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Case No. 05-2309

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LIVING WATER CHURCH OF GOD, d/b/a OKEMOS CHRISTIAN CENTER, a Michigan Ecclesiastical Non-Profit Corporation,

Plaintiff-Appellee,

-vs-

MERIDIAN CHARTER TOWNSHIP, SUSAN McGILLICUDDY, MARY HELMBRECHT, BRUCE D. HUNTING, JULIE BRIXIE, STEVE STIER, ANDREW J. SUCH, ANNE W. WOIWODE, in their official Capacities as members of the Meridian Township Board,

Defendants-Appellants.

Appeal from the United States District Court
Western District of Michigan

BRIEF ON APPEAL

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Sixth Circuit Rule 34(a), defendants-appellants request this Court to docket this appeal for oral argument. The appeal involves complex issues concerning the Religious Land Use Restoration Act and constitutional law as to which the law is still developing. Oral argument will afford the Court the opportunity to pose any questions it may have concerning these critical legal issues. Defendants-appellants' counsel believes that participation in oral argument will be beneficial, and that the decisional process will be significantly aided by this Court's grant of oral argument.

Justice Brennan once said that "oral argument is the absolutely indispensable ingredient of appellate advocacy . . . . [O]ften my whole notion of what a case is about crystallizes at oral argument." Robert L. Stern, *Supreme Court Practice*, pg. 671 (2002) quoting Brennan in Harvard Law School Occasional Pamphlet No. 9, 22-23 (1967). Justice Ginsburg explained that oral argument gives counsel "notice and a last clear chance to convince the Court concerning points on which the decision may turn." *Id.* quoting Ginsburg, Address to the Dinner of American Law Institute, 58 (5/19/94). Sixth Circuit Senior Judge Gilbert S. Merritt likewise recognized that the core of the adversary process is oral argument, a tradition that

provides a "hedge against misdiagnosis and misperformance in the brief, the one last chance of locating a postern missed in the advance survey." Merritt, *Judges on Judging: The Decision-Making Process in Federal Courts of Appeal*, 51 Ohio St. L. J. 1385, 1386-1387 (1991). Oral argument will help this Court resolve the issues presented in this complex and developing area of the law.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction of this case pursuant to 28 U.S.C. § 1441 and 28 U.S.C. § 1331. Defendants timely removed the case to the United States District Court for the Western District of Michigan because Living Water Center of God d/b/a Okemos Christian Center ("Center") raised a federal question under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq*. ("RLUIPA") in the complaint. (R.1 Notice of Removal and Complaint, 1/7/04, Apx. pg. 20). The removal was filed on January 7, 2004, within thirty days of the complaint having been filed in Ingham County Circuit Court, which took place on December 11, 2003. (*Id.*) The district court entered a final judgment in favor of the Center on August 23, 2005 that disposed of all the parties' claims. (R.89 Order and Judgment, Apx. pg. 104).[1] Defendants-appellants timely filed a notice of appeal on September 20, 2005. (R.96 Notice of Appeal, Apx. pg. 105). This Court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1291 and Fed. R. App. P. 3 and 4.

[1]In advance of trial, the Center agreed to narrow the claims to its RLUIPA claim.

STATEMENT OF THE ISSUE FOR REVIEW

DID THE CENTER FAIL TO ESTABLISH A RLUIPA VIOLATION BECAUSE THE TOWNSHIP DECISION TO DENY THE PERMIT REQUIRED FOR A BUILDING WITH A COMBINED GROSS FLOOR AREA OF GREATER THAN 25,000 FEET DOES NOT SUBSTANTIALLY BURDEN THE CENTER'S RELIGIOUS EXERCISE AND, IN ANY EVENT, IS THE LEAST RESTRICTIVE MEANS TO SERVE AND COMPELLING INTEREST IN DENSITY CONTROL?

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

This land use litigation arises out of Living Water Center of God d/b/a Okemos Christian Center's claims against the Charter Township of Meridian, and Susan McGillicuddy, Mary Helmbrecht, Bruce D. Hunting, Julie Brixie, Steve Stier, Andrew J. Such, Anne W. Woiwode, in their official capacities as members of the Meridian Township Board,[2] under the Township Zoning Act, the Michigan Constitution, the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* and 42 U.S.C. § 1983 for alleged violation of the First and Fourteenth Amendments to the United States Constitution. (R.1 Complaint, Apx. pg. 23). The Center's claims all arise out of the Township's denial of a request for a special use permit to allow a proposed 34,989 square foot building addition to the 10,925 square foot sanctuary and day care center that already existed on a six acre site. This would have exceeded the 25,000 square foot limit in the zoning ordinance. The Center simultaneously sought a special use permit to modify the use on the site by adding a building for a school and for ancillary church use, which was granted. After a bench trial,

[2]The individual defendants in their official capacities and Meridian Charter Township will be collectively referred to as "Township" unless otherwise indicated.

the district court held that the denial of the application for a special use permit to construct a building in excess of 25,000 feet violated the Center's rights under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, *et seq.* (R.88 Opinion, Apx. pg. 567). The district court then enjoined the Township from preventing the Center from proceeding with the construction of a school and church building on its property in conformity with its 2003 request for a special use permit. (R.89 Order and Judgment, 8/23/05, Apx. pg. 104). The Township timely appealed to this Court.

B. COURSE OF PROCEEDINGS.

The Living Water Center of God d/b/a Okemos Christian Center filed a complaint in the Ingham County Circuit Court against Meridian Charter Township and members of its board in their official capacities. (R.1 Complaint, Apx. pg. 23). The Center sought injunctive, declaratory, and compensatory relief for claimed injuries arising out of the Township's denial of its application for a special use permit to allow the combined buildings on its property to exceed 25,000 square feet. (*Id.*) The Center claimed that this limitation (allowing an approximately 14,000 square feet expansion but not more) violated its rights under various constitutional and statutory theories. The thirteen-count complaint attempted to set forth theories for recovery

including a purported violation of RLUIPA, a purported violation of the Township Zoning Act, a purported violation of 42 U.S.C. § 1983 based on the Center's right to the free exercise of religion as guaranteed by the First and Fourteenth Amendments to the United States Constitution, and a purported violation of the Mich. Const. art. I, § 4, which also protects the free exercise of religion. (R.1 Complaint, ¶¶ 1-95, Apx. pgs. 23-43). The Center also alleged that the Township violated the Center's freedom of speech and sought to recover pursuant to 42 U.S.C. § 1983 and the First and Fourteenth Amendments (R.1 Complaint, ¶¶ 97-98, Apx. pg. 43) and pursuant to the Mich. Const. art. I, § 5 protecting freedom of speech. (R.1 Complaint, ¶¶ 99-100, Apx. pgs. 43-44). The complaint attempted to set forth a claim under both the United States and the Michigan constitutions for the purported violation of the Center's right to freedom of assembly. (R.1 Complaint, ¶¶ 101-104, Apx. pg. 44). The complaint included counts based on the claimed violation of the Center's rights to equal protection and due process under the Michigan and United States constitutions. (R.1 Complaint, ¶¶ 105-112, Apx. pgs. 44-46). Finally, the complaint included a count seeking superintending control of the municipal zoning authority pursuant to M.C.R. 3.302. (R.1 Complaint, ¶¶ 113-115, Apx. pg. 46).

