

**The Federal Religious Land Use and Institutionalized Persons Act
(RLUIPA)
Challenges faced by Local Government**

**Joint Session of New Jersey League of Municipalities and
New Jersey Planning Officials
Atlantic City Convention Center
November 19, 2008
2:00-4:00 p.m.**

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PROGRAM

The Federal Religious Land Use and Institutionalized Persons Act (RLUIPA) Challenges faced by Local Government

RLUIPA bars a land use regulation that imposes a substantial burden on religious exercise by a person, assembly or institution unless the government demonstrates that the imposition of the burden is in furtherance of a compelling government interest and is the least restrictive means of furthering that compelling government interest. Its fee-shifting position also exposes government to payment of a religious entity's attorney's fees arising out of successful prosecution or settlement. RLUIPA has spawned much litigation and presents significant and unique challenges to local government to avoid exposure in the context of regulating local land use.

**Joint Session of New Jersey League of Municipalities and New Jersey Planning
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Introduction

Honorable Robert Holtaway, Mayor, Township of Bedminster

Overview of RLUIPA and presentation of factual hypothetical for panel discussion of RLUIPA issues

Howard D. Cohen, Esq., Parker, McCay, P.A., Moderator.

Panel discussion of RLUIPA issues based upon hypothetical

Panelists:

Marci A. Hamilton, Esq., Professor of Law, Paul R. Verkuil, Chair in Public Law, Benjamin N. Cardozo School of Law, Yeshiva University.

Robert L. Greene, Esq., Storzer & Greene, P.L.L.C.

Steven E. Barcan, Esq., Wilentz, Goldman & Spitzer, Past Chair New Jersey State Bar Land Use Committee.

Francis P. Banisch, III, P.P./A.I.C.P., Banisch & Associates, Professional Planners.

Attendees Question and Answer Session

**THE RELIGIOUS LAND USE AND
INSTITUTIONALIZED PERSONS ACT; 42 U.S.C. §2000cc**

Public Law 106-274
106th Congress

An Act

To protect religious liberty, and for other purposes.

Sept. 22, 2000
[S. 2869]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Religious Land
Use and
Institutionalized
Persons Act of
2000.
42 USC 2000cc
note.
42 USC 2000cc.

SECTION 1. SHORT TITLE.

This Act may be cited as the “Religious Land Use and Institutionalized Persons Act of 2000”.

SEC. 2. PROTECTION OF LAND USE AS RELIGIOUS EXERCISE.

(a) **SUBSTANTIAL BURDENS.—**

(1) **GENERAL RULE.—**No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) **SCOPE OF APPLICATION.—**This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) **DISCRIMINATION AND EXCLUSION.—**

(1) **EQUAL TERMS.—**No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) **NONDISCRIMINATION.—**No government shall impose or implement a land use regulation that discriminates against

any assembly or institution on the basis of religion or religious denomination.

(3) EXCLUSIONS AND LIMITS.—No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

42 USC
2000cc-1.

SEC. 3. PROTECTION OF RELIGIOUS EXERCISE OF INSTITUTIONALIZED PERSONS.

(a) GENERAL RULE.—No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

(1) is in furtherance of a compelling governmental interest;

and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) SCOPE OF APPLICATION.—This section applies in any case in which—

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

42 USC
2000cc-2.

SEC. 4. JUDICIAL RELIEF.

(a) CAUSE OF ACTION.—A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) BURDEN OF PERSUASION.—If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) FULL FAITH AND CREDIT.—Adjudication of a claim of a violation of section 2 in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) ATTORNEYS' FEES.—Section 722(b) of the Revised Statutes (42 U.S.C. 1988(b)) is amended—

(1) by inserting “the Religious Land Use and Institutionalized Persons Act of 2000,” after “Religious Freedom Restoration Act of 1993,”; and

(2) by striking the comma that follows a comma.

(e) PRISONERS.—Nothing in this Act shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) **AUTHORITY OF UNITED STATES TO ENFORCE THIS ACT.**—The United States may bring an action for injunctive or declaratory relief to enforce compliance with this Act. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) **LIMITATION.**—If the only jurisdictional basis for applying a provision of this Act is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

SEC. 5. RULES OF CONSTRUCTION.

42 USC
2000cc-3.

(a) **RELIGIOUS BELIEF UNAFFECTED.**—Nothing in this Act shall be construed to authorize any government to burden any religious belief.

(b) **RELIGIOUS EXERCISE NOT REGULATED.**—Nothing in this Act shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) **CLAIMS TO FUNDING UNAFFECTED.**—Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this Act may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) **OTHER AUTHORITY TO IMPOSE CONDITIONS ON FUNDING UNAFFECTED.**—Nothing in this Act shall—

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.

(e) **GOVERNMENTAL DISCRETION IN ALLEVIATING BURDENS ON RELIGIOUS EXERCISE.**—A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) **EFFECT ON OTHER LAW.**—With respect to a claim brought under this Act, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption

that Congress intends that any religious exercise is, or is not, subject to any law other than this Act.

(g) **BROAD CONSTRUCTION.**—This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.

(h) **NO PREEMPTION OR REPEAL.**—Nothing in this Act shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this Act.

(i) **SEVERABILITY.**—If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

42 USC
2000cc-4.

SEC. 6. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the “Establishment Clause”). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. In this section, the term “granting”, used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

SEC. 7. AMENDMENTS TO RELIGIOUS FREEDOM RESTORATION ACT.

(a) **DEFINITIONS.**—Section 5 of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-2) is amended—

(1) in paragraph (1), by striking “a State, or a subdivision of a State” and inserting “or of a covered entity”;

(2) in paragraph (2), by striking “term” and all that follows through “includes” and inserting “term ‘covered entity’ means”; and

(3) in paragraph (4), by striking all after “means” and inserting “religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000.”.

(b) **CONFORMING AMENDMENT.**—Section 6(a) of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-3(a)) is amended by striking “and State”.

42 USC
2000cc-5.

SEC. 8. DEFINITIONS.

In this Act:

(1) **CLAIMANT.**—The term “claimant” means a person raising a claim or defense under this Act.

(2) **DEMONSTRATES.**—The term “demonstrates” means meets the burdens of going forward with the evidence and of persuasion.

(3) **FREE EXERCISE CLAUSE.**—The term “Free Exercise Clause” means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) **GOVERNMENT.**—The term “government”—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 4(b) and 5, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) LAND USE REGULATION.—The term “land use regulation” means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant’s use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) PROGRAM OR ACTIVITY.—The term “program or activity” means all of the operations of any entity as described in paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-4a).

(7) RELIGIOUS EXERCISE.—

(A) IN GENERAL.—The term “religious exercise” includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) RULE.—The 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.

Approved September 22, 2000.

LEGISLATIVE HISTORY—S. 2869:

CONGRESSIONAL RECORD, Vol. 146 (2000):


July 27, considered and passed Senate and House.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 36 (2000):

Sept. 22, Presidential statement.



**CHURCH OF THE HILLS OF THE TOWNSHIP OF
BEDMINSTER
v.
TOWNSHIP OF BEDMINSTER, ET AL**

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2006 U.S. Dist. LEXIS 9488, *

THE CHURCH OF THE HILLS OF THE TOWNSHIP OF BEDMINSTER, et al., Plaintiffs, v. THE TOWNSHIP OF BEDMINSTER, et al., Defendants.

CIVIL NO. 05-3332 (SRC)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2006 U.S. Dist. LEXIS 9488

February 24, 2006, Decided

NOTICE: [*1] NOT FOR PUBLICATION

CORE TERMS: religious, church, land use, religion, zoning variances, variance, congregation, zoning, restrictive means, individualized, free exercise, exemption, religious beliefs, assembly, land-use, state interest, similarly situated, accommodation, zone, government interest, strict scrutiny, favorable, codify, coverage, general applicability, secular purpose, entanglement, accommodate, ordinance, landowner

COUNSEL: For THE CHURCH OF THE HILLS OF BEDMINSTER, NEW JERSEY, PASTOR RONALD MARINARI, ROBERT MARZANO, PAUL GLOVER, DAVID MERCER, CINDY REDMOND, Individually, Plaintiffs: DARREN M. GELBER, WILENTZ, GOLDMAN & SPITZER, PC, WOODBRIDGE, NJ.

For THE TOWNSHIP OF BEDMINSTER, Defendant: HOWARD D. COHEN, PARKER, MCCAY & CRISCUOLO, PA, LAWRENCEVILLE, NJ.

For THE BOARD OF ADJUSTMENT OF THE TOWNSHIP OF BEDMINSTER, Defendant: JOHN M LORE, DEMARCO & LORE ESQS, DUNELLEN, NJ US.

For UNITED STATES OF AMERICA, Intervenor: MICHAEL QUENTEN HYDE, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC US.

JUDGES: Stanley R. Chesler, U.S.D.J.

OPINION BY: Stanley R. Chesler

OPINION**CHESLER, District Judge**

THIS MATTER comes before the Court on a Motion to Dismiss by Defendants Township of Bedminster, New Jersey (the "Township") and The Board of Adjustment of the Township of Bedminster (the "Board") (docket entry # 5). Having considered the papers submitted by the parties, for the reasons set forth below, and for good cause shown, the Court **DENIES IN PART**, and **GRANTS IN PART** the Defendants' Motion.

I. BACKGROUND OF THE CASE

The Plaintiff, the Church of the Hills [*2] (the "Church"), has been in operation at its present location in the Township of Bedminster, New Jersey since 1995. There are currently approximately 500-600 members of the Church, which operates on a lot of 25.2 acres of property. The property contains a residential building as well as the present church building, which occupy approximately 24,000 - 24,500 square feet. ¹ The Church operates numerous ministries on the property, which meet at various times of the week, as well as operates a religious school which holds classes from Monday through Friday, from 8:30 to 3:30 pm.

FOOTNOTES

¹ The actual square footage of the two existing buildings remains in dispute between the parties. The Plaintiffs claim that the two buildings total approximately 24,000 while Defendants claim the two buildings are slightly larger, totaling

24,503 feet.

Originally, the Church held one worship service for its entire congregation. As the congregation expanded, the Church split the services in two. Currently, the Church holds two services each [*3] Sunday, at 8:00 AM and 3:00 PM. The Plaintiffs claim that, as part of the Church's religious beliefs, the entire congregation should attend services together. Due to the space limitations of their current facility, the Church is forced to hold two Sunday services, rather than one, to serve the needs of their congregation. The Plaintiffs' also claim that the earlier Sunday morning service is limited, by the time constraints of having to accommodate two services in a single day, to less than two hours rather than a three to three and a half hour service as mandated by the Church's religious beliefs. Accordingly, the Plaintiffs sought to expand the Church's current facilities in order to allow the entire congregation to attend a single service every Sunday. The Church also sought to expand its facilities to provide a Sunday school for older youths, a religious library, a Christian bookstore, dedicated prayer rooms, a choir room, facilities for religious wedding services, and other facilities to accommodate its various ministries.

The Church's property is currently in an "R-10" zone, which is a residential zone where a church and related accessory buildings are permitted as a conditional [*4] use. The conditional use standard is that the property must abut an arterial road, which the Church's property does, and otherwise meet the same bulk standards applied to houses for floor area ratio ("FAR") and impervious coverage limits. The current Township zoning regulations for R-10 zones are a 3% total FAR, 5% impervious coverage limit, and a 10-acre minimum lot-size requirement. The Church applied for multiple variances from the Township in March 2002. To accommodate their proposed expansion, the Church sought permission to allow a 5.92% FAR and impervious coverage of 16.36%. The Church also sought additional variances for signs, variance for the distance between the church and a gazebo, and a design waiver to locate the parking lot in the front yard. Public hearings were conducted on the Church's variance request, and the Church offered additional reductions to their original site plan request in order to attempt to bring their expansion closer to what is allowable under current Township zoning regulations.² Even with these reductions, the Church would have required 50 acres of property to comply with the Township FAR limits without seeking a variance, and 100 acres to comply [*5] with the Township's lot coverage restrictions.

FOOTNOTES

² The Plaintiffs note that their current plan has been "considerably reduced" from what they originally sought, including the elimination of certain outdoor facilities, decreasing the size of the parking lot (from 450 to 300 spaces), lowering a steeple that required a height variance, and reducing the proposed building size by 15,000 square feet (from the 50,000 originally requested). (Pl. Br. at 4.)

The Board denied the Church's application on May 18, 2005. The resolution denying the variance request cites numerous reasons for the denial, including increased traffic, light, and noise pollution, a negative impact on the visual landscape of the Township, the proposed size of the Church's structures was out of proportion with the neighborhood, and the proposed expansion's adverse impacts on aquifer and surface water quality due to impervious coverage. The Board stated that "the approval of this application with a facility of its magnitude would essentially change [*6] the entire character of the neighborhood from an essentially rural, quiet neighborhood to one of an entirely different character . . . not envisioned by either the Master Plan or the zoning ordinance." (Def. Br. at 4 - 5.) The Church claims that this denial "has substantially burdened its religious exercise by preventing it from worshiping together as one congregation, participating in necessary ministries, and being accessible to its congregation." (Pl. Br. at 5.)

On July 1, 2005, the Plaintiffs brought the current Complaint against the Township and the Board, alleging violations of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc et. seq. (the "**RLUIPA**"), the First and Fourteenth Amendments of the United States Constitution pursuant to 42 U.S.C. § 1983, as well as various state law claims including similar constitutional issues under the New Jersey State Constitution, state zoning law principles, and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12.2 ("**NJLAD**"). On October 11, 2005, the Defendants filed the current motion to dismiss the Plaintiff's action [*7] for failure to state a claim under the **RLUIPA** and the First and Fourteenth Amendments to the United States Constitution. The Defendants also argue, in the alternative, that Plaintiffs' **RLUIPA** claims should be dismissed on the grounds that the land use provisions of the **RLUIPA** are unconstitutional. While the Defendants do not challenge the Plaintiffs' state law claims in the current motion, they argue that, if the Court dismisses the Plaintiffs' federal claims, the Court should dismiss the Plaintiffs' remaining state claims for lack of subject matter jurisdiction. For the reasons stated below, the Defendant's motion is **DENIED IN PART, GRANTED IN PART**.

II. STANDARD OF REVIEW

In deciding a motion to dismiss under FED. R. CIV. PRO. 12(b)(6) all allegations in the Complaint must be taken as true and viewed in the light most favorable to the Plaintiff. See Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975); Trump Hotels & Casino Resorts, Inc., v. Mirage Resorts Inc., 140 F.3d 478, 483 (3d Cir. 1998); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). In evaluating a Rule 12(b)(6) motion to [*8] dismiss for failure to state a claim, a court may consider only the Complaint, exhibits attached to the complaint, matters of public record, and undisputedly authentic documents if the Plaintiff's claims are based upon those documents. See Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993). If, after viewing the allegations in the Complaint in the light most favorable to the Plaintiff, it appears beyond doubt that no relief could be granted "under any set of facts which could prove consistent with the allegations," a court shall dismiss a Complaint for failure to state a claim. Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984); Zynn v. O'Donnell, 688 F.2d 940, 941 (3d Cir.

1982).

III. DISCUSSION

The Plaintiffs' federal claims in this case are based on alleged violations of the **RLUIPA** statute and Title 42 U.S.C. § 1983. Section 1983 provides civil remedies against any person who, under color of state law, deprives another of rights protected by the United States Constitution. See Collins v. City of Harker Heights, 503 U.S. 115, 120, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992). Section [*9] 1983 does not, by itself, confer any substantive rights, but rather serves as a vehicle to enforce rights granted under the Constitution or federal law. Baker v. McCollan, 443 U.S. 137, 144 n.3, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979). Accordingly, to state a claim under § 1983, a plaintiff must "prove a violation of the underlying constitutional right." Daniels v. Williams, 474 U.S. 327, 330, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). The Plaintiffs claim that the Township's denial of their zoning variances violated their constitutional protections for religious exercise afforded under the First Amendment of the United States Constitution (made applicable to the states under the Fourteenth Amendment), as well as violated their rights to Due Process and Equal Protection under the Fourteenth Amendment.

