated federal laws protecting a local constituency, public accountability is of utmost importance.

Id. at 489-90 (citing other RLUIPA decisions in support of allowing suits against public officials in their official capacity to proceed). The Court should decline to dismiss the individual Defendants on the same ground.

XII. THIS COURT HAS SUPPLEMENTAL JURISDICTION OVER PLAINTIFFS' CLAIM UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION (RESPONDING TO POINT XI.D)

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because Plaintiffs' claims under RLUIPA and the Constitution arise under federal law. Congress decreed, by means of 28 U.S.C. § 1367, that the Court also has supplemental jurisdiction over any state law claims that arise from the same facts and present a single cause of action. Defendants do not explain how state law can override a federal statute granting this Court jurisdiction. *Kessler Institute for Rehabilitation, Inc.*, 876 F. Supp. 641, 664-65 (D.N.J. 1995) (Bassler, J.), is incorrectly decided and should not be followed.

CONCLUSION

Defendants' motion for summary judgment should be denied in all respects.

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Respectfully submitted,

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