The Township filed an answer to the complaint, the thrust of which was to deny liability. (R.7 Answer, Apx. pg. 106). The Township also raised numerous affirmative defenses including that the Center had failed to state a claim and that the denial of the special use permit did not substantially burden the Center. (R.8 Affirmative Defenses, Apx. pg. 147). The individual defendants were later served and then filed their answer to the complaint and affirmative defenses, also denying liability. (R.17 Answer, Apx. pg. 152; R.18 Affirmative Defenses, Apx. pg. 168).

The Township sought summary judgment. (R.32 Motion, Apx. pg. 173) which was denied. (R.59 Order, Apx. pg. 509). The parties then stipulated to a non-jury trial. (Proposed Stipulation). During the pre-trial proceedings, the parties and the district court narrowed the legal issues to those involving RLUIPA. (R.88 Opinion, pg. 1, n. 1, citing R.80 Plaintiff's Trial Brief, pg. 2, Apx, pg. 567).

The district court heard several days of testimony at trial. (R.84 TR, Apx. pg. 736; R.85 TR, Apx. pg. 952). After trial, both parties submitted annotated post-trial findings of fact and conclusions of law. (R.86 Post-Trial Annotated Proposed Findings of Fact, Apx. pg. 515; R.87 Plaintiffs Post-Trial Findings, Apx. pg. 521). The trial court entered an opinion ruling in favor of the Center on the RLUIPA claim

only. (R.88 Opinion, Apx. pg. 567). This opinion was embodied in a judgment. (R.89 Order and Judgment, Apx. pg. 104).

C. District Court's Opinion.

The district court held that the Center's operation of a school constituted the exercise of religion, which is protected under RLUIPA. (R.88 Opinion, pg. 10, Apx. pg. 576). The district court deemed the denial of a special use permit based on the size of the proposed building to represent an individualized assessment and thus subject to RLUIPA. (*Id.*, pg. 11, Apx. pg. 577). According to the district court, the denial imposed a substantial burden on the Center's religious exercise even though the Center was entitled to add approximately 14, 000 square feet to the existing church. (*Id.*, pg. 15, Apx. pg. 581). The district court based its conclusion on the Center's contention that the "facilities are too small for the needs of the congregation and staff." (*Id.*, pg. 18, Apx. pg. 584). The district court acknowledged that if it were viewing the 2003 application in isolation, "this Court might conceivably agree with the Township that the denial of an SUP for a certain sized building on a specific lot would not qualify as a substantial burden on religious exercise." (*Id.*, pg. 19, Apx. pg. 585). But the Court looked at the 2003 application within the context of the Center's history with the Township, including that in 1995 the Center

had been granted a permit to expand to 28,500 feet. This was more than the 25,000 limit now being enforced, although it is significantly smaller than the almost 35,000 square feet of space sought in the Center's current application. (*Id.*, pg. 19, Apx. pg. 585). The earlier permit had expired and thus the Center had to reapply. The district court compared the two proposals, speculated about what might happen if the permit were to be denied, and concluded that the denial of the special use permit needed to exceed 25,000 feet imposed a substantial burden under RLUIPA. (*Id.*, pgs. 19-20, Apx. pgs. 585-586). The district court also concluded that the Township's interest in density was not compelling and that denial of the permit was not the least restrictive means for accomplishing that purpose, particularly in light of the fact that enrollment in the 2003 proposal had been reduced from the 280 students approved in 2000. (*Id.*, pgs. 21-22, Apx. pgs. 587-588).

STATEMENT OF FACTS

A. THE CENTER'S EXISTING BUILDING AND ITS CURRENT ZONING.

The property at 2630 Bennett Road is zoned RA, single-family residential, medium density. The Center operates at that location as a non-residential use in a residential district under a special use permit (#94071), which was approved by the Planning Commission in January 1995. Under that special use permit, the Center operates an approximately 10,925 square foot single-story sanctuary and day care center on approximately six acres of property. The Center's existing playground violates the applicable setback requirement to the north lot line of fifty feet. (R.85 TR, II, pg. 227, Apx. pg. 964).

B. THE CENTER'S 2000 SPECIAL USE PERMIT REQUEST,[3] ITS EXPIRATION, THE TOWNSHIP'S NO-EXTENSION POLICY, AND THE OPERATION OF DOMINION ACADEMY AT OTHER LOCATIONS.

In 2000, the Center requested a special use permit (#00-94071) to (1) increase the permitted maximum enrollment of the day care center to seventy-two children for which the center was licensed; and (2) construct an approximately 28,500 square foot school with a

[3]The 2000 special use permit request was granted. The Township's refusal to extend it is not the basis for the Center's RLUIPA lawsuit. But the Center has pointed to the events relating to this request to argue that the Township has not dealt with it appropriately.

proposed capacity of 360 students and no gymnasium. The 2000 special use permit request was for a 28,500 square foot school building for grades K-8 with a maximum of 280 students and with fifteen classrooms, but no gymnasium. The Planning Commission approved the request. At the time the special use permit was granted in 2000, the Center had not yet opened the Dominion Academy. (R.84 TR I, pg. 107, Apx. pg. 842).

The Center began operation of its school, the Dominion Academy, in 2001 in a building it owned in Grand Ledge. (R.84 TR I, pgs. 16, 108, Apx. pgs. 751, 843). Only ten boys were enrolled in the school during the first year. (R.84 TR I, pgs. 16, 17, Apx. pgs. 751-752). The Dominion Academy was moved in 2002 to a house and office located in the Township at Mt. Hope and Hagadorn Road. The site was five acres with a building of 1,200 square feet. (R.84 TR I, pg. 18, Apx. pg. 753).

The Dominion Academy then moved to an office building of 9,000 square feet on the same site. (R.84 TR I, pgs 20, Apx. pg. 755). It obtained facilities for its athletic and exercise activities at other locations. (R.84 TR I, pgs. 148, 151, Apx. pgs. 883-886). The public schools also have school and athletic facilities at different locations or that share facilities. (R.84 TR I, pg. 149, Apx. pgs. 884-885). The

current locations of the Center and the Academy are seven to eight minutes from each other. (R.84 TR I, pg. 165, Apx. pg. 900).