A. The Factual Record in This Case is Not Sufficiently Developed to Support Dismissal of Plaintiffs' Claims for Failure to State a Claim Under RLUIPA or the First Amendment.

The **RLUIPA**, 42 U.S.C. § 2000cc et seq., was passed largely in response to the Supreme Court's partial invalidation of the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2000bb-4 [*10], in City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). The section of the **RLUIPA** relating to land use regulations establishes a "general rule" that:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly or institution

- (A) is in furtherance of a compelling government interest; and
- (B) is the least restrictive means of furthering that compelling government interest.

42 U.S.C. § 2000cc(a)(1). This "general rule" is carefully circumscribed to apply only to cases in which:

- (A) the substantial burden is imposed on a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
- (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or
- (C) the **[*11]** substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

42 U.S.C. § 2000cc(a)(2). Where applicable, the statute imposes three requirements for local land use regulations to prevent discrimination against or exclusion of religious uses:

- (1) Equal terms - No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.
 - (2) Nondiscrimination - No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.
 - (3) Exclusions and limits - No government shall impose or implement a land use regulation that:
 - (A) totally excludes religious assemblies from a jurisdiction; or
 - (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.
- [*12]**

42 U.S.C. § 2000cc(b).

The denial of the requested zoning variances at issue in this case invoke the same form of strict scrutiny under the First Amendment as mandated by the **RLUIPA** statute. Like the **RLUIPA** statute, to sustain the Plaintiffs' Free Exercise claim under the First Amendment, the Plaintiffs must demonstrate that the Township's actions impose a substantial burden on the Church's religious conduct. See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 361

(3d Cir. 1999 (noting that the Free Exercise Clause of the First Amendment offers "religious exemptions from neutral, generally applicable laws that have the incidental effect of substantially burdening religious conduct.") (citing Wisconsin v. Yoder, 406 U.S. 205, 220, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972)). Also like the application of the **RLUIPA** statute, Free Exercise jurisprudence requires the Court to apply strict scrutiny to the Township's denial of the Plaintiffs' zoning variances. The issuance of zoning variances, like those at issue in this case, are part of a process of "individualized exemptions" from general zoning laws. Freedom Baptist Church of Delaware County v. Township of Middletown, 204 F.Supp.2d 857, 868 (E.D.Pa. 2002). [*13] Under the First Amendment's Free Exercise protections, religious justifications for such an exemption cannot be denied unless the Township can demonstrate a compelling state interest for the denial and that the denial represents the least restrictive means available to further that interest. Sherbert v. Verner, 374 U.S. 398, 406, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963). See also Fraternal Order of Police, 170 F.3d at 366 (3d Cir. 1999).

The Defendants seek dismissal of the Plaintiffs' claims under the First Amendment and the **RLUIPA**, arguing that the Township's denial of the requested zoning variances did not substantially burden the Plaintiffs' religious exercise and, therefore, neither the First Amendment nor **RLUIPA** are implicated by the Township's actions. The Defendants also argue that the denial of these variances furthered a compelling government interest and was the least restrictive means of furthering that interest, thereby complying with the requirements of both the **RLUIPA** and the First Amendment.

1. The Plaintiffs' Complaint Sufficiently States a Claim That the Township's Actions Impose a Substantial Burden on Their Religious Activities.

Like the requirements for [*14] a Free Exercise claim under the First Amendment, in order for the **RLUIPA** to apply to the Plaintiffs' claims, they must first demonstrate that the Township's denial of their zoning variances imposes a "substantial burden on their religious exercise." 42 U.S.C. § 2000cc(a)(1) (emphasis added). Once the Plaintiffs demonstrate the existence of a substantial burden on the exercise of their religious beliefs, the **RLUIPA** then shifts the burden to the Township to show that the challenged action furthers a compelling state interest by the least restrictive means. The Plaintiffs claim that by denying their requested variances and preventing the Church's desired expansion, the Township "has substantially burdened its religious exercise by preventing it from worshipping together as one congregation, participating in necessary ministries, and being accessible to its congregation." (Pl. Br. at 5.) The Defendants argue that the denial of these zoning variances do not constitute "a substantial burden on their religious exercise" and, therefore, the Court should dismiss the Plaintiffs' claims under the **RLUIPA** and the First Amendment. (Def. Br. at 43.)

The need for religious [*15] institutions to have the ability to develop "a physical space adequate to their needs and consistent with their theological requirements" is at the heart of the **RLUIPA's** land-use provisions. 146 CONG. REC. S7774-01, 7774 (daily ed. July 27, 2000) (Joint Statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000). This was further recognized in the statutory language of the **RLUIPA** which defines religious exercise as:

(7) Religious exercise.

(A) In general. - The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule. - The 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.

Although the text of the statute contains no similar express definition of the term "substantial burden," the **RLUIPA's** legislative history indicates that it is to be interpreted by reference to RFRA and First Amendment jurisprudence. See 146 [*16] CONG. REC. 7774-01, 7776 (daily ed. July 27, 2000) ("The term 'substantial burden' as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise"). "Substantial burden" has been defined or explained in various ways by the courts. See, e.g., Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707, 718, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981) (exists where state "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs"); Sherbert, 374 U.S. at 404 (occurs when a person is required to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning the precepts of her religion . . . on the other"); Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir.1995) (state action "prevent[s] him or her from engaging in conduct or having a religious experience that is central to the religious doctrine"); Muslim v. Frame, 897 F.Supp. 215, 218 (E.D.Pa. 1995) (same) (citing Bryant, 46 F.3d at 949).

While specific definitions may vary, it is well established [*17] that a "'substantial burden' must place more than an inconvenience on religious exercise," Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004), and must have more of an impact than "'making the practice of [the individual's] religious beliefs more expensive.'" Stuart Circle Parish v. Board of Zoning Appeals of Richmond, 946 F.Supp. 1225, 1237 (E.D.Va.1996) (quoting Braunfeld v. Brown, 366 U.S. 599, 605, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961) (plurality opinion)). The Defendants claim that the Plaintiffs' inability to worship as an entire congregation in their current facility does not constitute a "substantial burden" on their religious conduct. (Def. Br. at 40.) The limited Record before the Court, however, leaves the Court unable to render a decision at this early stage of the case that, as a matter of law, the denial of the zoning variances at issue in this

case constitute either a mere "inconvenience and expense" to the Church, as the Defendants allege (Def. Br. at 43), or a "substantial burden" on the Church's religious conduct, as required for the Plaintiffs' First Amendment and **RLUIPA** claims. Accordingly, taking all allegations [***18**] in the Complaint as true and viewing them in the light most favorable to the Plaintiffs as required for deciding a motion to dismiss under FED. R. CIV. PRO. 12(b)(6), the Court cannot agree with the Defendants' assertion that "the 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." (Def. Br. at 40.) The Defendants' motion to dismiss the Plaintiffs' claims on these grounds, therefore, is denied.

2. The Plaintiffs' Complaint Sufficiently States a Claim That the Township's Denial of Their Request for Zoning Variances Was Not the Least Restrictive Means for the Township to Further Their Compelling Government Interests.

The Defendants also allege that, should the Court find that the Plaintiffs' beliefs were substantially burdened, that the Township's decision to deny the Church's requested variances complied with the requirements of the **RLUIPA** and the First Amendment because the denials were "the least restrictive means of furthering a compelling government interest." (Def. Br. at 45.) For the reasons noted above, however, the Court [***19**] finds the Record at this early stage of the case is insufficiently developed to offer support for the Defendants' assertion that, as a matter of law, "that 'the status quo is already the least restrictive' means." (Def. Br. at 46.) Accordingly, taking all allegations in the Complaint as true and viewing them in the light most favorable to the Plaintiffs under FED. R. CIV. PRO. 12(b)(6), the Defendants' motion to dismiss the Plaintiffs' claims on these grounds is also denied.

B. The RLUIPA, as Applied in the Present Case, is Constitutional.

The Defendants claim, in the alternative, that the Plaintiffs' **RLUIPA** claims should be dismissed on the grounds that the **RLUIPA's** land use provisions are unconstitutional because they go beyond Congress' enforcement powers under the Fourteenth Amendment, exceed Congress' power under the Commerce Clause, violate the doctrine of separation of powers, the 10th Amendment, and the Establishment Clause of the First Amendment.

1. The RLUIPA's Land Use Provisions Do not Exceed Congress' Power Under the Fourteenth Amendment.

Section 1 of the Fourteenth Amendment prohibits the States from "depriving [***20**] any person of life, liberty, or property without due process of law," or from "denying to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Pursuant to Section 5 of the Fourteenth Amendment, Congress may "enforce, by appropriate legislation, the provisions of this article." ³ Id. at § 5. Under this grant of statutory authority, Congress enacted the **RLUIPA** in order to codify and secure the protections of the First Amendment's rights to free exercise of religion as applied to the states by the Fourteenth Amendment. See 146 CONG. REC. S7774-01, 7775 (daily ed. July 27, 2000) ("Each subsection [of the **RLUIPA**] closely tracks the legal standards in one or more Supreme Court opinions, codifying those standards for greater visibility and easier enforceability."), H.R.REP. NO. 106-219, at 12-13.

FOOTNOTES

³ Congress may also prohibit a "somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," so long as such "prophylactic" legislation is "congruent" and "proportional" to the injury to be prevented or remedied. Kimel v. Florida Bd. of Regents, 528 U.S. 62, 81, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000) (citing City of Boerne v. Flores, 521 U.S. 507, 518, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997)). To the extent that, conceivably, the **RLUIPA** may cover a particular case that reaches beyond the scope of well-established constitutional guarantees protected by Section 1 of the Fourteenth Amendment, the Court finds it worth noting that the **RLUIPA's** land use provisions constitute the kind of congruent and proportional remedy that Congress is empowered to adopt under Section 5 of the Fourteenth Amendment which allows Congress to put forth legislation that exceeds the scope of those already established constitutional guarantees and prohibitions to remedy violations of constitutional rights. See City of Boerne, 521 U.S. at 520. The legislative record of the **RLUIPA** amply supports the notion that zoning laws are often applied in a manner that is hostile to the free exercise of religion. See 146 CONG. REC. S7774-01, 7775 (daily ed. July 27, 2000) (outlining the testimony in the record demonstrating zoning discrimination against religious uses). These findings have similarly been echoed in a number of cases before the courts. See, e.g., Family Christian Fellowship v. County of Winnebago, 151 Ill. App. 3d 616, 503 N.E.2d 367, 104 Ill. Dec. 810 (Ill.App.1986) (city's refusal to permit church use of existing buildings was arbitrary and capricious); Islamic Center of Mississippi, Inc. v. City of Starkville, 840 F.2d 293 (5th Cir.1988) (city denied a Muslim organization a special use permit three times while granting such permits to every Christian church that had applied); Marks v. City of Chesapeake, 883 F.2d 308, 309-10 (4th Cir.1989) (city, acting "arbitrarily and capriciously," refused to grant a use permit because neighbors disapproved of the religious practices of the applicant). The Court is satisfied that the limited protections offered by the **RLUIPA's** land use provisions are a congruent and proportional measure in addressing the type of widespread constitutional violations documented in the statute's legislative history, enabling these provisions to fall squarely within Congress' Fourteenth Amendment powers.

[***21**] The relevant application of the **RLUIPA** to the current case, § 2(a)(2)(C), applies only to situations where individualized assessments by government officials are made in land-use matters. 42 U.S.C. § 2000cc(a)(2)(C). While the Free Exercise Clause does not relieve a person of their obligations to comply with a neutral, generally applicable law, "subtle departures from neutrality" and "covert suppression of particular religious beliefs" are forbidden. Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 534, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (internal quotation marks and citations omitted). ⁴ Zoning regulation, like the ones at issue in this case, impose individual assessment regimes. See Freedom Baptist, 204 F.Supp.2d at 868. The process of granting zoning variances requires a case-by-case

evaluation of the proposed activity against the prevailing land use regulations. This makes them, by necessity, "different from laws of general applicability which do not admit to exceptions on Free Exercise grounds." *Id.* (citing Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 890, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)).

FOOTNOTES

⁴ As the Supreme Court noted in *Bowen v. Roy*, "if a state creates such a mechanism [for individualized exceptions], its refusal to extend an exemption to an instance of religious hardship suggests a discriminating intent." *Bowen v. Roy*, 476 U.S. 693, 708, 106 S. Ct. 2147, 90 L. Ed. 2d 735 (1986).

[*22] Applying the heightened level of scrutiny imposed by the **RLUIPA's** general rule, as established in Section (a)(1), to these types of individualized assessments merely codifies the jurisprudence in Free Exercise cases that originated with the Supreme Court's decision in *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963). Under *Sherbert*, where a statute permits "individualized exemptions" based on "good cause," the state cannot refuse to accept religious reasons as "good cause" absent a compelling state interest that permits such denials by the least restrictive means available. *Id.* at 406. To do otherwise would "effectively penalize the free exercise of [a person's] constitutional liberties." *Id.* See also *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 141, 107 S. Ct. 1046, 94 L. Ed. 2d 190 (1987) (reaffirming that strict scrutiny remains the standard of review in an unemployment case involving religious a applicant); *Thomas*, 450 U.S. at 718 ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); *Church of the Lukumi Babalu Aye*, 508 U.S. at 537 **[*23]** (where individualized exemptions from a general requirement are available, the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason"). This understanding of religious exception jurisprudence has also been applied in Third Circuit precedent as well, which holds that "a law must satisfy strict scrutiny if it permits individualized, discretionary exemptions because such a regime creates the opportunity for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct." *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (citing *Church of the Lukumi Babalu Aye*, 508 U.S. at 537, *Smith*, 494 U.S. at 884, and *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 364-65). See also *Fraternal Order of Police*, 170 F.3d at 366 (3d Cir. 1999) (holding where individualized exemptions indicate that government has made "a value judgment" secular reasons deserve exemptions which overcome the government's general interests, but religious reasons do not, "the government's actions must survive **[*24]** heightened scrutiny"). Because the provisions of the **RLUIPA's** Section (a)(1) "faithfully codifies the 'individual assessments' jurisprudence in the *Sherbert* through *Lukumi* line of cases [as well as the current jurisprudence of the Third Circuit,] it is therefore not constitutionally exceptional." *Freedom Baptist Church*, 204 F.Supp.2d at 869. See also *United States v. Maui County*, 298 F.Supp.2d 1010, 1016 (D.Hawai'i, 2003) ("If, as the Court finds here, [the] **RLUIPA** codified existing precedent regarding when to apply the strict scrutiny test (i.e., if a generally applicable and neutral law also contains exceptions based upon 'individual assessments' which can be used in a pretextual manner-as is the special use permit process) then it is Constitutional.").

2. The **RLUIPA's** Land Use Provisions Do not Exceed Congress' Power Under the Commerce Clause.

Congress identified its authority under the Spending Clause of Article I, § 8 as its first source of power to adopt the **RLUIPA**. 146 CONG. REC. S7774-01, 7774 (daily ed. July 27, 2000) ("[The **RLUIPA**] applies only to the extent that Congress has power to regulate under the Commerce Clause, **[*25]** the Spending Clause, or Section 5 of the Fourteenth Amendment"). The Defendants contend that Congress exceeded its authority when it adopted the **RLUIPA** because it "regulates that which is not economic in nature, and therefore cannot be valid legislation under the Commerce Clause." (Def. Br. at 23.) The jurisdictional 'hook' under which the **RLUIPA** would be applied under the Commerce Clause, is provided by subsection (a)(2)(B), which limits the application of the **RLUIPA** to cases where:

the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability.

