

Case No. 05-2309

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

Plaintiff-Appellee,

- vs -

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

Defendants-Appellants.

Appeal from the United States District Court
Western District of Michigan

APPELLEE'S FINAL BRIEF ON APPEAL

Steven M. Jentzen
Steven M. Jentzen, P.C.
106 S. Washington
Ypsilanti, MI 48197
(734) 482-5466

Derek L. Gaubatz*
Anthony R. Picarello, Jr.
Lori E. Halstead
The Becket Fund for Religious
Liberty
1350 Connecticut Ave., N.W.
Suite 605
Washington, D.C. 20036
(202) 955-0098

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**Counsel of Record*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellee states that the Appellee does not have a parent corporation, nor does it issue any stock.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellee believes that oral argument will significantly aid the Court in its decisional process in this case and therefore respectfully requests oral argument pursuant to 6TH CIR. R. 34(a).

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STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION

The Church agrees with the Township's statement of jurisdiction subject to the following exception: on Aug. 23, 2005, the trial court entered judgment in favor of the Church on its RLUIPA §2(a) claim in the form of a declaratory judgment and a permanent injunction. The court did not dispose of all of the Plaintiffs' claims. Pursuant to F.R.C.P. 54(b), the court held the other claims—including a claim for damages—in abeyance and only entered judgment on the RLUIPA §2(a) claim after apparently determining there was no just reason for delay.¹ The Township appealed the 8/23/05 order. This Court may have jurisdiction pursuant to 28 U.S.C. §1291 and F.R.A.P. 3 and 4, or, in the alternative, this Court has jurisdiction over the order of a permanent injunction pursuant to 28 U.S.C. § 1292(a)(1).

¹ 384 F.Supp.2d at 1125 n.1. The Church's other claims and the RLUIPA claim for damages were never addressed nor dismissed by the court.

STATEMENT OF THE ISSUE

Whether the Township's denial of permission for the Church to build a Christian education building necessary to accommodate its growing congregation and Christian educational ministry substantially burdened the Church's religious exercise in violation of RLUIPA, and whether the Township failed to justify its actions by showing that the permit denial was the least restrictive means of achieving a compelling interest.

STATEMENT OF FACTS

The operative facts for purposes of this appeal are the trial court’s findings of fact in its written order following the bench trial and the trial record viewed in the light most favorable to the Church, the prevailing party below. *Harrison v. Monumental Life Ins.*, 333 F.3d 717, 721–22 (6th Cir. 2003)(district court’s factual findings must be read in “the light most favorable to the appellee,” and cannot be overturned if “plausible in light of the record”). The following Statement of Facts is a summary of those two sources.

Remarkably, the “Statement of Facts” in the Township’s opening brief fails to set forth or cite—*even once*—the trial court’s binding findings of fact.² The Township cites exclusively to the trial record and makes little, if any, attempt to set forth that evidence in the light most favorable to the Church. Instead, the Township frequently does the opposite, citing the record and drawing inferences in its own favor, even when those inferences run contrary to the trial court’s express factual findings. *See, e.g., infra* p.9, n.3 & p.20, n.8 (detailing Township’s mischaracterization of the record).

² The Township has waived the argument that any of the trial court’s factual findings constitute reversible “clear error” by failing to raise that argument anywhere in its opening brief.

As a result, the Township’s “fact” statement is replete with omissions of established fact, mischaracterizations of the record, and clear mistakes. The Court should therefore disregard the Township’s “Statement of Facts” in its entirety.

I. Overview of the Church’s Ministries

Plaintiff Okemos Christian Center (“the Church”) operates a Christian church and school that exist to minister to the community in Meridian Township, Michigan. R.84:7-8,15/Apx.742–43,750. However, because the Township denied the Church’s application for a special use permit, the Church is “unable to practice its religious beliefs in its current location because the facilities are too small for the needs of the congregation and staff.” 384 F.Supp.2d at 1133.