Dominion Academy has had no more than fifteen to sixteen children enrolled. (R.84 TR I, pg. 109, Apx. pg. 844). The daycare center, which was approved by the Township for seventy-two children, has had a daily enrollment that is typically sixty to sixty-five children. (R.84 TR I, pg. 14, Apx. pg. 749).

The cost of construction of the proposed expansion in 2000 was $1.5 million. (R.84 TR I, pg. 106, Apx. pg. 841). Construction was never commenced on the 2000 expansion because the Center raised no more than $200,000.00 to pay for that 1.5 million dollar construction cost. (R.84 TR I, pg. 107, Apx. pg. 842). The school portion of the SUP #00-94071 eventually expired because construction was never started.

Although the Center sought an extension of its special use permit, it was unable to obtain one because the Township had changed its policy regarding such requests on March 9, 2001, before the Center obtained an extension. The Township's change in policy arose from the lack of legal authority for granting such extensions in the Township's ordinance, according to an opinion of the Township attorney. The no-renewal policy was first announced in relation to a

special use permit other than the special use permit for the Center. (R.84 Defendants' Binder 3, Exhibit V-2, Bates 000462-000477; R.84 TR I, pg. 171, Apx. pg. 906). The change was made in conjunction with a special use permit request submitted by Wal-Mart. (R.85 TR II, pgs. 221-222, Apx. pgs. 958-959). The Township has consistently applied the change in policy with regard to extensions of special use permits, including to subsequent requests, such as a request for extension of a special use permit known as Brogan, LLC. (R.85 TR II, pgs. 222-223, Apx. pgs. 959-960).

C. THE CENTER'S 2003 SPECIAL USE PERMIT REQUESTS FOR MODIFICATION OF THE ORIGINAL SPECIAL USE PERMIT AND TO EXCEED 25000 SQUARE FEET IN COMBINED BUILDING SPACE.

Pursuant to the Township Ordinances, the Center needed a special use permit for the 2003 proposed school building addition because (1) it modified the original SUP granted to the church for a non-residential use in a residential district; and (2) the total building area of the proposed addition and the existing building exceeded 25,000 square feet. The 2003 SUP request proposed a 35,000 square foot building for grades K-12 with a maximum of 125 students and with nine classrooms and a gymnasium. (R.111 Planning Staff Report, 7/10/03, Record on Appeal, Defendants' Binder 1, Exhibit C, Apx. pgs.

241-242). According to Ordinance 86-658, the Planning Commission had authority to approve the use (school) and to provide a recommendation to the Township Board regarding the size of the proposed building. The Township Board had authority to make the final decision on the size of the proposed building. The ordinance imposed the 25,000 square feet limit on any building or group of buildings. Section 86-658 of the ordinance provides:

> (a) *Purpose.* The construction of any building or group of buildings with a combined gross floor area greater than 25,000 square feet and located on a lot shall require a special use permit due to the significant impact such development has upon adjacent property owners, neighborhoods, and public infrastructure. The requirements of this section apply to any such building or group of buildings.

The Planning Commission held a public hearing on June 23, 2003. Several concerns were raised prompting an analysis by the Planning Staff of the 2000 SUP request and the 2003 SUP request. (R.34 Planning Commission Minutes, 6/23/03, Record on Appeal, Defendants' Binder 1, Exhibit B, Apx. pg. 223). The Planning Commission again discussed the special use permit request as unfinished business on July 14, 2003. (R.34 Planning Commission Minutes, 7/14/03, Record on Appeal, Defendants' Binder 1, Exhibit D, Apx. pg. 247). Before the Planning Commission meeting at which a

vote on the special use permit was scheduled, the planning staff prepared a memorandum offering proposed motions to approve the requested use and to recommend approval of the requested size and motions to deny with reasons indicated for all alternative decisions. (R.34 Planning Staff Memorandum, 7/24/03, Record on Appeal, Defendants' Binder 1, Exhibit E, Apx. pg. 257). After the discussions at its prior meetings, at its meeting on July 28, 2003, the Planning Commission by a vote of 3-2 approved the special use permit request for use of the property to include a school and recommended that the Township Board approve the special use permit for combined buildings, the size of which would exceed the 25,000 square feet limit. (R.34 Planning Commission Minutes, 7/28/03, Record on Appeal, Defendants' Binder 1, Exhibit F, Apx. pg. 264).

On August 7, 2003, the Township Clerk received an appeal[4] of the Planning Commission's approval of the SUP for the school use. The planning staff prepared a report to the Township Board summarizing the issues discussed at the Planning Commission and providing a packet of documents for the Township Board to review in conjunction with considering the appeal of the approval of the use as

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[4]The Township Clerk received several appeals but only accepted one.

well as the request for special use permit for a bulding size in excess of 25,000 square feet. The packet included a comparison of lot sizes, building size, and enrollment at public and private schools in the area. (R.34 Planning Staff Report, 9/12/03, Record on Appeal, Defendants' Binder 1, Exhibit G, Apx. pg. 273). Based on discussion at the Township Board meetings on September 16 and October 7, 2003, a table indicating the ratios of land area to building size was also prepared for the Board's review. (R.34 Township Board Meeting, 9/16/03, Minutes, Record on Appeal Exhibit H, Apx. pg. 337; Planning Staff Report, 10/3/03, Record on Appeal, Defendants' Binder 1, Exhibit I, Apx. pg. 357; Township Board Meeting, 10/7/03, Minutes, Record on Appeal, Defendants' Binder 1, Exhibit J, Apx. pg. 376; Planning Staff Report dated October 17, 2003, Record on Appeal, Defendants' Binder 1, Exhibit K, Apx. pg. 392; Planning Staff Report, 10/20/03, Record on Appeal, Defendants' Binder 1, Exhibit L, Apx. pg. 400; Land Area to Building Ratios Chart Record on Appeal, Defendants' Binder 1, Exhibit M, Apx. pg. 405).

At its meeting on October 21, 2003, the Township Board denied the appeal of the Planning Commission's approval of the use of the property, thus approving a special use permit for the proposed use of the property for a religious-oriented school. (R.34 Township Board

Meeting, 10/21/03, Minutes, Record on Appeal, Defendants' Binder 1, Exhibit N, Apx. pg. 407). At the same meeting, the Township Board denied the special use permit for the additional building of approximately 35,000 square feet under Ordinance 86-658. The Township Board based its denial on the fact that the size of the existing church (10,925 square feet) and the proposed school building (35,000 square feet) was out of proportion in relation to the size of the lot (6 acres) when compared to similarly-situated schools in the Township and inconsistent with the criteria for an SUP in Ordinance 86-126(1),(2), (3) and (4). (R.1 Exhibit 11, Resolution to Deny SUP #03-94071 - 35,000 Sq. Ft. Building Addition, Apx. pg. 99).