42 U.S.C. § 2000cc(a)(2)(B). The application of this jurisdictional element, by definition, prevents the **RLUIPA** from exceeding the bounds of Congress' power under the Commerce Clause. If, as the Defendants argue, the Court finds that the regulations at issue "do[] not regulate that which is economic" (Def. Br. at 24), then this subsection of the **RLUIPA** would not apply. If, however, the Court finds that the regulations at issue do affect **[*26]** interstate commerce, then this subsection of the **RLUIPA** would apply as a valid exercise under the Commerce Clause. In either case, the application of the **RLUIPA** under subsection 2(a)(2)(B) would not overstep the limits of Congress' powers under the Commerce Clause. See *Freedom Baptist Church*, 204 F.Supp.2d at 867-68 ("Insofar as state or local authorities 'substantially burden' the economic activity of religious organizations, Congress has ample authority to act under the Commerce Clause"); *Hale O Kaula Church v. Maui Planning Com'n*, 229 F.Supp.2d 1056, 1071-72 (D.Hawai'i 2002) (concluding that the jurisdictional qualification of the **RLUIPA** § 2(a)(2)(B) precludes Commerce Clause challenges).

3. The **RLUIPA's** Land Use Provisions Do Not Violate the Doctrine of Separation of Powers or the Tenth Amendment.

The Defendants further challenge the validity of the **RLUIPA's** land use provisions by claiming that, by "unilaterally deciding that neutral, generally applicable land use laws should be subject to a judicial standard of review, strict scrutiny, as opposed to the rationality review demanded by the Free Exercise Clause . . . [Congress] dramatically **[*27]** and unilaterally altered free exercise rights, and therefore stepped into the judiciary's domain." (Def. Br. at 28.) The Defendants further claim that the **RLUIPA** violates the "Constitution's inherent limits of federalism" by interfering with

"an arena that naturally and traditionally has belonged to local control-land use." (Def. Br. at 31.)

It has been long established that ultimate authority to interpret the Constitution resides in the Judicial Branch. Marbury v. Madison, 5 U.S. 137, 177, 2 L. Ed. 60 (1803). Under the doctrine of separation of powers, the Executive and Legislative Branches are precluded from reviewing and revising specific judgments of the Judiciary Branch. Miller v. French, 530 U.S. 327, 342, 120 S. Ct. 2246, 147 L. Ed. 2d 326 (2000) (noting that the Constitution gives federal courts "'the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy.'" (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995)) (emphasis in original).

While the **RLUIPA** was passed largely in response to the Supreme Court's partial invalidation the **RLUIPA's** predecessor, the RIFRA, in City of Boerne, [***28**] it does not revise or reviewing a specific ruling of the Supreme Court. As noted above, the application of the **RLUIPA** at issue in this case merely codifies existing "individual assessment" jurisprudence as established by the Supreme Court and as interpreted by additional precedent within this Circuit. Because the **RLUIPA** acts to codify firmly-established rights, it does not attempt to legislate the type of "substantive change in constitutional protections" that was deemed invalid by the Court in City of Boerne and does not represent an improper infringement of Congress into the sphere of judicial power. City of Boerne, 521 U.S. at 509.

The relevant inquiry, moreover, should focus on whether or not Congress acted within the scope of its constitutional authority. In the case of the **RLUIPA**, as applied in this case, this Court is satisfied that it has. Because Congress acted within their constitutional authority in enacting the **RLUIPA** § 2(a)(1), as limited in this case by §§ 2(a)(2)(B) and 2(a)(2)(C), the Defendants claims that the statute is invalid under the Tenth Amendment and general notions of federalism cannot be sustained. "[The] **RLUIPA** does not require [***29**] State or local governments to legislate on behalf of the federal government, or require State officials to administer any federal program. Land use regulation is left to the States and local governments under [the] **RLUIPA**; they are simply prohibited from imposing substantial burdens on religious exercise in the process." Castle Hills First Baptist Church v. City of Castle Hills, 2004 U.S. Dist. LEXIS 4669, 2004 WL 546792, *19 (W.D.Tex. March 17, 2004) (quoting Life Teen, Inc. v. Yavapai County, 2003 U.S. Dist. LEXIS 24363 (D.Ariz. March 26, 2003) (citations omitted)).

4. The **RLUIPA's** Land Use Provisions Do Not Violate the First Amendment's Establishment Clause.

Under the Establishment Clause of the First Amendment, "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. The Congress, however, is not required to be "oblivious to impositions that legitimate exercises of state power may place on religious belief and practice." Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 705, 114 S. Ct. 2481, 129 L. Ed. 2d 546 (1994). Government may, and sometimes must, "accommodate religious practices and . . . may do so without violating [***30**] the Establishment Clause." Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987).

The current test for statutes offering religious accommodations was established by the Supreme Court in Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). To pass scrutiny under the Lemon test, "the statute must have a secular legislative purpose, . . . its principal or primary effect must be one that neither advances nor inhibits religion, . . . [and] the statute must not foster 'an excessive government entanglement with religion.'" Lemon, 403 U.S. at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970)). The Defendants, in their brief, contend that the land-use provisions of the **RLUIPA** "violate[] the principles set forth in Lemon v. Kurtzman" and fail "all three prongs of its test." (Def. Br. at 32.) Numerous other courts that have evaluated this issue have expressly held that the land use provisions of the **RLUIPA** do not violate the three-pronged Lemon test. See, e.g., Midrash, 366 F.3d at 1241 (finding the **RLUIPA's** land use provisions [***31**] not to violate the Establishment Clause under the Lemon test); Mayweathers v. Newland, 314 F.3d 1062, 1069 (9th Cir. 2002) ("Because [the] **RLUIPA** has a secular legislative purpose, its primary effect is neither to advance nor inhibit religion, and it does not foster excessive government entanglement with religion, [the] **RLUIPA** does not violate the Establishment Clause."); Congregation Kol Ami v. Abington Township, 2004 U.S. Dist. LEXIS 16397, 2004 WL 1837037, *13 (E.D.Pa. August 17, 2004) (finding, "in accordance with the majority of courts," that the **RLUIPA's** land use provisions pass the Lemon test); Castle Hills, 2004 WL 546792 at *18 (same). For the reasons noted below, this Court concurs with the weight of authority cited above that **RLUIPA** must survive the Defendants' Establishment Clause challenge. Accordingly, the Defendant's motion to dismiss the Plaintiffs' claims on these grounds is denied.

a. The **RLUIPA** has a secular purpose under Lemon.

Although the **RLUIPA** is an accommodation statute that singles out religious practices, the statute nonetheless has a secular purpose as defined in Lemon. The Lemon test's requirement that [***32**] a law have a secular purpose "does not mean that the law's purpose must be unrelated to religion--that would amount to a requirement 'that the government show a callous indifference to religious groups,'" Amos, 483 U.S. at 335 (quoting Zorach v. Clauson, 343 U.S. 306, 314, 72 S. Ct. 679, 96 L. Ed. 954 (1952)). The secular purpose requirement of Lemon is to prevent governmental decision makers "from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." Id. Like the **RLUIPA's** institutionalized-persons provisions, the **RLUIPA's** land use provisions are designed to "alleviate[] exceptional government-created burdens on private religious exercise." Cutter v. Wilkinson, 125 S.Ct. 2113, 2118 n. 3, 544 U.S. 709, 161 L. Ed. 2d 1020. Such statutes are expressly permitted under the first prong of the Lemon test. Id.

b. The **RLUIPA's** principal or primary effect neither advances nor inhibits religion under Lemon.

The Defendants argue that the **RLUIPA's** land-use provisions fail the second-prong of the Lemon test because they "give religious landowners special rights against the laws that make communities work, regardless of any showing of animus [*33] or hostility." (Def. Br. at 32.) As the Supreme Court noted, however, "religious accommodations . . . need not 'come packaged with benefits to secular entities.'" Cutter, 125 S.Ct. at 2123 (quoting Amos, 483 U.S. at 338). To accept the Defendants' view that the land-use provisions of the **RLUIPA** violate the Establishment Clause because it confers special accommodations to religious landowners would require "all manner of religious accommodations [to] fall." Id. See also Amos, 483 U.S. at 338 ("[The Court] has never indicated that statutes that give special consideration to religious groups are *per se* invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause"). "The **RLUIPA**, by its own terms, has done nothing to actively advance religion. All it has done is advance the ability of people to engage in the free exercise of their religious beliefs without unnecessary government burdens. This fact does not make it unconstitutional." Congregation Ko! Ami, 2004 WL 1837037 at *14.

c. The **RLUIPA** Does Not Create Excessive Government [*34] Entanglement With Religion.

The Defendants claim that the **RLUIPA's** land use provisions fail the third prong of Lemon "because there is now necessary entanglement, including possible litigation, every time a state or local government seeks to apply a content-neutral, generally applicable land use law to a religious landowner." (Def. Br. at 33.) Statutes, like the **RLUIPA**, that limit government interference with religious exercise do not, however, entangle government and religion, but rather "effectuate a more complete separation of church and state." Williams v. Bitner, 285 F.Supp.2d 593, 601 (M.D.Pa. 2003) (citing Amos, 483 U.S. at 335). Furthermore, as noted above, the type of considerations mandated of government entities under the **RLUIPA** statute in considering whether to grant zoning variances to religious landowners are no more than is required under current First Amendment jurisprudence. Accordingly, the **RLUIPA's** land-use provisions at issue in this case are constitutionally permissible under the third prong of the Lemon test as well.

C. The Plaintiffs' Complaint Fails to State a Violation of Due Process Under the Fourteenth [*35] Amendment.

Count VI of the Plaintiffs' Complaint alleges that the Township deprived the Church of "due process of law, as secured by the Fourteenth Amendment . . . by denying Plaintiffs use of their property based on an irrational, unreasonable and discriminatory motivation, and by applying vague statutes, ordinances and regulations against them." (Compl. at 40, P164.) The Plaintiffs' Complaint, however, does not specify whether they are claiming a violation of their substantive or procedural due process rights.

To sustain a claim for deprivation of procedural due process would require the Plaintiffs to demonstrate the deprivation of a property interest that was not "preceded by notice and opportunity for hearing appropriate to the nature of the case." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542; 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950)). The Plaintiffs do not contend that the application and approval process for securing a zoning variance from the Township was deficient to meet this standard for procedural due process protections. In their Complaint, the Plaintiffs note that they were engaged [*36] in public hearings on the zoning variances for "over two and one-half years," inferring that the Township afforded in too much, rather than too little, opportunity to be heard on these variances. ⁵ (Compl. at 16, P68.) The Court, therefore, finds that Plaintiffs' Complaint does not sufficiently allege a violation of their procedural due process rights.

FOOTNOTES

⁵ The Plaintiffs cite to twenty four public hearings held on their zoning application between September 18, 2000 and August 25, 2004. (Compl. at 20, P82.)

Absent a procedural due process violation, the Court must examine to see whether the Complaint sufficiently alleges a violation of the Plaintiffs' substantive due process rights. The threshold for a substantive due process violation, however, is quite high. "The substantive component of the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" United Artists Theatre Circuit, Inc. v. Township of Warrington, PA, 316 F.3d 392, 399 (3d Cir. 2003) [*37] (quoting County of Sacramento v. Lewis, 523 U.S. 833, 847, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)) (emphasis in original). See also Fagan v. City of Vineland, 22 F.3d 1296, 1303 (3d Cir. 1994) (en banc) ("The substantive component of the Due Process Clause can only be violated by governmental employees when their conduct amounts to an abuse of official power that 'shocks the conscience.'). The crux of the Plaintiffs' complaint is that they received an adverse ruling from the Township regarding their requests for zoning variances. Every appeal from an adverse ruling of a local planning board involves some form of claim that the planning board abused its legal authority. This is not the type of behavior, however, that meets the high threshold for a substantive due process violation. As the Third Circuit cautioned, "land-use decisions are matters of local concern, and such disputes should not be transformed into substantive due process claims based only on allegations that government officials acted with 'improper' motives." United Artists, 316 F.3d at 402. Accordingly, the Defendants' motion to dismiss Count VI of the Plaintiffs' Complaint is granted.

[*38] D. The Plaintiffs' Complaint Sufficiently States a Violation of Equal Protection Under the Fourteenth Amendment.

In Count V of their Complaint, the Plaintiffs allege that the Township violated their rights to equal protection under the Fourteenth Amendment by "discriminating against Plaintiffs in their application" for zoning variances. (Compl. at 39 - 40,

P162.) To establish an equal protection claim, the Plaintiffs must establish that they were treated differently from other similarly situated persons who were granted similar variances in a similarly zoned parcel of land. See Cleburne v. Cleburne Living Center, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). See also Congregation Kol Ami v. Abington Township, 309 F.3d 120, 137 (3d Cir. 2002) ("The first inquiry a court must make in an equal protection challenge to a zoning ordinance is to examine whether the complaining party is similarly situated to other uses that are either permitted as of right, or by special permit, in a certain zone."). If the Plaintiffs demonstrate that they have been treated differently from another similarly situated use, then the Township must justify its actions by showing that the differing [*39] treatment is rationally related to a legitimate state interest. Id. See also Cleburne, 473 U.S. at 440; The Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 406 F.Supp.2d 507, 523 (D.N.J. 2005) ("If two similarly situated uses are treated differently, a land use ordinance will be deemed irrational if the stated interest asserted to justify the different treatment is either illegitimate (an ends focus) or the classification is not rationally related to the interest (a means focus).").

The Plaintiffs' Complaint alleges that the Township has granted zoning variances to other churches located in R-10 zones within the town. (Compl. at 13, P54.) Consistent with the standard for reviewing a motion to dismiss under FED. R. CIV. PRO. 12(b)(6), the Court must view this allegation as true and view in the light most favorable to the Plaintiffs. Accordingly, the Court finds that the Plaintiffs have sufficiently alleged that other similarly situated uses within the Township's R-10 zones were granted variances similar to the ones sought by the Church in the present case. This places the burden on the Township [*40] to either refute the allegation or to demonstrate why the denial of the Church's variances, as opposed to any given to similarly situated churches, were rationally related to a legitimate state interest. The Record at this stage of the case, however, is insufficient for the Township to properly do either. Accordingly, the Defendants motion to dismiss Count V of the Plaintiffs' Complaint is denied.

III. CONCLUSION

For the reasons stated above, and for good cause shown, the Court **DENIES IN PART AND GRANTS IN PART** the Defendants' Motion to Dismiss. An appropriate form of order will be filed herewith.

Date: February 24, 2006

Stanley R. Chesler, U.S.D.J.

ORDER


This matter having come before the Court on a Motion to Dismiss by Defendant the Township of Bedminster, and the Court having considered the submissions of the parties, without oral argument pursuant to L. CIV. R. 9.1; and for the reasons expressed in the opinion filed herewith; and for good cause shown;

IT IS THIS 24th day of February 2006

ORDERED that Defendant's motion (docket entry # 5) is hereby is **DENIED IN PART, GRANTED IN PART**; and it is further

ORDERED that Count VI of [*41] the Plaintiffs' Complaint (docket # 1) is **DISMISSED**.

Stanley R. Chesler, U.S.D.J.