Since its inception, the Church’s mission has been to provide more than just a place to worship on Sundays; it seeks to minister to people of all ages and teach them how to apply Christianity to all aspects of life. R.84:8/Apx.743;Pltf.Ex.6/Apx.634. To that end, the church seeks to carry out a wide variety of ministries to care for the spiritual needs of its members and minister to the community. These ministries include weekly meetings of men’s and women’s groups, regular evening seminars for adults, mid-week services, “Marriage 101” classes, mothers of preschoolers meetings,

concerts, and special mission events. 384 F.Supp.2d at 1128; R.84:8,15/Apx.743,750;Pltf.Ex.6/Apx.615,622,648,652,655. The Church also has a variety of other ministries aimed at addressing the needs of children. See R.84:8/Apx.743 (describing youth ministry); Pltf.Ex.6/Apx.624(listing worship and religious education opportunities available for children and teens, including Children’s Church, play day with pastor, and infant and toddler rooms); *id.*(describing employment of multiple pastors to work with children and teens).

In addition, the Church operated a Christian daycare ministry for eight years, until it was forced to shut it down because of lack of space at its existing facility. 384 F.Supp.2d at 1128; see also R.84:56/Apx.791;Pltf.Ex.6/Apx.618(describing daycare ministry as “explicitly Christian care with an explicitly Christian worldview”). The child care center ran from 7:00a.m. to 6:00p.m. Monday–Friday and used most of the space in the church. R.84:39–40/Apx.774–75. At its peak, it served almost 70 children and was so important to the church’s vision of ministering to the community that the Church heavily subsidized it. R.84:13–14/Apx.748–49;*id.* at 80–81/Apx.815–16.

Finally, a primary component of the Church’s ministry plans from its inception was to operate a school from a “Christian world view.” 384

F.Supp.2d at 1133; R.84:8,15/Apx.743,750. Accordingly, in fall 2001, after years of planning, the Church opened Dominion Leadership Academy, a Christian junior and high school for boys. The Academy opened at an offsite, temporary location while the Church awaited Township approval of plans to construct a permanent home for the school on its existing property. 384 F.Supp.2d at 1128; R.84:16/Apx.751.

The Academy is designed to “train future generations...through discipleship, wisdom, destiny and purpose according to the Word of God.” Pltf.Ex.5/Apx.595. In accordance with the Church’s beliefs, all subjects are taught from a Christian perspective. *See* Pltf.Ex.5/Apx.607–08(promotional materials on “Science from Biblical Foundations” and “Mathematics as God’s Blueprint for Understanding the Cosmos”). This is in addition to daily chapel services and Scripture readings. Pltf.Ex.5/Apx.601;R.84:51–53/Apx.786–88.

Also, in accordance with the Church’s beliefs, the school is designed to promote “Biblical masculinity” and uses both traditional and non-traditional techniques to educate its students. R.84:130/Apx.865. An important component of this training is physical activity—for which a gymnasium is necessary—designed to make good use of their energy and instill values such as respect for authority, diligence, perseverance, team

work and discipline. R.84:131/Apx.866;Pltf.Ex.5/Apx.606, “Developing Biblical Masculinity Through Sports”.

II. The Church Acquires Its Existing Facility, Begins to Use It, Plans for Expansion in Cooperation with the Township, and Obtains a SUP for Expansion.

In 1994, the young Church searched for and purchased its current 6-acre home in the Township. 384 F.Supp.2d at 1125; R.84:7–8/Apx.742–43. The Church did not choose just any parcel of land, but looked for, and found, the “perfect location” to establish not only a place of worship, but also its anticipated religious school. R.84:9–10/Apx.744–45. It chose land just across the street from public elementary and high schools, with recreational areas and ballfields within walking distance. *Id.*; *id.* at 34. The Church applied for and received a special use permit (“SUP”) to build a 10,925-square-foot church building for use as a sanctuary and its Christian daycare ministry. 384 F.Supp.2d at 1126.

The SUP was necessary because the Township requires churches to run the gauntlet of the discretionary SUP process before they can assemble for worship and service *anywhere* inside its borders. R.85:234/Apx.971. Religious schools face the same scrutiny. 384 F.Supp.2d at 1134.