A factor for consideration of the approval or denial of a special use permit at Section 86-126 of the ordinance includes whether the proposed project is consistent with the Comprehensive Development Plan. (R.85 TR II, pg. 276, Apx. pg. 1013). The Comprehensive Development Plan for the Township adopts criteria established by the National Education Association and others for evaluating desirable site sizes for school facilities. Those standards establish as a desirable site size for an elementary school of ten acres, a middle school of twenty acres, and high school of forty acres. (Comprehensive Development Plan, pgs. 165-166). The Township was

assisted in drafting the Comprehensive Development Plan by a professional planning firm, McKenna & Associates, who recommended the NSA standards for school site size. (R.85 TR II, pgs. 219-221, Apx. pgs. 956-958). Table 29 to the Comprehensive Development Plan includes site sizes for public schools. (R.85 TR II, pgs. 219-220, Apx. pgs. 956-957).

Vacant parcels of land owned by the Okemos School District comply with the site size standards in the Township's Comprehensive Development Plan. (R.85 TR II, pgs. 226-227, Apx. pgs. 963-964).[5] The Comprehensive Development Plan also includes a policy or ratio for land to building size for commercial and office buildings. (R.84 TR I, pgs. 204, 205, Apx. pgs. 939-940; R.85 TR II, pg. 237, Apx. pg. 974). A "land area to building ratio chart" was originally developed in conjunction with the Township's consideration of the 2000 SUP. (R.84 Defendants' Binder 1, Exhibit I, TR I, pg. 172, Apx. pg. 907; Defendants' Binder 1, Exhibit M, TR I, pg. 176, Apx. pg. 911).

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[5]The site occupied by Rayla Elementary and Meridian High School is bordered by a railroad track and Commercial zoning to the north and including a bus garage. (R.84 TR I, pgs. 175-176, Apx. pgs. 910-911; R.85 TR II, pg. 220, Apx. pg. 957). Construction of the existing Rayla Elementary School and Meridian High School pre-date the Township's Comprehensive Development Plan.

The special use permit that is the subject of this case and the special use permit from 2000 are not decisions made in relation to the same project; the Center increased the size and configuration of the building requested in its 2003 special use permit request, which is the subject of this case. (R.7 Staff Report, 6/19/03, Apx. pgs. 180-187; R.7 Staff Report, 7/10/03, Apx. pgs. 240-244). The special use permit granted to the Center in 2000 was not conditioned upon seeking a variance to meeting parking requirements. But the 2003 special use permit for a larger building would have required a variance from parking requirements. (R.7 Exhibit 6, Apx. pgs 80-81; R.34 Exhibit 9, pg. 2, Apx. pg. 359). The size of the proposed building was also significantly larger.

D. THE CENTER'S ONGOING ACTIVITIES AND OPERATIONS.

At the time the special use permit was granted in 2000, the Center had not yet opened the Dominion Academy. (R.84 TR I, pg. 107, Apx. pg. 842). The Center began operation of its school, the Dominion Academy, in 2001 in a building it owned in Grand Ledge. (R.84 TR I, pgs. 16, 108, Apx. pg. 843). Only ten boys were enrolled in the school during the first year. (R.84 TR I, pgs. 16, 17, Apx. pgs. 751-752). The Dominion Academy was moved in 2002 to a house and office located in the Township at Mt. Hope and Hagadorn Road. The

site was five acres with a building of 1,200 square feet. (R.84 TR I, pg. 18, Apx. pg. 753).

The Dominion Academy then moved to an office building of 9,000 square feet on the same site. (R.84 TR I, pg. 20, Apx. pg. 755). It obtained facilities for its athletic and exercise activities at other locations. (R.84 TR I, pgs. 148-151, Apx. pg. 883-886).[6] The current locations of the Center and the Academy are seven to eight minutes from each other. (R.84 TR I, pg. 165, Apx. pg. 900).

The highest enrollment in Dominion Academy has been fifteen to sixteen children. (R.84 TR I, pg. 109, Apx. pg. 844). The daycare center, which was approved by the Township for seventy-two children, has had a daily enrollment that is typically sixty to sixty-five children. (R.84 TR I, pg. 14, Apx. pg. 749).

The cost of construction of the proposed expansion in 2000 was $1.5 million. (R.84 TR I, pg. 106, Apx. pg. 841). Construction was not commenced on the 2000 expansion because the Center raised no more than $200,000.00 to pay for that 1.5 million dollar construction cost. (R.84 TR I, pg. 107, Apx. pg. 842). The school portion of the SUP #00-94071 eventually expired because construction was never

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[6]The public schools in the Township also have school and athletic facilities at different locations or that share facilities. (R.84 TR I, pg. 149, Apx. pg. 884).

started. Even if the Township had granted the subject SUP, Dominion Academy would have needed to conduct activities off site because of the limited size of the site. (R.84 TR I, pg. 114, Apx. pg. 849).

The Center has one hundred members. (R.84 TR I, pg. 44, Apx. pg. 779). Week to week attendance on Sunday is approximately 120. (R.84 TR I, pg. 44, Apx. pg. 779). The existing worship area is designed to a capacity of 250 to 350 persons. (Defendants' Binder 3, Exhibit V 1.A, Bates 000007 and Bates 000047). The Center has never had the need for a second worship service on Sunday. (R.84 TR I, pg. 89, Apx. pg. 824). Membership includes approximately fifty children under age twelve, and twenty children over the age of twelve. (R.84 TR I, pg. 111, Apx. pg. 846). Both the daycare and Dominion Academy operate at a loss and are subsidized by the Church. (R.84 TR I, pgs. 79-80, Apx. pgs. 814-815). Parents have expressed concerns regarding academic deficiencies at the Academy. (R.84 TR I, pg. 146, Apx. pg. 881). Various activities put on by the Center attract only ten to twenty members. (R.84 TR I, pg. 97, Apx. pg. 832).

The Center's explanation of its inability to conduct church activities is the inconvenience of moving daycare equipment. (R.84 TR I, pgs. 100-105, Apx. pgs. 835-840). The Center never asked daycare center parents if they were willing to assist in moving the

center's equipment to clear areas for other church activities. (R.84 TR I, pg. 120, Apx. pg. 855). The predominant need for the requested expansion of the building beyond 14,000 square feet stems from the Center's desire for a strong athletic program. (R.84 TR I, pgs. 138-140, Apx. pgs. 873-875).