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**CONGREGATION ANSHEI ROOSEVELT AND
CONGREGATION YESHIVAS ME'ON HATORAH
v.
PLANNING AND ZONING BOARD OF THE BOROUGH OF
ROOSEVELT, ET AL**

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CONGREGATION ANSHEI ROOSEVELT :
and CONGREGATION YESHIVAS ME'ON :
HATORAH, :

Plaintiffs :

v. :

Civ. No. 07-4109 (GEB)

MEMORANDUM OPINION

PLANNING AND ZONING BOARD OF :
THE BOROUGH OF ROOSEVELT, :
MAYOR AND COUNCIL OF THE :
BOROUGH OF ROOSEVELT, BOROUGH :
OF ROOSEVELT, ROOSEVELT :
PRESERVATION ASSOCIATION, LLC, :
JEFFREY ELLENTUCK, PEGGY :
MALKIN, STEVEN YEGER, JANE :
ROTHFUSS, ALLISON PETRILLA, and :
JAMES ALT, :

Defendants. :

BROWN, C.J.

This matter comes before the Court upon two motions to dismiss the complaint of Congregation Anshei Roosevelt (“the Synagogue”) and Congregation Yeshivas Me’ On Hatorah (“the Yeshiva”) (collectively “Plaintiffs”). One of these motions was filed by defendants Borough of Roosevelt, the mayor of Roosevelt, the Council of the Borough of Roosevelt, the Planning and Zoning Board of the Borough of Roosevelt, and Planning Board members Steven Yeger, Jane Rothfuss, Allison Petrilla, and James Alt (collectively, “Defendants.”) The other motion to dismiss was filed by defendants Jeff Ellentuck and Peggy Malkin. Plaintiffs have also filed cross-motions for summary judgment. On July 21, 2008, this Court heard oral argument. For the reasons set forth below and on the record during oral argument, the Court will grant both

motions to dismiss.

I. BACKGROUND

The Borough of Roosevelt (“Roosevelt”), originally known as Jersey Homesteads was founded in 1936, under the auspices of the Federal Government, as an agricultural and industrial cooperative community for Jewish farmers and garment workers. (Compl. at ¶ 13.) The establishment of the town was one of President Roosevelt’s endeavors to combat the economic hardships of the great depression. (*Id.* at ¶ 14.) Roosevelt is designated on both the state and national registers for historic places. The once predominantly Jewish town, remains the only municipality in the state and perhaps the country that has a synagogue as its only house of worship. (*Id.* at ¶ 15.) It was submitted at oral argument that the Borough is 1.95 square miles with a population of approximately 900 residents.

The property where the Synagogue is located is in the Borough’s R-40, Residential District, located at 18 Homestead Lane in the Borough. (Compl. at ¶ 16.) Plaintiffs maintain that the building that houses Congregation Anshei Roosevelt was constructed in or around 1955. (*Id.* at ¶ 17.) At the time the synagogue was constructed, no zoning ordinances were in effect. (Plaint. Opp. at 3.) However, on May 23, 1979, the Borough adopted Ordinance No. 97, which allowed for public schools in the RA-40 Zone as a principal permitted use and allowed houses of worship as conditional uses. (Compl. at ¶ 18.) Pursuant to this ordinance, three conditions were required for a house of worship to be constructed in the RA-40 Zone: “(i) [a] two acre minimum lot size, (ii) a minimum parking standard, (iii) and maximum building coverage. (Compl. at ¶ 19.) It was determined at a hearing before the Zoning Board that the synagogue lot size is 1.8757 acres (i.e. less than the two acre minimum) and that the synagogue does not meet the parking

requirements of the current zoning regulation.

In the face of declining membership and increasing difficulty in paying for rabbinical services, the leaders of the Synagogue congregation entered into a lease agreement with the Yeshiva,¹ whereby, in exchange for providing rabbinical services to the Congregation, the Yeshiva would be permitted to conduct religious and secular studies on the property. (Compl. at ¶ 21). One condition of the agreement between the synagogue and the Yeshiva was that no members of the Yeshiva would sit on the synagogue board. According to Temple President Rabbi Elly Shapiro, this was done to allay the fear that if the Yeshiva grew in size, “there might be a lopsided lease or [] relationship.” (Van Grouw Affidavit, Exhibit C, 74-75.)

The first class of Yeshiva students began in September, 2005 with twelve students. (Compl. at ¶ 23.) However, it was asserted by a neighbor of the Synagogue during one of the hearings before the Planning Board that the student population had grown to 34. Rabbi Shapiro also testified during one of the hearings that there were six “junior rabbis or rabbis in training” living in a resident house on the premises. (Van Grouw Affidavit, Exhibit C, 83-84.)

Plaintiffs allege that from the outset, certain residents vehemently opposed the Yeshiva operating at the Synagogue, stating that the Borough lacked the financial and physical resources to absorb the Yeshiva. (Compl. at ¶ 25.)² Plaintiffs further assert that the “virulence” expressed by those in opposition to the Synagogue/Yeshiva partnership, “divided the residents of the

¹ Plaintiff defines a yeshiva generally as “an institution whose primary focus is to facilitate and direct the study of Jewish religious texts and doctrine (referred to generally as ‘Torah’).” (Compl. at ¶ 22.)

² Plaintiffs attach several news articles that evidence the tension caused by the agreement between the Congregation and the Yeshiva. (See Van Grouw Affidavit, Exhibit E.)

Borough and ultimately led to then mayor Neil Marko (a supporter of the Yeshiva) being voted out of office in a recall election in 2006.” (*Id.* at ¶¶ 26-27)

Plaintiffs allege that in a letter to Robert Francis (“the zoning officer”), dated September 7, 2005, Bert Ellentuck, a neighbor of the Synagogue, complained that the Synagogue property was being used for improper purposes in violation of the Borough’s local ordinance. (*Id.* at ¶ 29.) According to Plaintiffs, Mr. Ellentuck complained that the operation of a private school was not permitted as a principal permitted use or a conditional use in the RA-40 Zone. (*Id.*)

In response, the zoning officer visited the synagogue to “determine the nature of the Yeshiva activity in the synagogue.” (Plaint. Opp. at 5.) Mr. Francis also sought and received the legal advice of the Borough’s then-attorney, Ira Karasick. (“the Borough’s attorney”). (Van Grouw Affidavit, exhibit D.) In a written opinion, the Borough’s attorney noted that private schools were indeed a prohibited use in the R-40 district. (*Id.* at 2.). However, in his opinion, “the use of the property as a yeshiva for 12 students, without any modification of the existing facility, comports more with and is encompassed within the use of the property as a house of worship, rather than constituting the establishment of a private school.” (*Id.* at 2.) He based this opinion on what he described as “the education of youth as a traditional component of a house of worship in virtually all religions, certainly those prevalent in our society.” The Borough’s attorney added that even if the Yeshiva was considered a private school, it would still be allowed to exist on the property because the New Jersey Municipal Land Use Law (“MLUL”) requires that private schools be afforded the same treatment as public schools in a given area, and the R-40 zone allows public schools as a permitted use. (*Id.*) Following the Borough’s Attorney’s advice, in a letter of October 3, 2005, the zoning officer declined to issue a summons for any

zoning violation. (*Id.* at exhibit E.)

Plaintiffs allege that in the wake of the zoning officer's decision, Bert Ellentuck individually and through the Roosevelt Preservation Association ("the Association") sought to garner support in the community to oppose the Yeshiva.³ (Compl. at ¶ 33.) Plaintiffs further allege that "at least two members of the Municipal Council are also members of the Association." (*Id.* at ¶ 34).

This decision was appealed to the Zoning Board ("the Board") by the Association⁴ and hearings took place before the Board on December 13, 2005, February 14, 2006, March 14, 2006, April 4, 2006, and September 12, 2006. (Cohen Affidavit, Exhibit B, Resolution of the Board.) At the September 12 hearing, Rabbi Zevulun Charlop was called by Plaintiffs to testify as an expert on Jewish law, custom, and practice. Rabbi Charlop testified that "[a] yeshiva is a place where [students] congregate to study the Torah." (Van Grouw Affidavit, exhibit C, 33.) According to Rabbi Charlop, a synagogue "[m]ay not necessarily be a yeshiva[, b]ut a yeshiva is always a synagogue." (*Id.* at 35; *see also* 57.) He also testified that historically, a synagogue has always served the role of "a house of worship and [a] house of study." (*Id.* at 35.) Rabbi Charlop opined that the study of secular subjects at a Yeshiva, such as science or math, in his mind, would not change the nature of the Yeshiva. According to Charlop, students would not

³ Plaintiffs allege that "[a]lthough the association purports that its purpose is to ensure proper land use in the Borough, its focus has been on eliminating the Yeshiva and the Association's members have perpetuated an atmosphere of intolerance in the Borough towards Orthodox Jews." (Compl. at ¶ 33.)

⁴ Plaintiffs submit that following the zoning officer's decision not to issue a zoning violation, both he and the Borough's attorney were discharged from their positions and replaced. Plaintiffs also submit that the "Mayor of Roosevelt who had publicly spoken out in favor of the Yeshiva use was soon recalled from office." (Plaint. Opp. at 5.)

attend a Yeshiva to study secular topics, but rather would attend a Yeshiva to engage in religious studies. (*Id.* at 36-37.) The rabbi opined further that a typical Yeshiva might consist of 80% religious studies and 20% secular studies. (*Id.* at 53.) According to Rabbi Charlop, a “yeshiva [as well as a synagogue] can operate all day and all night.” (*Id.* at 60; 67.)

At the March 14 hearing, Charles B. Rush, a licensed land surveyor was called upon by the Association to testify before the Planning Board. (Van Grouw Affidavit, exhibit B.) By Mr. Rush’s calculations, the land where the synagogue is located is equal to 1.8757 acres, which is just under the two acre minimum mandated by the local ordinance. (*Id.* at 24.)

John Chadwick, a licensed planner, was also called upon by the Association to testify at the March 14 hearing. *Id.* at 37. Mr. Chadwick testified that in the R-40 zone, the local zoning ordinance does not permit more than one principal use on a piece of property. *Id.* at 46. Based upon the views expressed by the zoning officer and Mr. Chadwick’s review of the lease, he opined that there were three principle uses on the subject property: (1) the synagogue, (2) the Yeshiva; and (3) the parsonage. He also testified that the Synagogue (without regard to the Yeshiva) is a non-conforming use because the property is less than two acres and does not provide adequate parking pursuant to the relevant local ordinance. *Id.* at 54. As a result, Mr. Chadwick testified that the addition of a school to the synagogue would alter that nonconforming use, regardless of whether the added use was a permitted use. *Id.* at 100. In Mr. Chadwick’s opinion, from a “planning standpoint,” worship and religious instruction are two separate uses. *Id.* at 58. Mr. Chadwick distinguished a synagogue or church that might have classes on Sundays or after school (a permitted use) from the situation at issue here where the Yeshiva is running classes during the day in the same building where worship is taking place at other times. *Id.* at

58-59. Mr. Chadwick added that it was clear to him from the description given by the zoning officer in addition to the lease between the synagogue and the Yeshiva, that the Synagogue is being utilized for two different uses at different times. *Id.* at 60. He also noted that the zoning officer's letter failed to mention that the lease provided for the Yeshiva to add dormitories to the property. *Id.* at 61-62. Mr. Chadwick concluded that the Yeshiva's presence on the property was a non-conforming use and the Yeshiva was obligated to apply for a variance to maintain this use. *Id.* at 54.

The Board also heard from Bert Ellentuck, a member of the Association and neighbor of the Synagogue, at the hearing of September 12, 2006. Mr. Ellentuck testified that it was his "belief that there is no Congregation Anshei Roosevelt," and opined further that the Yeshiva had taken over the building and was not respecting the local zoning ordinances. (Van Grouw Affidavit, Exhibit C, 93.) Mr. Ellentuck testified further that he was told by someone that morning that there were 34 students currently enrolled in the Yeshiva who were living in various buildings around the community.⁵ According to Ellentuck, these students were "in school and on the street from about 7:30 in the morning to sometimes 12 or one o'clock [at] night." *Id.* at 93-94. He also indicated that the lights in the synagogue are frequently on and there are also a number of cars always parked on the side of the street. *Id.* at 94.

Another resident living on the same street as the Synagogue, Melissa Brankle, expressed dissatisfaction over the Yeshiva's involvement at the Synagogue, due to the loss of her quiet enjoyment of her property since the Yeshiva has commenced its operations at the Synagogue.

⁵ Mr. Ellentuck's voice appears to have been inaudible on the tape of the hearing, as indicated in the transcript, and as such, the transcript does not reflect who told Mr. Ellentuck about the current population of the Yeshiva.

Ms. Brankle testified that vehicles travel to and from the synagogue 40 to 50 times a day beginning at 7:20 a.m. and ending around 1:30 a.m. the next day. She added that 20 to 30 students are outside playing at all hours of the day, including the evenings, seven days a week. *Id.* at 100.

Mr. Ellentuck's wife, Mrs. Shan Ellentuck also testified that she was concerned about a provision in the lease agreement that provided for a 25 year extension of the lease between the Synagogue and the Yeshiva. According to Mrs. Ellentuck, the Yeshiva has stated that it intends to significantly increase the student population. Mrs. Ellentuck testified that estimates on the part of the Yeshiva as to the potential future population range from 50 to 300 students. *Id.* at 101-02.

On July 24, 2007, the Board adopted a Resolution, overturning the zoning officer's decision. (*See* Cohen Affidavit, Exhibit B.) In the Resolution, the Board noted all the testimony highlighted above, and also the complaints of several other community members, regarding the potential harm the Yeshiva's presence could cause to the town's water and sewer systems. (*Id.*) The Board found that the synagogue was established in 1955, before the minimum 2 acre requirement was established as reflected in the current zoning ordinance. (*Id.* at ¶ 35.) The Board also accepted the evidence produced by the Association that the Synagogue as a house of worship, "is a nonconforming use in that it does not comply with the conditional use standards contained in the Ordinance." (*Id.*) The Resolution further stated that "[w]hile the Board accepts the testimony of the Rabbi that a Yeshiva can be a synagogue, the Rabbi acknowledged that the Yeshiva is a school." (*Id.* at ¶ 36.) The Board continued that "[t]he argument that the Yeshiva is a function of a Jewish house of worship may be accurate. The problem is that from a land use

perspective, the Yeshiva has resulted in a significant increase in the intensity of the use.” (*Id.* at ¶ 37.) Because the Board found the Yeshiva to be “an expansion of an already nonconforming use,” it concluded that a variance was required for its continued operation. (*Id.*) The Resolution continued that “[s]ince Roosevelt has other locations within the plan available for such an intense use, the expansion of the nonconforming use is not justified.” (*Id.*) The Board further found that while “a house of worship might have religious classes in appropriate circumstances, in this instance, the students are outside late at night when they are not in classes.” The Board concluded that these activities did not constitute a religious exercise. (*Id.* at ¶ 38.)

The Board also apparently accepted Mr. Ellentuck’s testimony that there were 12 students at the inception of the Yeshiva, as compared to the Yeshiva’s current student population of 34. The potential future growth in student population at the Yeshiva led the Board to conclude that municipal overview of this process was necessary for public health and safety reasons, and to preserve the integrity of the zone plan. (*Id.* at ¶ 39.)

The Board further noted that at the time the zoning officer rendered his opinion, he relied on the Borough’s Attorney, and neither the zoning officer nor the Borough’s Attorney were aware of the Yeshiva’s plans to become a boarding school. (*Id.* ¶ 40.) The Board added that in rendering its opinion, the Borough Attorney relied on the Municipal Land Use Law (“MLUL”) which prohibits discrimination against between public and private schools. However, because it concluded that the Yeshiva is a boarding school, and houses six junior rabbis in the parsonage house, with additional students living in a house at another property (known as the “Brottman

property”),⁶ the Board found that the Yeshiva was not protected by the MLUL (*Id.* at 40-42.)