The Center has never requested a special use permit for temporary trailers to meet its alleged need for space although the Township has issued special use permits to other churches for school use in the past. (R.85 TR II, pg. 226, Apx. pg. 963). The Center could also build a 25,000 square feet school at a different location without the need for the special use permit, which is the subject of this case. (R.84 TR I, pg. 77, Apx. pg. 812). Alternate sites of residential zoned land are available in Meridian Township, including an 8.5-acre site directly east of the subject property. (R.85 TR II, pgs. 281-282, 278, Apx. pgs. 1018-1019, 1015). The Township issued a special use permit for a church on land immediately adjacent to the east of the subject property for a building of approximately 16,000 square feet on 8-1/2 acres. (R.85 TR II, pg. 225, Apx. pg. 962). The Center can add approximately 14,000 square feet to the existing buildings without the need for the disputed special use permit. (R.84 TR I, pg. 75, Apx. pg. 810). But the Center is unwilling to exercise its

right to add 14,000 square feet to its building because of its desire to have a gymnasium and to have the church and school on the same site. (R.84 TR I, pgs. 75-78, Apx. pgs. 810-813). The perimeter of a building is not a relevant measure for planning purposes. (R.85 TR II, pg. 272-273, Apx. pgs. 1009-1010). A gymnasium is a use that creates special consideration with regard to the intensity of use including parking, occupancy loads, utilities, and traffic. (R.85 TR II, pg. 273, Apx. pg. 1010).

SUMMARY OF THE ARGUMENT

The Center failed to establish a RLUIPA violation based on the denial of its request for a permit to exceed the square feet limit for buildings on a site because it failed to show that enforcement of the size limit for its expansion amounts to a substantial burden. This Court has not yet announced a definition of substantial burden under RLUIPA. But guidance can be found in Supreme Court authority and the decisions of other courts. See *Sherbert v. Verner*, 374 U.S. 398; 83 S. Ct. 1790; 10 L. Ed. 2d 965 (1963); *Thomas v. Review Bd. of Indiana*, 450 U.S. 707; 101 S. Ct. 1425; 67 L. Ed. 624 (1981); *Wisconsin v. Yoder*, 406 U.S. 205; 92 S. Ct. 1425; 67 L. Ed. 2d 15 (1972); *Braunfeld v. Brown*, 366 U.S. 599; 81 S. Ct. 1144; 6 L. Ed. 2d 563 (1961). Those courts that have articulated a definition have required a showing that the government conduct or regulation must bear "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." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003). Or they have required a showing that the government action or regulation significantly pressures the religious adherent to forego religious precepts. *Midrash*

Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1255 (11th Cir. 2004).

The district court's conclusion is inconsistent with this decisional authority because the court predicated a finding of substantial burden on mere inconvenience and indirect financial burdens created by enforcement of a neutral zoning regulation limiting the square feet allowed in buildings on a site. The district court acknowledged that other sites were available, and recognized that the Center could build its school under the permits it had already been granted. (R.88 Opinion, pg. 20, Apx. pg. 567). But it, nevertheless, found a substantial burden because the school proposed by the Center was thousands of feet too large and the Center was unwilling to build it without a gymnasium. (*Id.*) Expanding the reach of the substantial burden analysis this far is inconsistent with the language, legislative history, and decisional authority governing RLUIPA. And it poses grave constitutional problems under the Establishment clause. Thus, a reversal is in order.

The district court's holding that enforcement of the regulation was not the Township's least restrictive means of satisfying a compelling interest was also erroneous. The Court need not reach this issue if it agrees with the Township's position on substantial burden.

But if it does reach this issue, a reversal is in order on this ground as well. The Township has a compelling interest in enforcement of its zoning ordinances to protect the quality of life in its neighborhoods and ensure that land uses are compatible. See e.g., *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50; 96 S. Ct. 2440; 49 L. Ed. 2d 310 (1976). The district court offered no analysis of how the Township's interest in controlling density could be satisfied in a less restrictive way. Nor did it point to any record evidence concerning alternate less restrictive means for achieving the same result. Thus, its conclusion was erroneous and should be reversed.

ARGUMENT

THE OKEMOS CHRISTIAN CENTER FAILED TO ESTABLISH A RLUIPA VIOLATION BECAUSE THE TOWNSHIP DECISION TO GRANT A SPECIAL USE PERMIT BUT TO DENY THE ADDITIONAL PERMIT REQUIRED FOR BUILDINGS WITH A COMBINED GROSS FLOOR AREA OF GREATER THAN 25,000 FEET DOES NOT SUBSTANTIALLY BURDEN THE CENTER'S RELIGIOUS EXERCISE AND, IN ANY EVENT, IS THE LEAST RESTRICTIVE MEANS TO SERVE A COMPELLING INTEREST.

A. Standard Of Review.

This Court reviews the grant of an injunction for an abuse of discretion, but questions of law are reviewed de novo. *Hoevenaar v. Lazaroff*, 422 F.3d 366 (6th Cir. 2005); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 685 (6th Cir. 2002). The Court reviews the district court's legal conclusions de novo and its factual findings for clear error. *Moss v. Hofbauer*, 286 F.3d 851, 858 (6th Cir. 2002).

B. RLUIPA Requires A Showing Of Substantial Burden On Religious Exercise.

In order to prevail on a claim under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-5(7), the plaintiff must first demonstrate that the regulation at issue actually imposes a substantial burden on religious exercise. RLUIPA defines "religious exercise" broadly to encompass "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.*

§ 2000cc-5(7)(A). Religious exercise includes "the use, building, or conversion of real property for the purpose of religious exercise." 42 U.S.C. § 2000cc-5(7).

C. A Church Is Not Substantially Burdened When It Receives Permission To Add A School Building But The Size Is Less Than Sought, The Expansion Is Not Presently Needed, Other Locations Within The Township Are Available, And The Record Contains No Evidence To Show That Religious Exercise Would Be Effectively Impracticable Or That The Denial Would Tend To Force Adherents To Forego Religious Precepts.

The term "substantial burden" is not defined in the statute. But RLUIPA's legislative history indicates the term is to be interpreted by reference to the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* and First Amendment jurisprudence. *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 760-761 (7th Cir. 2003) citing 146 Cong. Rec. 7774-01, 7776 ("The term 'substantial burden' as used in the Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden on religious exercise.")

The United States Supreme Court has not yet defined "substantial burden" within the meaning of the Act. The Sixth Circuit has also not yet articulated a definition of substantial burden within the meaning of RLUIPA. Although it differentiated indirect financial or economic

burdens from those which prevent a congregation from practicing its faith through worship or requiring an adherent to violate a fundamental precept or tenet of its religion when deciding a freedom of religion dispute. *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc v. City of Lakewood, Ohio*, 699 F.2d 303 (6th Cir. 1983). Several federal circuit courts of appeals have defined the term under RLUIPA. None has embraced a definition that is broad enough to encompass the minor impact on religious exercise that stems from enforcement of a zoning ordinance or regulation that together with other constraints upon the use of specific parcels of land inhibits their use, building, or conversion to the purpose of religious exercise.

The Seventh Circuit adopted an effectively-impracticable definition:

> [I]n 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.