The Board concluded the following:

The Yeshiva and the Congregation have the right and the responsibility to apply to the Board for variances from the conditional use standards and conditional use and site plan approval. The filing of an application does not constitute a substantial burden but is a burden shared by all landowners under the land use regulatory scheme that exists in New Jersey.

Nothing in the Board’s decision on this appeal should be interpreted as being opposed to the establishment of the Yeshiva on the Property. The sole decision rendered is that land use approval is required and the Zoning Officer erred in allowing the Yeshiva to be established without such approvals. This is not a question of prohibition or substantial burden but whether the synagogue and the yeshiva are allowed to exist without municipal oversight.

The Board concludes that the Zoning Officer erred in that the proposal is a significant intensification of the non-conforming use and should have been allowed as of right without any municipal review or approval.

(*Id.* at ¶¶ 43-45.)

Plaintiffs allege that while the appeal was pending before the Board, the Borough Council engaged in two attempts to prevent the Yeshiva from operating at the synagogue. (Plaint. Opp. at 8.) According to Plaintiffs, in mid to late 2006, the Council attempted to pass Ordinance No. 97-36, which provided in part that “[a] house of worship existing before the date of this zoning ordinance and located in a residential district shall . . . [b]e located on a lot of at least two acres.” (Compl. at ¶ 48.) Plaintiffs further maintain that the proposed ordinance “re-defined the principal permitted uses and conditional uses within the District R-40 . . . deleting ‘public

⁶ The Resolution stated that the legality of the use of the house at the Brottman property was the subject of a separate appeal before the Board.

schools' from the list of principal permitted uses, and deleting 'houses of worship' from the list of conditional uses." (*Id.* at ¶ 49.) Plaintiffs assert that had this proposed ordinance been enacted, it would have violated New Jersey Municipal Land Use Laws that protect pre-existing non-conforming uses. (*Id.* at ¶ 50.) According to Plaintiffs, a newer version of Ordinance No. 97-36 was enacted, which no longer imposed limitations on existing uses. Plaintiffs assert that the enacted ordinance also provides for schools and dormitories in the Borough, but restricts them to a remote area known as the RA-400 zone, where physical restraints make development highly unlikely. (*Id.* at ¶ 51; *see also* Cohen Affidavit, Exhibits C, D.)

Plaintiffs appeal the Board's Resolution to this Court. In Count One, Plaintiffs assert that the Board's determination is "arbitrary, capricious and against the weight of evidence" and that the the New Jersey Municipal Land Use Law requires that the Yeshiva be treated in the same manner as public schools. (*Id.* at ¶ 60.) Count Two alleges that Ordinance No. 97 is unconstitutional as applied.⁷ Count Three alleges violations of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). Count Four alleges that the Board's decision in addition to the actions of all defendants violates Plaintiffs' rights to freely exercise their religion under the First and Fourteenth Amendment. Count Four also alleges Equal Protection and Due Process violations. Count Five alleges violates of New Jersey's Constitution. Finally, Count Six alleges violations of the New Jersey Law Against Discrimination.

II. DISCUSSION

A. Legal Standard

⁷ The complaint does not specify whether Count Two alleges federal or state constitutional violations. However, Plaintiffs's counsel maintained at oral argument that Counts Three and Four of the complaint were Plaintiffs' only federal constitutional claims.

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court finds that the plaintiff has failed to set forth fair notice of what the claim is and the grounds upon which it rests. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964 (2007) (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A complaint will survive a motion under Rule 12(b)(6) if it states plausible grounds for plaintiff's entitlement to the relief sought. *Id.* at 1965-66 (abrogating *Conley's* standard that the "complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). In other words, it must contain sufficient factual allegations to raise a right to relief above the speculative level. *Id.* at 1965. The issue before the Court "is not whether plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence in support of the claims." *Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 (3d Cir. 1997) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). In evaluating a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court may consider only the complaint, exhibits attached to the complaint, matters of public record, and undisputedly authentic documents if the complainant's claims are based upon those documents. *See Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993), cert. denied 510 U.S. 1042 (U.S. Jan. 10, 1994).

B. Dismissal of Plaintiffs' Claims Against Ellentuck and Malkin's Claim

Noerr-Pennington Doctrine

Defendants Ellentuck and Malkin argue that the *Noerr-Pennington* doctrine bars

Plaintiffs' claims against them. (Ellentuck and Malkin Br. at 6.) The Court agrees.

The *Noer-Pennington* doctrine was established in the seminal cases of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) ("Noerr"), and *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, (1965) ("Pennington"), where the Supreme Court held "that an individual is immune from liability for exercising his or her First Amendment right to petition the government." *Barnes Found. v. Township of Lower Merion*, 242 F.3d 151, 159 (3d Cir. Pa. 2001). These cases took place in an antitrust context. *Id.* The defendants were alleged to have violated the Sherman Act by acting together and campaigning to persuade the government to eliminate competition within their particular industries. *Id.* The Supreme Court however found that the Sherman Act did not prohibit the defendants' campaign. *Id.* The Court held that the defendants were immune without regard to their motives in initiating the campaigns, explaining that individuals' rights to petition the government "cannot properly be made to depend on their intent in doing so." *Noerr*, 365 U.S. at 139.

The Supreme Court as well as the Third Circuit Court of Appeals have since extended the *Noerr-Pennington* doctrine beyond the scope of antitrust to areas such as civil conspiracy and cases arising under § 1983 as well as other civil rights statutes. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)(NAACP participants immune to civil conspiracy claim under *Noerr-Pennington* with regard to non-violent aspects of boycott against white owned businesses, which was designed to force elected officials to comply with demands for integration and racial equality); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155 (3d Cir. 1988)(in a civil conspiracy suit, private citizens, dismayed at the conditions of a nursing home, immune from damages based on their attempts to persuade public official to decertify the nursing

home); (*Pfizer Inc. v. Giles (In re Asbestos School Litigation)*, 46 F.3d 1284 (3d Cir. 1994)(defendant immune from liability for involvement and financial support of lobbying organization without specific evidence of wrongful conduct). The *Noerr-Pennington* doctrine has also been applied to New Jersey state tort law claims as well. See *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 128 (3d Cir. N.J. 1999).

Defendants Malkin and Ellentuck dispute that they were public officials at the time of their challenged conduct. However, even if they were, *Noerr-Pennington* immunity still applies. In *Mariana v. Fisher*, the Third Circuit, quoting *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090 (9th Cir. Ariz. 2000), explained that “[g]overnment officials are frequently called upon to be ombudsmen for their constituents’ whereby ‘they intercede, lobby, and generate publicity to advance their constituents’ goals.’” 338 F.3d 189, 200 (3d Cir. Pa. 2003). The Court added, again quoting *Manistee*, that the immunity provided to private officials by the *Noerr-Pennington doctrine* was “‘nearly as vital’” to democracy as the protection that it provides to private citizens.” *Id.*

In *Barnes Foundation. v. Township of Lower Merion*, the Third Circuit applied the *Noerr-Pennington* doctrine in a similar scenario to this case, providing immunity to residents who opposed and spoke out against the Barnes Foundation’s (the “Foundation”) plan to re-open their art gallery in their neighborhood on a larger scale than had previously existed. 242 F.3d at 159. The Foundation alleged that these neighbor-defendants organized a Neighborhood Association, to oppose the re-opening of the gallery and challenge other Foundation activities that the neighbors believed were in violation of the Foundation’s agreement, under which it was established and in violation of local zoning rules. *Id.* at 154. The Foundation asserted that the

Association also supported litigation that would limit the expansion of the gallery. *Id.* The Foundation's complaint alleged that the neighbors sought to deprive it of its constitutional rights on the basis of race (three of the four Foundation trustees were African American) in violation the Due Process and Equal Protection Clauses of the United States Constitution. *Id.* at 154-55, 156.

The District Court in *Barnes* dismissed the Foundation's claims against the neighbors finding that the neighbors were protected by First Amendment immunity i.e. – the *Noerr-Pennington Doctrine*. *Id.* at 158. The Foundation did not appeal this decision. *Id.* However, the neighbors did appeal the District Court's denial of their motion for attorney's fees. Before addressing the issue of attorney's fees, the Third Circuit noted that “[u]nquestionably, given the outstanding case law at the time,” the district court properly dismissed the complaint against the neighborhood defendants. *Id.* However because neither the Third Circuit nor the Supreme Court had previously “held expressly that the *Noerr-Pennington* doctrine provides an immunity for First Amendment activity allegedly constituting a civil rights abuse,” the Court found that the Plaintiffs' actions in filing suit against the neighbors fell just short of constituting the type of frivolousness required for an award of attorney's fees. *Id.* at 158, 162. However, the Court gave the following warning to those who might attempt to similarly deprive others of their First Amendment rights in the future:

Before we close our discussion of the *Noerr-Pennington* doctrine we hasten to add that persons contemplating bringing suits to stifle First Amendment activity should draw no comfort from this opinion because the uncertainty of the availability of a First Amendment defense when a plaintiff brings a civil rights case now has been dispelled. This point is of particular importance in land-use cases in which a developer seeks to eliminate community opposition to its plans as this opinion should make it clear that it will do so at its own peril.

Id. at 162.

The complaint accuses Ellentuck and Malkin of engaging in the type of activity that is protected by *Barnes* – specifically that through their involvement in the Association, they influenced the Planning Board’s decision with regard to the Congregation and the Yeshiva (compl. at ¶ 45.) and expressed critical views about the Congregation and the Yeshiva as being “too orthodox.” (compl. at ¶ 73.) Similar to the plaintiffs in *Barnes*, Plaintiffs here: (1) seek land use approval; (2) were opposed by citizens who spoke out against them (Ellentuck and Malkin); (3) and filed a civil rights suit against these citizens. As *Barnes* makes clear, Plaintiffs’ claims against Ellentuck and Malkin fall squarely within the protections of the *Noerr-Pennington* Doctrine.

Legislative Immunity

To the extent that Plaintiffs seek damages against Ellentuck and Malkin because of their role in passing Ordinance No. 97-36, these claims are barred by the doctrine of absolute legislative immunity. “Members of local legislative bodies, such as municipal planning boards, are entitled to absolute legislative immunity for actions taken in a purely legislative capacity.” *County Concrete Corp. v. Twp. of Roxbury*, 442 F.3d 159, 172 (3d Cir. 2006) (citing *Acierno v. Cloutier*, 40 F.3d 597, 610 & 610 n.10 (3d Cir. 1994) (en banc)). The Third Circuit has set out a two-part test to determine whether an action is “legislative” for purposes of determining immunity: “(1) the action must be ‘substantively’ legislative, which requires that it involve a policy-making or line-drawing decision; and (2) the action must be ‘procedurally’ legislative, which requires that it be undertaken through established legislative procedures.” *Acierno*, 40 F.3d at 610 (citation omitted).

In the present case, both prongs are met. “[W]hen zoning officials are enacting or amending zoning legislation, their acts are substantively legislative.” *County Concrete Corp*, 442 F.3d at 172. Such was the case here in the enactment of Ordinance No. 97-36. With regard to the second prong, an ordinance is “procedurally legislative if it was undertaken through established legislative procedures.” *Aciermo*, 40 F.3d at 613. Public records establish that such procedures were followed here and Plaintiffs do not contend otherwise. As such, Ellentuck and Malkin are also protected for any claim stemming from their role in enacting Ordinance No. 97-36 by the doctrine of absolute legislative immunity.

C. Ripeness

Defendants argue that because Plaintiffs have never filed a variance application or received a final determination with respect to the Yeshiva operating at the Synagogue, Plaintiffs’ complaint is not ripe for review. (RPA Br. at 15 [docket # 23]; Borough Br. at 9 [docket # 9].) Defendants assert that the only ruling issued by the Board in the Resolution was that a variance is required for the Yeshiva to operate at the Synagogue. (Borough Br. at 12; RPA Br. at 15.) This ruling, according to Defendants, does not represent a final determination pursuant to RLUIPA or otherwise, is not a substantial burden, and does not limit the manner in which Plaintiffs can use the property because Plaintiffs may still seek a variance to operate the Yeshiva at the Synagogue. (*Id.*) As such, Defendants argue that Plaintiffs must first follow the land use procedures in place to seek a variance, before this Court may properly hear their case.

Plaintiffs do not dispute that a final determination by the Board is a prerequisite for this Court to consider their claims. However, Plaintiffs maintain that the Board rendered such a final determination when it stated in the Resolution that the Yeshiva’s operations at the Synagogue

were a violation of local zoning controls. (Plaint. Opp. at 10 [docket # 17].) Plaintiffs further assert that because the Objectors (and not Plaintiffs) appealed the zoning officer's decision (in favor of Plaintiffs) to the Board, "[t]here was no reason or legal basis for the Yeshiva to file an appeal or a variance application to the Board." (*Id.* at 12.) Plaintiffs maintain that "[t]he Board's after-the-fact invitation to the Yeshiva to file for a variance" does not effect the finality of the Board's interpretation of a local ordinance in the Resolution. (*Id.*) Plaintiffs further assert that Defendants desire Plaintiffs to seek a variance because the standards by which a variance for a non-permitted use are granted are very burdensome for an applicant, and the standard of review on appeal is very deferential to the Board. (*Id.* at 13-14.) Plaintiffs also seem to argue that if they were forced to file a variance application, they would later be barred from appealing the board's decision under New Jersey Court Rule 4:69-6(a), which sets a 45 day limit for parties to appeal a decision of a planning board. (*Id.* at 15.)

"Ripeness is a doctrine rooted in both Article III's case or controversy requirement and prudential limitations on the exercise of judicial authority." *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 347 (2d Cir. Conn. 2005)(citing *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 732 (U.S. 1997)). "The purpose of the ripeness doctrine is to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Wyatt v. Gov't of the V.I.*, 385 F.3d 801, 806 (3d Cir. V.I. 2004)(quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, (1967), overruled on other grounds, *Califano v. Sanders*, 430 U.S. 99, 105 (1977)). In determining whether a matter

is ripe, courts make a twofold inquiry to determine both "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Brubaker v. E. Hempfield Twp.*, 234 Fed. Appx. 32, 34-35 (3d Cir. Pa. 2007)(quoting *Abbott Labs.*, 387 U.S. at 149). "A dispute is not ripe for judicial determination 'if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Wyatt*, 385 F.3d at 806 (quoting *Doe v. County of Centre, PA*, 242 F.3d 437, 453 (3d Cir. 2001)(citation omitted)).

"[I]n cases involving land-use decisions, a property owner does not have a ripe constitutional claim until the zoning authorities have had 'an opportunity to arrive [] at a final, definitive position regarding how [they] will apply the regulations at issue to the particular land in question.'" *Sameric Corp. of DE v. City of Philadelphia*, 142 F.3d 582, 597 (3d Cir. 1998)(quoting *Taylor Inv., Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1290 (3d Cir. 1993)); see also *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (U.S. 1985)). This requirement, known as the finality rule, requires a property owner to demonstrate that a "final decision has been reached by the [local] agency before it may seek compensatory or injunctive relief in federal court on federal constitutional grounds.'" *Acierno v. Mitchell*, 6 F.3d 970, 974 (3d Cir. Del. 1993)(quoting *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. Cal. 1989)). Four considerations buttress this requirement: (1) "a final decision from a local land use authority aids in the development of a full record;" (2) exhaustion of the variance process enables courts to know the exact manner that "a regulation will be applied to a particular parcel;" (3) "a variance might provide the relief the property owner seeks without requiring judicial entanglement in constitutional disputes. Thus, requiring a meaningful variance application as a prerequisite to federal litigation enforces the long-standing principle that disputes

should be decided on non-constitutional grounds whenever possible;” and (4) allowing a zoning authority to issue a final determination enforces principles of federalism and “evinces the judiciary's appreciation that land use disputes are uniquely matters of local concern more aptly suited for local resolution.” *Murphy*, 402 F.3d at 348.

The Court in *Williamson* originally applied the finality rule in the context of a Just Compensation Takings Claim, but since then the Third Circuit has applied the same requirement to as-applied substantive due process and as-applied equal protection claims. *County Concrete Corp. v. Twp. of Roxbury*, 442 F.3d 159, 164 (3d Cir. N.J. 2006). The finality rule can bar these as-applied claims because “[o]nly once a [local] decision maker has arrived at a definitive position on the issue' has a property owner been inflicted with 'an actual, concrete injury.'” *Id.* (quoting *Williamson*, 473 U.S. at 192). “The Third Circuit has stressed the importance of the finality rule in the as-applied context because of its ‘reluctance to allow the courts to become super land-use boards of appeals. Land-use decisions concern a variety of interests and persons, and local authorities are in a better position than the courts to assess the burdens and benefits of those varying interests.’” *Cornell Cos. v. Borough of New Morgan*, 512 F. Supp. 2d 238, 256 (E.D. Pa. 2007)(quoting *Sameric*, 142 F.3d at 598).

Notwithstanding the strong policy considerations favoring the finality rule, “the finality requirement is not mechanically applied.” *Murphy*, 402 F.3d at 348. “A property owner [may] be excused from obtaining a final decision if pursuing an appeal to a zoning board of appeals or seeking a variance would be futile.” *Id.*; see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 n. 3 (U.S. 1992)(finality requirement not mandatory when applying for a permit would be “pointless” because council for local municipality stipulated that no permit would be issued even

if an application was made). In addition “a property owner need not pursue such applications when a zoning agency lacks discretion to grant variances or has dug in its heels and made clear that all such applications will be denied.” *Murphy*, 402 F.3d at 348 (citing *Southview Assoc., Ltd. v. Bongartz*, 980 F.2d 84, 98-99 (2d Cir. 1992)).

During oral argument, this Court expressed concern over what, on the surface, appeared to be somewhat contradictory language in the Board’s Resolution. The Resolution states that “[n]othing in the Board’s decision on this appeal should be interpreted as being opposed to the establishment of the Yeshiva on the Property. The sole decision rendered is that land use approval is required and the Zoning Officer erred in allowing the Yeshiva to be established without such approvals.” (Cohen Affidavit, Exhibit B, ¶ 44.) However, the Resolution also states that because there are “other locations within the [Borough] available for such an intense use, the expansion of the nonconforming use is not justified.” (*Id.* at ¶ 37.) These two sections of the Resolution appeared to be in discord, with the latter statement seeming to oppose the establishment of the Yeshiva at the Synagogue – something the Board was denying it was doing in the former quoted section of the Resolution. This apparent contradiction raised the question of whether requiring Plaintiffs to go through the variance process would be an exercise in futility – if in fact the Board had already determined that it would not permit the Yeshiva to operate at the Synagogue. At oral argument, Defense counsel explained that the Resolution’s statement that “the expansion of the nonconforming use is not justified” simply meant that the Yeshiva’s operations at the Synagogue were not justified *in absence of a variance*. Counsel urged that this explanation was clear when looked at in the overall context of the Resolution. Counsel for the Plaintiffs did not contest Defense counsel’s explanation, and the Court finds it to be convincing.

Indeed, Plaintiffs' counsel did not argue that the futility exception should be applied, either in their papers or at oral argument. Given that Defendants have repeatedly insisted – in the Resolution, in their motion papers, and at oral argument, that the Planning Board will not discriminate against the Plaintiffs in any way, if Plaintiffs choose to seek a variance, the narrow futility exception to the ripeness requirements is not applicable. *See Murphy*, 402 F.3d at 348; *Lucas*, 505 U.S. at 1014, n. 3.

The question is whether the Resolution constitutes “a final, definitive position as to how [the Board] will apply the regulations at issue to the particular land in question,” which would make Plaintiffs' federal claims ripe for review. *Williamson*, 473 U.S. at 191. Plaintiffs cite *Taylor Inv., Ltd. v. Upper Darby* and *Murphy v. New Milford Zoning Comm'n* as providing support for the proposition that after the zoning officer's decision was appealed to the Board, hearings were held, and the Board issued a Resolution, no more administrative procedures were required, and as such, Plaintiffs' claims before this Court are ripe. (Plaint. Br. at 11.) The Court interprets *Taylor* and *Murphy* differently.

In *Taylor*, after a zoning officer revoked the plaintiff's use permit for his club, the plaintiff filed a 42 U.S.C. § 1983 claim in the District Court for the Eastern District of Pennsylvania. 983 F.2d at 1289. Because the plaintiff “did not reapply for a use permit, appeal the revocation to the Township Zoning Board, or seek a variance or special exception to the Township's zoning ordinances,” the Third Circuit, applying the finality rule, affirmed the District Court's dismissal of the plaintiff's claim on ripeness grounds. *Id.* at 1289, 1292. Plaintiffs assert that by using the word “or” in the preceding sentence, the *Taylor* Court ruled that the plaintiff could have satisfied the finality rule in obtaining a variance or appealing the Board's decision,

but that as long as Plaintiff had followed through with either available remedy, the finality rule would be satisfied. Because in the present case the zoning officer's decision was appealed to the board, which held a full hearing, Plaintiffs maintain that they abided by the procedural requirements of *Taylor*, and their claim is therefore ripe. The Court disagrees.

The court in *Taylor* stated that if the plaintiff had taken the extra step to appeal the zoning officer's decision to the zoning board, "the board *could* have" overturned the zoning officer's decision. *Id.* at 1293 (emphasis added). However, the court did not state that appealing to the board *would* have emphatically provided the plaintiff with a final determination, for the purpose of determining the ripeness of the plaintiff's claims. As such, this Court cannot conclude from *Taylor* that Plaintiffs' federal claims in this matter are ripe simply by virtue of the fact that the zoning officer's decision was appealed to the board.

In *Murphy*, after the plaintiffs were issued a cease and desist order for holding religious services in their home, they filed suit in federal court. 402 F.3d at 345. The Second Circuit found the plaintiffs' federal claims to be unripe, because the plaintiffs failed to appeal the cease and desist order or receive a final determination from a local authority as to how their property could be used. *Id.* at 352. The First Circuit noted that "[h]ad the Murphys appealed the cease and desist order to the Zoning Board of Appeals and requested variance relief from that body . . . things *may* very well have been different." *Id.* (emphasis added). However, the court did not state that an appeal of the cease and desist order definitely would have made Plaintiffs' federal claims ripe for review – rather that in absence of an appeal, Plaintiffs' claims were certainly unripe. The Court recognizes that in participating in the local public hearings, Plaintiffs here have participated in a more extensive administrative process than the plaintiffs in *Taylor* and

Murphy. However, neither *Taylor* nor *Murphy* nor stand for the proposition that Plaintiffs suggest – that in rendering a decision (regardless of the import of the decision), the administrative process came to a close, making Plaintiffs’ federal complaints ripe.

The ultimate question before the Court in determining whether Plaintiffs’ federal claims are ripe, is whether the Board’s Resolution constitutes "a final, definitive position as to how [the Board] will apply the regulations at issue to the particular land in question." *Williamson*, 473 U.S. at 191. Despite the administrative proceedings that have taken place, and the Board’s ruling requiring Plaintiffs to seek a variance, the Court concludes that the local municipality should be given an opportunity to reach to a final decision as to how it will apply the local regulation to the property at issue. Specifically, the Board should be permitted to rule on whether the Yeshiva may operate on the Synagogue premises in the matter Plaintiffs desire, and if not, whether the Yeshiva will be barred completely from operating at the Synagogue, or whether it may operate to some lesser degree. The Court notes Plaintiffs’ counsel’s position during oral argument – that in requiring Plaintiffs to apply for a variance, the Board has essentially come to the determination that Plaintiffs are acting in violation of the zoning regulations. However, local zoning boards “are flexible institutions . . . that may “give back with one hand what they have taken with the other.” *Taylor*, 983 F.2d at 1294 (quoting *Macdonald v. County of Yolo*, 477 U.S. 340, 350 (1986)).

Allowing the Board to consider and rule on Plaintiffs’ variance application will help develop a full record – something that is absent at this time, and as such, militates against review of Plaintiffs’ federal claims. See *Murphy*, 402 F.3d at 348. Issues such as the exact population of the Yeshiva, the degree to which the Yeshiva’s presence increases traffic, whether and how much

time students will be spending outside on the street, and the Yeshiva's plans for growth in the future are all issues that have not been fully fleshed out in the record before the Court – and should be for Plaintiffs' federal claims to be ripe. Exhausting the variance process will also determine exactly how the Board will apply the regulations to the property. *Id.* Such a determination is critical in order to define the constitutional injury.⁸ *Taylor*, 983 F.2d 12 at 1291. Of course, the very real possibility exists that the Board will grant Plaintiffs' variance application, permitting the Yeshiva to operate on the property, obviating the need for Plaintiffs to file suit, and preventing this Court from becoming prematurely “entangl[ed] in a constitutional dispute[.]” *Murphy*, 402 F.3d at 348. Finally, the Court again notes that “local bodies are better able than federal courts” to handle this type of dispute. *Taylor*, 983 F.2d at 1291 (quotation omitted). In absence of a final determination on Plaintiffs' application, this Court will not act as a “super land-use board[] of appeals.” *Sameric*, 142 F.3d at 598.

In reaching this decision, the Court emphasizes that it is only addressing Plaintiffs' federal claims. Because the Court finds Plaintiffs' federal claims to be unripe, it declines to retain jurisdiction over Plaintiffs' pendent state law claims. *See* 28 USCS § 1367(c)(3); *Fralin v. County of Bucks*, 296 F. Supp. 2d 609, 616 (E.D. Pa. 2003).

III. CONCLUSION

For the reasons set forth in this Memorandum Opinion and on the record during oral argument on July 21, 2008, Defendants' motions to dismiss are granted. Plaintiffs' motion for

⁸ During oral argument, Plaintiffs' counsel identified the present injury to Plaintiffs as merely being required to seek a variance. Plaintiff has provided no authority (nor is the Court aware of any) to support this type of injury satisfying Federal Constitutional ripeness standards. The Court also notes that the Yeshiva is still operating at the Synagogue.

summary judgment is denied. An appropriate form of order accompanies this Memorandum Opinion.

Dated: August 20, 2008

s/ Garrett E. Brown Jr.
GARRETT E. BROWN, JR., U.S.D.J.

SICA
v.
BOARD OF ADJUSTMENT TOWNSHIP OF WALL

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127 N.J. 152, *; 603 A.2d 30, **;
1992 N.J. LEXIS 23, ***

DR. ROBERT B. SICA, PLAINTIFF-APPELLANT, v. BOARD OF ADJUSTMENT OF THE TOWNSHIP OF WALL, DEFENDANT-RESPONDENT, AND TOWNSHIP OF WALL, MONMOUTH COUNTY, A MUNICIPAL CORPORATION OF NEW JERSEY; TOWNSHIP COMMITTEE OF THE TOWNSHIP OF WALL; AND PLANNING BOARD OF THE TOWNSHIP OF WALL, DEFENDANTS

A-48 September Term 1991

SUPREME COURT OF NEW JERSEY

127 N.J. 152; 603 A.2d 30; 1992 N.J. LEXIS 23

November 18, 1991, Argued
March 19, 1992, Decided

PRIOR HISTORY: [***1] On certification to the Superior Court, Appellate Division, whose opinion is reported at 246 N.J. Super. 338 (1991).

DISPOSITION: The judgment of the Appellate Division is reversed, and the judgment of the Law Division is reinstated.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant physician sought review of the order of the Superior Court, Appellate Division (New Jersey), which reversed the trial court's decision in favor of appellant in an action brought by appellant against appellees, Board of Adjustment and others, seeking a conditional use variance for a head trauma rehabilitation center.

OVERVIEW: Appellant physician applied for a conditional use variance to build a head trauma rehabilitation center. Appellee Board of Adjustment (board) denied appellant's application. The trial court reversed the decision of appellee board, and the appeals court later reversed the trial court's decision. The court reversed the decision of the appeals court and reinstated the trial court's decision. The court held that the proposed center was inherently beneficial, that it satisfied all of the positive criteria of N.J. Stat. Ann. § 40:55D-70(d) and that the enhanced standard did not apply to an inherently beneficial use. The court held that a balancing of the positive and negative criteria was necessary to determine whether a use variance had a substantial detrimental effect on the public good and the zone plan. The court found that the proposed center met legitimate public need, that the use was suitable for the site, and that the variance could have been granted without violating negative criteria. The court concluded that appellant was entitled to a use variance, subject to the imposition of reasonable conditions necessary to control the adverse impact of the negative criteria.

OUTCOME: The court reversed the judgment of the appeals court in favor of appellees, Board of Adjustment and others. The court held that appellant physician's proposed head-trauma center was inherently beneficial, that it satisfied the positive criteria of the statute, and that the use variance could have been granted without violating the negative criteria. The court reinstated the decision of the trial court.

CORE TERMS: variance, inherently, zoning ordinance, use variance, beneficial uses, enhanced, beneficial, balancing, zone, public good, proposed use, nursing homes, detriment, site, Law Division, planning board, township, governing body, residential zones, municipal, master plan, conditional use, head-trauma, suitable, patient, zoning, land use, municipality, certificate, traffic

LEXISNEXIS® HEADNOTES

Hide

Real Property Law > Zoning & Land Use > Nonconforming Uses

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN1 See N.J. Stat. Ann. § 40:55D-70(d).

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN2 Although inherently beneficial uses are generally non-commercial, various profit-making ventures have been deemed to be inherently beneficial. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN3 The Board of Adjustment must evaluate the impact of the proposed use variance upon the adjacent properties and determine whether or not it will cause such damage to the character of the neighborhood as to constitute substantial detriment to the public good. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN4 The standard is to weigh benefits from the grant of the variance against the detriment to the public good. If on adequate proofs, the Board of Adjustment, without arbitrariness, concludes that the harms, if any, are not substantial, and impliedly determines that the benefits preponderate, the variance stands. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN5 Although [N.J. Stat. Ann. § 40:55D-70\(d\)](#) does not expressly require a balancing of the positive and negative criteria, the need for balancing is implicit in the statutory requirement that the grant of a variance must be without substantial detriment to the public good. Under the legislative scheme, not every detriment will support the denial of a use variance. Only one that is substantial will suffice. Fairly read, the requirement that a detriment be substantial necessitates a balancing of positive and negative criteria. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN6 When the impact of the adverse effect on the neighborhood is significant, the balance may tip toward denial of the use variance. Because of an inherently beneficial use's satisfaction of positive criteria, a minimal effect, however, would support a finding that the detriment is not substantial. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Real Property Law](#) > [Zoning & Land Use](#) > [Special Permits & Variances](#)

HN7 Review of the decision of a board of adjustment denying such a variance because of the failure to satisfy the negative criteria begins with the recognition that the Board of Adjustment's decision is presumptively valid, and is reversible only if arbitrary, capricious, and unreasonable. Underlying the presumption is the recognition that such boards possess special knowledge of local conditions and must be accorded wide latitude in the exercise of their discretion. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

COUNSEL: Bruce D. Greenberg argued the cause for appellant (*Greenbaum, Rowe, Smith, Ravin & Davis*, attorneys, Douglas K. Wolfson and Wilentz, Goldman & Spitzer (Messrs. Stephen E. Barcan and Richard J. Byrnes, attorneys), of counsel; Douglas K. Wolfson, Bruce D. Greenberg, and Jessica R. Mayer, on the briefs).

Thomas J. Hirsch argued the cause for respondent (*Crawford & Hirsch*, attorneys).