342 F.3d at 761. The Seventh Circuit rejected the argument that the scarcity of affordable land available in zones where churches were permitted as of right, along with the costs, procedural requirements, and political aspects of the special use, map amendment, and planned

development approval process, imposed a substantial burden. According to the Seventh Circuit, those conditions did not amount to a substantial burden on religious exercise. Noting that all of the plaintiffs had located property in the city limits, the court stated that although the conditions might contribute to ordinary difficulties associated with locating in an urban area, they did not render the use of property for religious exercise impracticable, much less discourage churches from attempting to locate in the city. To rule that such conditions present a substantial burden to the exercise of religion would mean that compliance with RLUIPA would require a municipality to favor religious land uses in the form of an outright exemption from land-use regulations rather than treat religious land uses on an equal footing with non-religious land uses. The court rejected an approach that would cause constitutional problems by favoring religious land-uses:

> No such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise."

Id. at 761-762.

The Ninth Circuit employed a definition drawn from the dictionary, which requires a plaintiff to demonstrate that the imposition of the land use regulation imposes a significantly great

restriction or onus on religious exercise. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004). The Ninth Circuit used this "plain meaning" analysis of the term "substantial burden" to develop a rule that "the government is prohibited from imposing or implementing a land use regulation in a manner that imposes a 'significantly great' restriction or onus" on religious exercise." *Id.* at 1026. The court rejected plaintiff's RLUIPA claim stating that the PUD requirements imposed no restriction on the college's religious exercise, as it requires the same things of all applicants. There was no indication in the record that the city would not impose the same requirements on any other entity seeking a change in that particular PUD. *Id.* at 1028-1029.

The Ninth Circuit insisted that its holding was "entirely consistent with the Seventh Circuit's recent ruling in *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003). The Ninth Circuit embraced the Seventh Circuit's holding rejecting RLUIPA claims based on the costs, procedural requirements, and inherent political aspects of the permit approval process because they do not constitute a substantial burden within the meaning of the statute. 360 F.3d at 1035. The Ninth Circuit agreed that these problems might contribute to the ordinary difficulties associated use

of a location; they do not render impracticable the plaintiff's ability to use real property within the jurisdiction for religious exercise. The Ninth Circuit rejected the plaintiff's claim because "there is no evidence in the record demonstrating that College was precluded from using other sites within the city." *Id.* The Ninth Circuit also noted the absence of evidence that "the City would not impose the same requirements on any other entity seeking to build something other than a hospital on the Property." *Id.*

The Eleventh Circuit's definition of "substantial burden" requires the plaintiff to show "significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1225 (11th Cir. 2004). The Eleventh Circuit elaborated on this definition by observing that the substantial burden could "result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct." *Id.* at 1227. Thus, the test recognized by the Eleventh Circuit is whether the regulation tends to force adherents to forego religious precepts.

The Fifth Circuit defined substantial burden within the meaning of RLUIPA to encompass governmental action that "truly pressures the adherent to significantly modify his religious behavior and

significantly violate his religious beliefs." *Adkins v. Kaspar*, 393 F.3d 559 (5th Cir. 2004). The Fifth Circuit elaborated on this definition by explaining that the "effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, foregoing his religious beliefs." 393 F.3d at 570. The Fifth Circuit emphasized that "a government benefit or regulation does not rise to the level of a substantial burden on religious exercise if it merely prevents adherents from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed." *Id.*

In *Corporation of the Presiding Bishop of the Center of Jesus Christ of Latter-Day Saints v. City of West Linn*, 86 P.3d 1140 (Ore. App. 2004), the Oregon Court of Appeals upheld a city's decision to deny a conditional use permit to build a church meetinghouse in a residential neighborhood against a RLUIPA challenge. The church had proposed to build a 16,558 square foot, twenty-eight-foot-high, single-story structure, surrounded on three sides by parking, comprising 2.02 acres on a 3.85-acre site. The planning commission denied the application because there was not an adequate buffer to

screen the parking lot from surrounding residences, and a building of the proposed size was not appropriate in a residential zone. 86 P.3d 1142-1145. The city council denied the applicant's appeal finding in part that the denial did not impose a substantial burden on religious exercise within the meaning of RLUIPA because additional land was available around the site and the church might have obtained approval if the site were larger." *Id.* At the next appellate level, the land use board of appeals determined that the decision of the planning commission, as upheld by the city council, violated RLUIPA because it imposed a substantial burden on religious exercise. *Id.*

The Oregon intermediate appellate court identified the "burden" and then looked to First Amendment and RLUIPA case law to determine whether it was substantial. According to the court, the burden imposed was the burden of being prevented from implementing the particular design proposal at issue plus the burden of submitting a new application for a modified proposal. The church was also burdened by conditions of crowding in its existing location. *Id.*

The court acknowledged the impact of the city's decision. This included the fact that the church could not construct the particular design of building and parking lot it proposed, the need to expend additional time and money to submit a new application, and to

continue worshipping at neighboring facilities in the interim. But the court held that this did not constitute a substantial burden under RLUIPA. 86 P.3d at 1156. The record showed that existing members of the church could continue to worship at the existing location. The court found no reason to believe that the city would not approve an application for a smaller or differently configured building and parking lot that addressed the applicable requirements for buffers and impact mitigation. Nor did the record indicate that the particular building size and design proposed by the church was required by its religious beliefs. The court reasoned that "it appears that the church merely had a preference, albeit a strong one, for obtaining approval of a particular design proposal." *Id.* at 1154-1157. The court determined that the city's rejection of the proposed building and site plan was not "coercive" nor did it "put substantial pressure on an adherent to modify his or her behavior and to violate his or her beliefs." *Id.* at 1157 citing *Thomas v. Review Board of Indiana*, 450 U.S. 707, 717-718; 101 S. Ct. 1425; 67 L. Ed. 624 (1981). The court characterized the denial of the church's first and only application and the need to submit a second application as a "mere inconvenience," which was not enough to show a substantial burden. *Id.* at 1158. Thus, the court determined there was no violation of RLUIPA. *Id.* at 1158-1159.