Kenneth E. Meiser submitted a brief on behalf of *amicus curiae*, Volunteers of America (*Frizell, Pozycki & Meiser*, attorneys).

JUDGES: For reversal and reinstatement—Justices CLIFFORD, HANDLER, POLLOCK, O'HERN, GARIBALDI and STEIN. Chief Justice WILENTZ, not participating.

OPINION BY: POLLOCK

OPINION

[*154] [***31] The opinion of the Court was delivered by

POLLOCK, J.

In *Medici v. BPR Co.*, 107 N.J. 1, 21, 526 A.2d 109 (1987), we held that an applicant seeking a use variance for a commercial purpose must establish by enhanced [***2] proof that the variance is not inconsistent with the intent and purpose of the master plan and zoning ordinance. This appeal raises the question whether the enhanced standard also applies to inherently beneficial uses. The Board of Adjustment of the Township of Wall (the Board) denied the applicant, Dr. Robert B. Sica, a use variance for a trauma rehabilitation center. The Law Division reversed the Board's decision and remanded the matter to the Board to [*155] consider the imposition of reasonable restrictions on the center. In reversing the judgment of the Law Division, the Appellate Division held that the enhanced standard applies to inherently beneficial uses. 246 N.J. Super. 338, 340, 587 A.2d 661 (1991). We granted Dr. Sica's petition for certification. 126 N.J. 334, 598 A.2d 892 (1991). Contrary to the Appellate Division, we conclude that the enhanced standard does not apply to inherently beneficial uses. Consequently, we reverse that court's judgment and reinstate the judgment of the Law Division directing the grant of the requested variance.

I

The basic law governing *****3** land use variances is codified in *N.J.S.A. 40:55D-70d, amended by L.1991, c. 256*, which states that a board of adjustment may

HN1 [i]n particular cases and for special reasons, grant a variance to allow departure from regulations pursuant to article 8 of this act to permit: (1) a use or principal structure in a district restricted against such use or principal structure, (2) an expansion of a nonconforming use, (3) deviation from a specification or standard pursuant to section 54 of P.L.1975, c. 291 (C. 40:55D-67) pertaining solely to a conditional use, (4) an increase in the permitted floor area ratio as defined in section 3.1 of P.L.1975, c. 291 (C. 40:55D-4), (5) an increase in the permitted density as defined in section 3.1 of P.L.1975, c. 291 (C. 40:55D-4), except as applied to the required lot area for a lot or lots for detached one or two dwelling unit buildings, which lot or lots are either an isolated undersized lot or lots resulting from a minor subdivision or (6) a height of a principal structure which exceeds by 10 feet or 10% the maximum height permitted in the district for a principal structure. A variance under this subsection shall be granted only by affirmative *****4** vote of at least five members, in the case of a municipal board, or 2/3 of the full authorized membership, in the case of a regional board, pursuant to article 10 of this act.

*****32** If an application for development requests one or more variances but not a variance for a purpose enumerated in subsection d. of this section, the decision on the requested variance or variances shall be rendered under subsection c. of this section.

No variance or other relief may be granted under the terms of this section unless 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. In respect to any airport hazard areas delineated under the "Air Safety and Hazardous Zoning Act of 1983," P.L.1983, c. 260 (C. 6:1-80 et seq.), no variance or other relief may be granted under the terms of this section, permitting the creation or establishment ***156** of a nonconforming use which would be prohibited under the standards promulgated pursuant to that act, except upon issuance of a permit by the Commissioner of Transportation. An application under this section may be referred *****5** to any appropriate person or agency for its report; provided that such reference shall not extend the period of time within which the zoning board of adjustment shall act. [Footnotes omitted.]

The statute requires proof of both positive and negative criteria. Under the positive criteria, the applicant must establish "special reasons" for the grant of the variance. The negative criteria require proof that the variance "can be granted without substantial detriment to the public good" and that it "will not substantially impair the intent and the purpose of the zone plan and zoning ordinance."

Dr. Sica's proposed use is a forty-bed "head-trauma" residential-rehabilitation center for which he has received a certificate of need from the New Jersey Department of Health. The certificate, the first granted in this state, requires that ten percent of the beds be reserved for indigent or low-income patients. At present, head-trauma patients must go to New York or Pennsylvania for treatment in a residential program.

Dr. Sica, a neurophysiologist, applied in 1987 to the Wall Township Planning Board for subdivision and site plan approval and for a conditional use permit for the center. *****6** He sought to subdivide the 5.45-acre tract on which he proposed to build the center from a thirty-two-acre tract that he had purchased in 1986. The lot, which fronts on Belmar Boulevard, is in an R-60 zone. This zone permits farming, single-family dwellings, public parks, and playgrounds, as well as municipal buildings, facilities, and services essential to the township. When Dr. Sica applied for subdivision approval, the R-60 zone permitted a number of conditional uses, including nursing homes and hospitals. In 1987, the Wall Township land use officer wrote Dr. Sica informing him that the proposed center was permitted as a conditional use. On March 7, 1988, the Planning Board approved the subdivision of the lot. The Township Committee then amended the zoning ordinance to exclude from the entire Township hospitals and nursing homes as conditional uses. ***157** Following the enactment of that ordinance, the Planning Board dismissed without prejudice the application for approval of the site plan and the conditional use.

Dr. Sica then applied to the Board for both a use variance and site plan approval. At the hearing, he testified, as did some of his former patients—one *****7** a former resident of the Township—and several expert witnesses. His land use expert testified that the variance would be consistent with the zoning ordinance and master plan, pointing out that the proposed lot and building met all the bulk requirements for the R-60 zone. He distinguished the center from hospitals and nursing homes by noting that, among other things, the center would not receive ambulance calls and that nursing care would be limited to twelve minutes per patient per week. Noting that a horse barn on a neighboring property was larger than the proposed center, an architect testified that the building setback and design, as well as the topography, would render the center unobtrusive. The increase in traffic, according to a traffic expert, would *****33** be minimal. A real estate expert testified that the center would not cause a diminution in real estate values. All of the expert testimony remained uncontradicted, notwithstanding the presence of the township planner throughout the hearings.

At the conclusion of the hearings, the Board voted 7-0 to reject the application. It acknowledged that the facility met all of the bulk and buffer requirements of the R-60 zone. *****8** The Board concluded, however, that the evidence did not satisfy *Medica's* enhanced standard of proof that the variance could not "be granted without substantial detriment to the public good," and that it would not "substantially impair the intent and the purpose of the zone plan and zoning ordinance." See *N.J.S.A. 40:55D-70d*. Specifically, the Board found in relevant part:

The Board, pursuant to the dictates of the *Medici* case, is obligated to determine whether or not the removal of nursing homes and hospitals from residential zones by the amendment to the zoning ordinance was meant to include a prohibition against the type of use proposed by applicant. As noted in *Medici*, a reconciliation of a non-permitted use with the zoning ordinance becomes increasingly difficult when the governing body has been made aware [*158] of prior applications for the same use variance but has declined to revise the zoning ordinance. In this case, it is not a question of the governing body declining to revise the zoning ordinance, but a question of them taking specific action to amend the zoning ordinance to prohibit a particular use.

The Board has already pointed out the testimony [***9] of applicant concerning the differences between the proposed use and a nursing home. The Board finds that there are some differences between the proposed use and what is traditionally termed a nursing home, however, the Board also finds that it was the intent of the governing body to also preclude the type of use which is the subject matter of this application when it amended the zoning ordinances to preclude hospitals and nursing homes. At the time of the amendment to the zoning ordinance, this application was before the Planning Board, and was considered a permitted use under the general heading of nursing homes. Therefore, in light of the fact that the proposed amendment to the zoning ordinance had to be sent to the Planning Board for their recommendation and the Planning Board recommended the adoption of this ordinance, and the fact that the Mayor and one other member of the committee sit on the Planning Board, the Board comes to the inescapable conclusion that the governing body intended to exclude applicant's type of use from residential zones at the time it amended the zoning ordinance.

Based on this finding, the Board cannot reconcile the grant of this variance with the [***10] prohibition of this use from the zoning ordinance. The Board further finds that the applicant certainly has not carried its burden of an "enhanced quality of proof" that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance.

The Board never addressed the question whether "special reasons" existed for approving the proposed head-trauma center. *N.J.S.A. 40:55D-70d*.

The Law Division reversed, finding that the center was an inherently beneficial use and that it satisfied all the criteria for a use variance. On the assumption that *Medici* applied to such uses, the court found the evidence satisfied the requirement for enhanced proof.

In reversing, the Appellate Division assumed that the proposed use was inherently beneficial. *246 N.J. Super. at 342, 587 A.2d 661*. The court found, however, that measured against *Medici's* enhanced standard, Dr. Sica had failed to demonstrate that the proposed use was not inconsistent with the zoning ordinance and master plan. [*159]

II

We begin with the question left unanswered by the Board, whether the proposed use is inherently [***11] beneficial. When answering that question, courts generally [***34] distinguish between commercial and non-commercial uses. William M. Cox, *New Jersey Zoning and Land Use Administration* § 8-3 (1991). ^{HN2} Although inherently beneficial uses are generally non-commercial, various profit-making ventures have been deemed to be inherently beneficial. Examples of inherently beneficial commercial uses include private, for-profit senior citizen congregate-care facilities, *Kunzler v. Hoffman*, 48 N.J. 277, 288, 225 A.2d 321 (1966); *Jayber, Inc. v. Township of W. Orange*, 238 N.J. Super. 165, 174-75, 569 A.2d 304 (App.Div.1990); a 120-bed nursing home, *Urban Farms, Inc. v. Borough of Franklin Lakes*, 179 N.J. Super. 203, 212, 431 A.2d 163 (App.Div.), certif. denied, 87 N.J. 428, 434 A.2d 1099 (1981); a private day-care nursery, *Three L Corp. v. Newark Board of Adjustment*, 118 N.J. Super. 453, 457, 288 A.2d 312 (Law Div.1972); and a tertiary [***12] sewage treatment plant to serve a commercial trailer park, *Wickatunk Village, Inc. v. Township of Marlboro*, 118 N.J. Super. 445, 452, 288 A.2d 308 (Ch.Div.1972).

We have no difficulty in concluding that the proposed head-trauma center is inherently beneficial and that it satisfies the positive criteria of *N.J.S.A. 40:55D-70d*. The center will serve to rehabilitate people who have suffered head injuries and help them to resume lives as useful members of society. According to the New Jersey Department of Transportation, residents of New Jersey sustain approximately 5,000 head injuries per year. Dr. Sica estimates that 500 to 2,000 of those injuries occur in Monmouth and Ocean Counties. The certificate of need granted by the New Jersey Department of Health attests to the need for the center as do the letters of support from local hospitals and the University of Medicine and Dentistry of New Jersey. Significantly, ten per cent of the beds in the center are reserved for indigent patients. So benevolent a facility, even when operated for a profit, easily qualifies as one that is [*160] "inherently beneficial." See *Urban Farms, Inc., supra*, 179 N.J. Super. at 212, 431 A.2d 163 [***13] ("a nursing home, whether or not nonprofit, comes within the inherently beneficial category, particularly where, as here, a certificate of need has been granted and more than a third of its beds have been committed to Medicaid recipients, i.e., indigents"). The proposed center, as one that would serve the general welfare, satisfies the positive criteria. *DeSimone v. Greater Englewood Housing Corp.*, 56 N.J. 428, 440, 267 A.2d 31 (1970); *Kohl v. Mayor of Fair Lawn*, 50 N.J. 268, 279, 234 A.2d 385 (1967). In effect, by its nature, the proposed facility creates special reasons for its grant.

For inherently beneficial uses, we have never required either that the site be particularly suitable, *Kohl, supra*, 50 N.J. at 279, 234 A.2d 385, or that it may not be used for a permitted use, *DeSimone, supra*, 56 N.J. at 440, 267 A.2d 31; *Kunzler, supra*, 48 N.J. at 286, 225 A.2d 321. We have yet to determine, however, whether [***14] the negative criteria compel consideration of the effect of the proposed use on surrounding property. See *Medici, supra*, 107 N.J. at 22

n. 12, 526 A.2d 109; Cox, *supra*, at 146.

III

Hence we turn to the initial question, whether *Medici* requires proof of satisfaction of the negative criteria by an enhanced standard when the proposed use is inherently beneficial. *Medici* does not impose any such requirement. The opinion begins: "This case invites our reconsideration, for the first time since *Kohl v. Mayor of Fair Lawn*, 50 N.J. 268, 234 A.2d 385 (1967), of the factors that should guide a municipal board of adjustment considering a use-variance application for a commercial use that does not 'inherently serve[] the public good.'" *Medici, supra*, 107 N.J. at 3, 526 A.2d 109 (quoting *Kohl, supra*, 50 N.J. at 279, 234 A.2d 385). By its terms, [*161] therefore, the opinion does not apply to inherently beneficial uses. The Appellate Division was apparently misled [***15] by a later sentence in the opinion to the effect that proof by the enhanced standard of satisfaction of the negative criteria "will apply in all use-variance cases." 107 N.J. at 4-5, 526 A.2d 109. That sentence, however, appears [**35] in the middle of a paragraph that begins by repeating the scope of the opinion as delineated in the paragraph's opening sentence that when a variance "is not one that inherently serves the public good, the applicant must prove and the board must specifically find that the use promotes the general welfare because the proposed site is particularly suitable for the proposed use." *Id.* at 4, 526 A.2d 109 (footnote omitted). Taken out of context, the statement that the enhanced standard "will apply in all use-variance cases" might be viewed as creating an ambiguity. Taken in context, however, that the enhanced standard does not apply to inherently beneficial uses is apparent.

Medici's facts corroborate that conclusion. Although the zoning ordinance there did not permit hotels or motels, the Board of Adjustment had previously approved three use variances for [***16] such uses. When confronted with the grant of a fourth variance, this Court found that the applicant had not met "the formidable burden of proving that the grant of another use variance for a motel at this site was not inconsistent with the intent and purpose of the zoning ordinance as reflected by the governing body's failure to authorize motels as a permitted use in the zone." 107 N.J. at 25-26, 526 A.2d 109. To prevent conflict between the Board of Adjustment's power to grant use variances under the 1985 amendments and the governing body's power to zone, we mandated "an enhanced quality of proof and clear and specific findings by the board of adjustment that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance." *Id.* at 21, 526 A.2d 109. The case emphasized that under the 1985 amendments to the Municipal Land Use Law, N.J.S.A. 40:55D-1 to -129, rezoning of a municipality should be accomplished not by a board [*162] of adjustment through the liberal grant of use variances for commercial purposes, but by the governing body [***17] through amendment to the zoning ordinance. *Medici, supra*, 107 N.J. at 5, 526 A.2d 109. In the interest of completeness, we note that both the Appellate Division, *Jayber, Inc., supra*, 238 N.J. Super. 165, 569 A.2d 304, and the Law Division, *Homes of Hope, Inc. v. Board of Adjustment of Mount Holly*, 236 N.J. Super. 584, 566 A.2d 575 (1989), have also concluded that *Medici's* enhanced standard does not apply to inherently beneficial uses. The Board erred in applying that standard to the subject application.

IV

The final issue is to what extent a use variance involving an inherently beneficial use must satisfy the negative criteria. As Justice Hall wrote, "[j]ust because an institution is thought to be a good thing for the community is no reason to exempt it completely from restrictions designed to alleviate any baneful physical impact it may nonetheless exert in the interest of another aspect of the public good equally worthy of protection." *Roman Catholic Diocese of Newark v. Borough of Ho-Ho-Kus*, 47 N.J. 211, 221, 220 A.2d 97 (1966) [***18] (*Ho-Ho-Kus* II) (concurring opinion) (footnotes omitted).