The United States District Court for the Eastern District of Michigan in *Episcopal Student Foundation v. City of Ann Arbor*, 341 F. Supp. 2d 691 (E.D. Mich. 2004), examined Supreme Court decisional authority to determine the correct test and its analysis is instructive. A RLUIPA claim was based on the denial of a request for a permit to demolish an existing historical building and construct a new building for a church, space for meditation, large dining area, lounge, a library, an industrial-sized kitchen, an elevator, an all purpose room, and other offices and work areas. *Id.* at 694. The court looked to the traditional "substantial burden" test identified by the Supreme Court in First Amendment free exercise jurisprudence to resolve the definition for RLUIPA claims. *Id.* at 701. The court looked for guidance from the landmark cases of *Sherbert v. Verner*, 374 U.S. 398; 83 S. Ct. 1790; 10 L. Ed. 2d 965 (1963); *Wisconsin v. Yoder*, 406 U.S. 205; 92 S. Ct. 1526; 32 L. Ed. 2d 15 (1972); and *Braunfeld v. Brown*, 366 U.S. 599; 81 S. Ct. 1144; 6 L. Ed. 2d 563 (1961). The case law addressing infringements of the free exercise of religion fell into two camps, (1) those in which compliance with the statute itself violates the individual's religious beliefs, and (2) those in which noncompliance may subject him to criminal penalties or the loss of a significant government privilege or benefit. In the first

category, compliance with the challenged regulation makes the practice of one's religion more difficult or expensive, but the regulation is not inherently inconsistent with the litigant's beliefs. Courts have more often found a violation of the free exercise clause when the claims fall within the second category.

In *Sherbert* and *Yoder*, the governmental action required the plaintiffs to violate a cardinal principle of their religious faith and subjected the plaintiffs to sanctions for non-compliance. *Id.* at 702. The Supreme Court found both to violate the First Amendment. *Braunfeld* dealt with a challenge by Orthodox Jewish merchants to Sunday closing laws. The Court rejected the claim there and held that religious exercise is not substantially burdened by a statute that makes religious observance more difficult or expensive. *Id.* In *Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439; 108 S. Ct. 1319; 99 L. Ed. 2d 534 (1988) and *Locke v. Davey*, 540 U.S. 712; 124 S. Ct. 1307; 158 L. Ed.2d 1 (2004), the Supreme Court similarly rejected a substantial burden claim because the challenged action did not coerce the plaintiffs into violating their religious beliefs or penalize their religious activity. *Id.* at 702 citing *Lyng*, 485 U.S. at 449; *Id.* at 703 citing *Locke*, 124 S. Ct. at 1308.

Applying these principles to a claim that a city had violated RLUIPA by denying a religious foundation's application to demolish a building, the court determined that the burden placed on the group's religious exercise did not rise to the level of that found in *Sherbert* and *Yoder*. The denial of the religious group's request to demolish an existing building did not prevent the group from pursuing its religious beliefs, coerce its members into abandoning or violating those beliefs, or dissuade members from practicing their faith. 341 F. Supp. 2d at 704. The group's religious exercise had not been burdened by the denial of the permit because it could accomplish its religious mission through worship or other activities at other locations in the city. *Id.* Thus, the burden imposed was not "substantial" as defined by the Supreme Court and the Sixth Circuit in the First Amendment context. *Id.* at 707. See also *Cathedral Church of the Intercessor v. Village of Malverne*, 353 F. Supp. 2d 375 (E.D. N.Y. 2005) (fact that an applicant for a building permit is a religious organization does not grant it an unencumbered right to zoning approval for nonreligious uses); *Williams Island Synagogue, Inc. v. City of Aventura*, 358 F. Supp. 2d 1207 (S.D. Fla. 2005) (no substantial burden because denial of permit request caused distraction and inconvenience alone).

D. THE DISTRICT COURT'S SUBSTANTIAL BURDEN ANALYSIS AS TO THE CENTER CANNOT BE SQUARED WITH RLUIPA.

The district court held that the Center was substantially burdened by the Township's denial of the special use permit needed to exceed the 25,000 square foot limit of the Township zoning laws. (R.88 Opinion, pg. 20, Apx. pg. 586). When enunciating the precise burden, the district court explained that the "[d]enial of the SUP is directly responsible for rendering Plaintiff's ability to use its real property for its religious purposes effectively impracticable." (*Id.*) But the test for substantial burden is not whether the Center's ability to use certain property has been burdened. The test is whether the religious exercise of the Center (and its members) is substantially burdened by enforcement of the regulation. As to that, the record is completely barren. The district court itself acknowledged that, viewed in isolation, the denial of the 2003 special use permit application would not qualify as a substantial burden.

Yet the court predicated a finding of substantial burden on the denial "in context," considering factors that are irrelevant to the analysis required under RLUIPA. Rather than looking to see if the Center's religious exercise was rendered effectively impracticable or if its members would be coerced into violating their religious precepts, the court considered a series of events looking more for its

own view of the township's decisions. For example, the court recalled that the Township had been aware that the Center planned to expand since its first approval of a special use permit for its operations in a residential district in 1995. The fact that the Township was purportedly aware of the Center's desire to expand its operations over time has nothing to do with a burden, substantial or otherwise, on the religious exercise of the Center or its members.

The district court also placed weight on the Township's grant of an earlier expired permit, which allowed 28,500 square feet (3500 more than the 25000 limit). The earlier permit sought approval for considerably less space than the approximately 35000 square foot proposal submitted in 2003. Whether a prior approval was given for a smaller building has nothing to do with a showing of substantial burden on the religious exercise of the Center. The district court also focused on the sudden change in the practice of allowing extensions, a fact which ignores the legal advice given to the Township. Its new attorney warned the Township not to continue the practice because there was no legal authority for extending the time period for permits. The district court did not find, nor is there any record support for the proposition, that this change was discriminatory. In any event, this fact is also irrelevant to any burden to religious exercise. The district

court emphasized that the Center had "worked diligently and in good faith" to address the Township's concerns before submitting its revised proposal. But this, again, is completely irrelevant to any burden. The district court's analysis is foreclosed by RLUIPA because the findings are all focused on minor inconvenience and indirect economic impacts. The district court also observed that the Center had spent significant funds in crating the proposal, that it sought to address concerns that had been raised in the previously approved plan, and that the building footprint was smaller than the earlier plan. (R.88, Opinion, pg. 20, Apx. pg. 586). None of these points pertain to a burden on religious exercise. Courts, including this court in *Lakewood*, *supra*, have rejected inconvenience or indirect financial burdens as a basis for a substantial burden finding.

The district court acknowledged that "there may be larger lots of residentially zoned land available in the Township," but noted increased expense in redoing the building plans and resubmitting them to reduce the size of the proposed building and expressed concern about whether the Center would also have to resubmit an application for a school. The district court reasoned that there was "no guarantee" that the Center would receive permission to "build a school, regardless of size, at this location or anywhere else within the Township." (*Id.*)

The district court concluded that the Center would "incur delay, expense and uncertainty if it is required to reapply or search for another site." (*Id.*) Based on this, it held that enforcement of the regulation amounted to a substantial burden (not on religious exercise but on the Center's ability to use its real property for religious purposes). The district court's holding that this constitutes a substantial burden under RLUIPA is inconsistent with the test for burden articulated in any federal circuit court of appeals. If accepted, it will expand the reach of RLUIPA to encompass neutrally-enforced and critical zoning regulations even when they do not interfere with or burden religious exercise in any meaningful way. In addition, the Court should resist a definition of substantial burden that expands RLUIPA to the extent that it poses serious constitutional questions under the Establishment Clause. Courts have been careful to apply RLUIPA in a constitutional manner by rejecting claims that favor religious land use decisions over non-religious land use decisions. See e.g. *Civil Liberties for Urban Believers*, 340 F.3d at 761-762.