Reasonable restrictions may be a more temperate response than a complete rejection of needed regional facilities. Justice Hall concisely described the dilemma posed by an unrestricted ban on such facilities:

Regional or, for that matter, local institutions generally recognized as serving the public welfare are too important to be prevented from locating on available, appropriate sites, subject to reasonable qualifications and safeguards, by the imposition of exclusionary or unnecessarily onerous municipal legislation enacted for the sake of preserving the established or proposed character of a community or some portion of it * * * or to further some other equally indefensible parochial interest. And, of course, if one municipality can so act, all can, with the result that needed and desirable institutions end up with no suitable place to locate. [*Id.* at 223, 220 A.2d 97.]

[*163] A too-strict reading of the negative criteria can result in the denial of many deserving inherently beneficial uses, which "should have the right to locate on any [***36] appropriate site where [***19] the physical impact of their operations can be alleviated to a reasonable extent by the imposition of suitable conditions and restrictions." *Id.* at 222, 220 A.2d 97.

The dispositive issue is not whether inherently beneficial uses should be subject to the negative criteria, but whether a board of adjustment or planning board should balance the positive and negative criteria in determining whether to grant a variance. See *Baptist Home of S. Jersey v. Borough of Riverton*, 201 N.J. Super. 226, 240, 492 A.2d 1100 (Law Div. 1984). For commercial uses, *Medici* affirmed that ^{HN3} "[t]he board of adjustment must evaluate the impact of the proposed use variance upon the adjacent properties and determine whether or not it will cause such damage to the character of the neighborhood as to constitute 'substantial detriment to the public good.'" 107 N.J. at 22 n. 12, 526 A.2d 109 (footnote omitted). In making that statement, the Court in *Medici* drew on *Yahnel v. Board of Adjustment of Jamesburg*, 79 N.J. Super. 509, 519, 192 A.2d 177 (1963), [***20] in which the Appellate Division proposed a balancing test: "a discretionary weighing function by the board wherein the zoning benefits from the variance are balanced against the zoning harms." *Yahnel*, like *Medici*, arose in the context of a challenge to the board of adjustment's

grant of a use variance for a commercial purpose. ^{HN4}Concerning such uses, the standard is to weigh benefits from the grant of the variance against the detriment to the public good. "If on adequate proofs, the board without arbitrariness concludes that the harms, if any, are not substantial, and impliedly determines that the benefits preponderate, the variance stands." *Yahnel, supra*, 79 N.J. Super. at 519, 192 A.2d 177. Although the issue before us arises in a case concerning the denial of an inherently beneficial use, we must nevertheless consider the relationship between the benefits and burdens of the grant of the variance. As the Law Division recently noted, "[t]he riddle presented by [*164] the inherently beneficial use variance has not been solved." *Homes of Hope, supra*, 236 N.J. Super. at 593, 566 A.2d 575. [***21]

The lower courts disagree on the solution to the riddle. One part of the Appellate Division has repudiated any balancing of the negative and positive criteria:

N.J.S.A. 40:55D-70, by its plain language, requires an applicant for a use variance to establish special reasons and to establish the negative criteria The concepts of special reasons and negative criteria are independent and separate requirements of proof not to be integrated into some kind of balancing test. [*Lazovitz v. Board of Adjustment*, 213 N.J. Super. 376, 382-83, 517 A.2d 486 (1986) (citations omitted).]

The Law Division has concluded, however, that a balancing test is appropriate. *Homes of Hope, supra*, 236 N.J. Super. at 594, 566 A.2d 575. Another part of the Appellate Division disavowed a direct balancing of positive and negative criteria, but recognized the need for some "overall consideration of the proposal * * *." *Medical Realty Assocs. v. Board of Adjustment*, 228 N.J. Super. 226, 232, 549 A.2d 469 (1988).

Some balancing of benefits [***22] and burdens necessarily occurs when one considers whether a use variance will have a substantial detrimental effect on the public good and the zone plan. Without any balancing, a local board's finding that an applicant has not satisfied the negative criteria would always defeat an inherently beneficial use, no matter how compelling the need for that use. *Baptist Home, supra*, 201 N.J. Super. at 245, 492 A.2d 1100.

^{HN5}Although *N.J.S.A. 40:55D-70d* does not expressly require a balancing of the positive and negative criteria, the need for balancing is implicit in the statutory requirement that the grant of a variance must be "without substantial detriment to the public good." See *Medici, supra*, 107 N.J. at 22 n. 12, 526 A.2d 109. Under the legislative scheme, not every detriment will support the denial of a use variance. Only one that is "substantial" will suffice. *Id.* at 22-23 n. 12, 526 A.2d 109. Fairly read, the requirement that a detriment be substantial [***37] necessitates a balancing of positive and negative criteria. *Ibid.*; [***23] *Yahnel, supra*, 79 N.J. Super. at 519, 192 A.2d 177. [***165]

The facts of each case will demonstrate the extent to which an inherently beneficial use compensates for its adverse effect on the neighborhood. Any non-residential use is bound to produce some adverse effect. *Yahnel, supra*, 79 N.J. Super. at 519, 192 A.2d 177. ^{HN6}When the impact of that effect is significant, the balance may tip toward denial. *Baptist Home, supra*, 201 N.J. Super. at 247, 492 A.2d 1100. Because of an inherently beneficial use's satisfaction of positive criteria, a minimal effect, however, would support a finding that the detriment is not substantial.

We suggest the following procedure as a general guide to municipal boards when balancing the positive and negative criteria. First, the board should identify the public interest at stake. Some uses are more compelling than others. For example, community residences for the developmentally disabled, *N.J.S.A. 40:55D-66.1*; community shelters for victims of domestic violence, *ibid.*; and child care [***24] centers, *N.J.S.A. 40:55D-66.6*, are so beneficial that the Legislature has permitted them in every residential zone in the state. The Legislature has deemed others, such as family day-care centers, as "home occupations" that may not be subject to more stringent restrictions than other such occupations in the residential zone in which the home is located. *N.J.S.A. 40:55D-66.4*. Thus, the Legislature has removed some uses from the power of local land use boards to preclude them from residential zones. Courts have recognized other uses as sufficiently beneficial to satisfy the positive criteria: low- and moderate-income housing, *DeSimone, supra*, 56 N.J. at 442, 267 A.2d 31; housing for the poor and homeless, *Homes of Hope, supra*, 236 N.J. Super. at 588, 566 A.2d 575; senior citizen congregate housing, *Jayber, supra*, 238 N.J. Super. at 177, 569 A.2d 304; a health-care facility for the elderly, *Baptist Home, supra*, 201 N.J. Super. at 240, 492 A.2d 1100; a commercial [***25] radio transmission tower, *Alpine Tower Co. v. Mayor of Alpine*, 231 N.J. Super. 239, 555 A.2d 657 (App.Div.1989); and a dial telephone service center, *Yahnel, supra*, 79 N.J. Super. at 518, 192 A.2d 177. Although [***166] that list may be incomplete, it suffices to identify the kind of use that may outweigh the negative criteria.

Second, the Board should identify the detrimental effect that will ensue from the grant of the variance. Certain effects, such as an increase in traffic, *Baptist Home, supra*, 201 N.J. Super. at 246, 492 A.2d 1100, or "some tendency to impair residential character, utility or value," *Yahnel, supra*, 79 N.J. Super. at 519, 192 A.2d 177, will usually attend any nonresidential use in a residential zone. When minimal, such an effect need not outweigh an inherently beneficial use that satisfies the positive criteria.

Third, in some situations, the local board may reduce the detrimental effect by imposing reasonable conditions on the use. *Ho-Ho-Kus* [***26] II, *supra*, 47 N.J. at 224, 220 A.2d 97 (Hall, J., concurring); *Baptist Home, supra*, 201 N.J. Super. at 247, 492 A.2d 1100. If so, the weight accorded the adverse effect should be reduced by the anticipated effect of those restrictions. *Baptist Home, supra*, 201 N.J. Super. at 246-47, 492 A.2d 1100.

Fourth, the Board should then weigh the positive and negative criteria and determine whether, on balance, the grant of the variance would cause a substantial detriment to the public good. This balancing, "[w]hile properly making it more

difficult for municipalities to exclude inherently beneficial uses * * * permits such exclusion when the negative impact of the use is significant. It also preserves the right of the municipality to impose appropriate conditions upon such uses." *Id.* at 247, 492 A.2d 1100.

V

HN7 Review of the decision of a board of adjustment denying such a variance because of the failure to satisfy the negative criteria, like the review of decisions of local land use **[***27]** agencies generally, begins with the recognition that the board's decision is **[***38]** presumptively valid, and is reversible only if arbitrary, capricious, **[*167]** and unreasonable. See *Rowatti v. Gonchar*, 101 N.J. 46, 51-52, 500 A.2d 381 (1985); *Kramer v. Board of Adjustment*, 45 N.J. 268, 296, 212 A.2d 153 (1965); *Ward v. Scott*, 16 N.J. 16, 23, 105 A.2d 851 (1954). Underlying the presumption is the recognition that such boards possess special knowledge of local conditions and must be accorded wide latitude in the exercise of their discretion. *Kramer, supra*, 45 N.J. at 296-97, 212 A.2d 153.

With those principles in mind, we turn to the record. Our review of the record leads us to conclude that the head-trauma residential-rehabilitation center will meet a legitimate public need. New Jersey residents who suffer traumatic head injuries should not have to leave this state for residential-rehabilitation treatment. Furthermore, the use is suitable for the site, and the variance **[***28]** may be granted without violating the negative criteria. Nothing supports a contrary decision. The proposed center meets the requirements for the R-60 zone. The building setback and design will render the building unobtrusive. Uncontradicted testimony established the absence of traffic problems and of any diminution in the values of neighboring properties. It is not amiss, moreover, to note that the proposed use was authorized by the ordinance when Dr. Sica purchased the property. *Ho-Ho-Kus II, supra*, 47 N.J. at 217, 220 A.2d 97. We conclude that Dr. Sica is entitled to the grant of the variance, subject to the imposition of reasonable conditions necessary to ameliorate the adverse impact of the negative criteria. See *id.* at 222, 220 A.2d 97 (Hall, J., concurring). Ordinarily, we would remand the matter to the Board for reconsideration in light of our decision. Here, however, we are satisfied that the Board's power to impose reasonable conditions suffices to control any adverse impact of the center.

The judgment of the Appellate Division is reversed, and the judgment **[***29]** of the Law Division is reinstated.

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FACTUAL HYPOTHETICAL

Houses of Worship are permitted uses in the Township's 5-acre Residential Zoning District (R5). Non-religious assemblies and institutions are also permitted uses in the R5 District.

ABC House of Worship (ABC) in the R5 District wishes to expand its present building. The intended expansion will exceed FAR, lot coverage, set-backs and other standards governing the R5 District.

The intended expansion also includes construction of a school wing, dormitory, athletic fields and community center. None of these uses are permitted in the R5 District.

ABC contends that its intended expansion is in furtherance of the exercise of its religion.

ABC has refused to make application for variance or any other form of relief before the Township Planning Board or Zoning Board of Adjustment for its intended expansion. It contends it has no obligation to do so and asserts that the local regulations constitute a substantial burden on its exercise of religion.

Individual residents have openly voiced objection to ABC's proposed expansion, including comments which can be reasonably interpreted as biased and discriminatory. The Township officials have not made any public comments regarding the proposed expansion which can be interpreted as discriminatory but have insisted upon strict compliance with the Township's local regulations.

The Township has adopted an amendment to its Master Plan and amended its zoning regulations applicable to its 10-acre Agricultural-Residential Zoning District (AR10). Those amendments permit houses of worship, public and private schools,

athletic fields, dormitories and community centers. The amendments were adopted to provide a suitable opportunity for such uses consistent with the character of the AR10 District. The amendments were also intended to insulate the Township against potential RLUIPA claims.

ABC is proceeding with its intended expansion and has ignored all communications from the Township demanding that it comply with local regulations and make application for the requisite approvals.

The Township has sent a cease and desist letter and is about to undertake formal action in Court to enjoin ABC from proceeding with its expansion.

ABC has filed an action in Federal Court asserting, among other claims, that the Township's regulations violate RLUIPA alleging they impose a substantial burden on ABC's exercise of religion. ABC also asserts that the Township's regulations have been applied on less than equal terms with non-religious assemblies or institutions, citing as examples, other non-religious assemblies and institutions in the R5 District that have obtained local approvals permitting them to expand in excess of what the regulations allow.

Each of the panelists is asked to comment upon what they view to be the principle issues presented by the above hypothetical. Each panelist is to limit their comments to 5 minutes. After all panelists have presented their comments, each panelist will be afforded the opportunity to present a 2-minute comment to the observations by the other panelists.

LIST OF STATE AND FEDERAL DECISION
IN NEW JERSEY ON RLUIPA ISSUES

List of State and Federal Decisions in New Jersey
on RLUIPA Issues

Lost Trail, LLC v. Town of Weston

United States Court of Appeals for the 2d Circuit, Case No. 07-2105-cv, Honorable Reena Raggi, CJ, Honorable Richard C. Wesley, CJ, Honorable Debra Ann Livingston, CJ, Summary Order - August 8, 2008. (Unpublished)

Congregation Anshei Roosevelt and Congregation Yeshivas Me'On Hatorah v. Planning and Zoning Board of The Borough of Roosevelt

United States District Court for the District of New Jersey, Civ. No. 07-4109(GEB), Honorable Garrett E. Brown, Jr., U.S.D.J., Memorandum Opinion dated August 20, 2008. (Unpublished)

Hindu Temple & Cultural Society v. Township of Bridgewater Zoning Board of Adjustment

Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-486-05, Honorable Victor Ashrafi, J.S.C., Letter Opinion dated April 25, 2007. (Unpublished)

Muslim Center of Somerset County, Inc., et al v. Borough of Somerville Zoning Board of Adjustment, Borough of Somerville

Superior Court of New Jersey, Law Division, Somerset County, Docket No. SOM-L-1313-04, Honorable Peter A. Buchsbaum, J.S.C., Memorandum of Decision dated May 16, 2006. (Unpublished)

St. Joseph's Korean Catholic Church v. Zoning Board of Adjustment of the Borough of Rockleigh

Superior Court of New Jersey, Appellate Division, Docket No. A-6860-03T2, Honorable Clarkson S. Fisher, J.A.D., Honorable Joseph L. Yannotti, J.A.D., and Honorable Bart Ives Humphreys, J.A.D, Decision decided May 16, 2006. (Unpublished)

Congregation Kol Ami, et al v. Abington Township
309 F.3d. 120 (3d. Cir. 2002)

East Hill Synagogue v. City of Englewood
2005 U.S. Dist. LEXIS 20038 (Unpublished)

East Hill Synagogue v. City of Englewood

240 Fed. Appx. 938; 2007 U.S. App. LEXIS 17108 (Unpublished)

Second Baptist Church of Leechburg v. Gilpin Township, PA

118 Fed. Appx. 615; 2004 U.S. App. LEXIS 26858 (Unpublished)

House of The Christian Church v. Zoning Board of Adjustment of the City of Clifton

379 N.J. Super. 526 (App. Div. 2005)

Albanian Associated Fund v. Township of Wayne

2007 U.S. Dist. LEXIS 73176 (Unpublished)

The Lighthouse Institute for Evangelism, Inc. v. City of Long Branch

510 F.3d. 253 (3d. Cir. 2007)

The Church of the Hills of the Township of Bedminster v. Township of Bedminster

2006 U.S. Dist. LEXIS 9488 (Unpublished)

Macedonian Orthodox Church v. Planning Board of the Township of Randolph

269 N.J. Super. 562 (App. Div. 1994)

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