Nowhere in the district court's analysis is there a discussion of evidence showing that it would be effectively impracticable for the Center to exercise its religion within the Township. Nor is there evidence that the enforcement of the Township's zoning regulation

would have a tendency to coerce individuals into acting contrary to their religious beliefs. The record is absent of evidence showing that enforcement of the space limitation would put substantial pressure on any adherent to modify his or her behavior or violate his or her beliefs. To the contrary, the record shows that enforcement would have only an incidental effect arguably rendering it inconvenient and increasing the expense because the Center would have to build a smaller school or seek another location. This is not enough to establish a RLUIPA claim.

The Center is operating within the Township in a building with capacity for more than twice as many members as it currently has. Its request for approval to add to the buildings to provide a school on the premises has been granted. The Center is entitled to add approximately 14,000 square feet in building space, which will allow it to move its school to the same location as its church. At present the school has only fifteen students, far less than the capacity it can provide for under the zoning without exceeding the square feet limit. No testimony suggests that the Center or its members will be coerced into violating a religious precept by building a somewhat smaller school. Nor does any testimony suggest that the Center's religious exercise will be rendered effectively impracticable.

The district court made no such findings. It made a far more limited finding that the Center would not be able to use this site for the school, a finding which lacks support in the record. The record merely shows that the Center cannot use this site for the building if it insists on this size building. This is not enough to constitute a substantial burden under RLUIPA. Thus, a reversal is in order.

E. In Any Event, The Township Square Feet Restriction Is The Least Restrictive Means Of Serving The Township's Compelling Interest.

The district court held that the denial of the special use permit to exceed the Township's square footage limit did not serve a compelling governmental interest and was not the least restrictive means of serving the interest. But the district court's analysis failed to cite any decisional authority holding that a local government lacks a compelling interest in enforcement of its zoning regulations that can be enforced by less restrictive means.

The United States Supreme Court has recognized the importance of governmental interests in protecting the quality of life in urban neighborhoods and commercial districts through zoning and land use regulations. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50; 96 S.Ct. 2440; 49 L. Ed. 2d 310 (1976); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41; 106 S.Ct. 925; 89 L. Ed. 2d 29 (1986).

Federal appellate courts have recognized the important governmental interest in zoning and land use regulations. See e.g., *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003); *D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991); *Grace United Methodist Center v. City Of Cheyenne*, 427 F.3d 775 (10th Cir. 2005); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004).

These decisions cannot be squared with the district court's conclusory rejection of the Township's interest in enforcing its neutral zoning regulations regarding density. Rather than analyzing any authority concerning whether an interest is properly deemed to be compelling, the district court attacked the data employed by the Township to evaluate the request for a special use permit lifting the normally-enforced square footage limit. The district court criticized the Township's examination of data analyzing the land to building ratio of other schools. The district court also argued against its reliance on NEA guidelines (which were incorporated into the Township's comprehensive development plan).

The district court pointed to no similar projects as to which the square feet limit had not been applied. The district court mentioned in passing testimony regarding the Township's approval of a special use

permit for a building of thirty-two dwelling units on 5.07 acres of land. (R.88, pg. 8, Apx. pg. 574). But the special use permit for that development expired (as did the Center's) and was not extended (just as the Center's was not). (R.85 Kieselbach at TR 223, Apx. pg. 960). Ultimately, approval was given for only twenty-four dwelling units, rather than the thirty-two that were sought. (*Id.*) Thus, neither this example nor any other in the record suggests that the space limitation was applied in a discriminatory manner. Although the district court correctly pointed out that public schools do not have to obtain special use permits, the conclusion drawn from this is incorrect. The Township is not entitled to regulate public schools as a matter of state law. Thus, it cannot enforce its zoning regulations as to schools. The district court emphasized that other comparisons could have been done; but this point offers no help in determining whether the interests at stake are compelling. Nor does it undercut the long-standing respect that federal courts have afforded to local governments' interests in land use and zoning regulations to protect the public health, safety, and welfare interests of their citizens by ensuring compatible use of land and preserving a wholesome urban environment that is not marred by too much density.

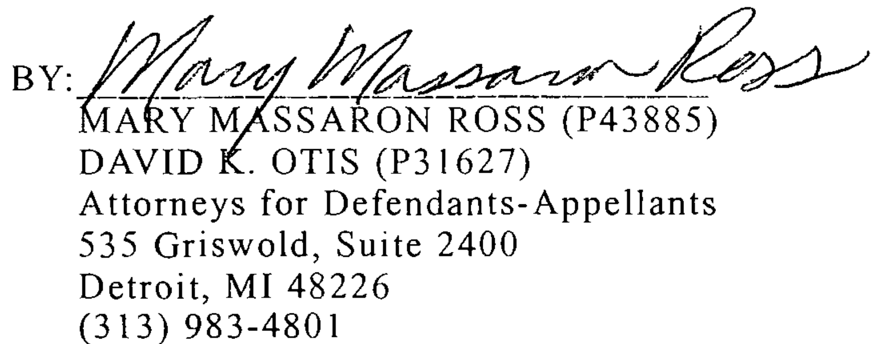
The square feet limit applies to all buildings in the Township. Permits may be issued when those buildings are on large parcels, but not when, as here, the request is to squeeze the building on to a relatively tiny six-acre lot. The decisional authority cannot be squared with the district court's conclusion that "denial of the SUP was not the least restrictive means of achieving the Township's legitimate governmental interest in controlling density in order to limit the negative impact on neighborhoods and infrastructures." (R.88 Opinion, pgs. 21-24, Apx. pgs. 587-590). The district court offered no analysis on this point. Instead, after criticizing the land to building ratio analysis, the district court rejected the Township's position. The district court offered no suggestion of where in the record it found support for its conclusion. The district court offered no discussion of what other less restrictive means could be employed to address density, other than to point out that the basement would be underground. This does not undermine the need for a neutrally-enforced ordinance limiting the building square feet to control for building density. Thus, the district court's conclusion was erroneous and should be reversed.

CONCLUSION

Based on the foregoing analyses and citations to authority, Charter Township of Meridian, and Susan McGillicuddy, Mary Helmbrecht, Bruce D. Hunting, Julie Brixie, Steve Stier, Andrew J. Such, Anne W. Woiwode, respectfully request that this Court reverse the judgment in favor of Living Water Center of God d/b/a Okemos Christian Center, and grant them such other relief as is proper in law and equity.

Respectfully submitted,

PLUNKETT & COONEY, P.C.



BY: ______________________

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