When it applied for the SUP, the Church specifically discussed its future plans with the Township. 384 F.Supp.2d at 1126. The Township

understood that the sanctuary and daycare center was Phase One of a multi-phase building plan. *Id.*

In 2000, the Church moved ahead with the next phase of its building plan, so that it could both address the lack of space for its current ministries and provide a permanent and adequate home for its Christian school. Specifically, the Church applied for a SUP to add a 28,500-square-foot school building to its existing property that would allow it to operate a school and other ministries. 384 F.Supp.2d at 1126. Although the Church initially sought approval for enrollment of 360 students, it “voluntarily limited enrollment to 280 at the request of the Township.” *Id.* The Church “also made several other concessions, including delaying its start time so as not to interfere with traffic to nearby schools, doing without athletic fields, and paying [\$18,000] for construction of a deceleration lane to lessen the traffic impact.” *Id.*;R.84:29–30/Apx.764–65. After the Church agreed to these concessions, the Township granted the SUP in May 2000. 384 F.Supp.2d at 1126.

After receiving the SUP, the Church “immediately began promoting the school and raising money for construction.” 384 F.Supp.2d at 1126. It earmarked \$200,000 for construction of the school and planned to make additional arrangements to finance the project. R.84:106–107/Apx.841–42.

III. The Township Arbitrarily Denies a Routine Extension to Complete Construction of the Permitted Project, Arbitrarily Requires a New SUP Application, and Arbitrarily Denies That Application, Notwithstanding the Approval of Its Own Planning Staff.

As the Church was preparing for the needed expansion, it received a March 7, 2001 letter from the Township advising that its SUP for construction “would expire on May 19, 2001, unless [it] obtained an extension or began substantial construction of the project.” 384 F.Supp.2d at 1126. The Church requested an extension the next day. Ex.V-2/Apx.674. The Church had no reason to believe that its extension would not be granted because “up until May 2001 the Township had a *policy* of granting extensions on SUPs.” 384 F.Supp.2d at 1126. (emphasis added).³ See also R.84:167,172/Apx.914–15 (testimony of city planner stating that he could not remember a single refusal to grant an extension prior to May 2001).

Eight weeks later—just ten days before its permit was to expire—the Church received a shock. On May 9, the Township contradicted its prior policy of granting SUPs and denied the Church’s SUP extension. 384 F.Supp.2d at 1126. Subsequently, on May 15, 2001, the Township passed a

³ The Township’s assertion in its brief that it “changed its policy regarding [SUP extensions] on March 9, 2001” is not only unsupported by any citation to the record, but is in fact expressly contradicted by the District Court’s factual finding that a policy existed of extending SUPs until May 2001.

resolution setting forth a new policy. *Id.* The new policy stated “that because the Zoning Ordinance had no provision for extending an SUP, any request for extension of an SUP must be treated as an application for a new SUP and be subject to all of the requirements of a new SUP request.” *Id.*

Because of the Township’s “*unprecedented* denial of the extension of time to proceed on the 2000 SUP, [the Church] lost its initial investment of \$35,000 or \$40,000 in planning documents” and had to restart the SUP process, thereby delaying the construction of its needed ministry space. *Id.* (emphasis added).

Nevertheless, the Church moved forward with its plans. First, in fall 2001, it opened its school at a temporary location, pending the Township’s approval of a revised SUP proposal to build a permanent facility on Church property. R.84:16–18/Apx.751–53. Second, and despite the Township’s “sudden[] abandon[ment]” of its prior policy, the Church “worked diligently and in good faith with the Township to address its concerns before submitting a revised [SUP] proposal.” 384 F.Supp.2d at 1134. Rev. Dumont, the Church’s pastor, met with Township planning staff to determine how best to address Township concerns. *Id.* at 1126. “He was told that he needed to reduce enrollment further.” *Id.* To address this concern over “intensity of use,” the Church agreed that in addition to the

concessions it made in 2000, “it would agree to further reduce the number of students from 280 to 125.” *Id.* at 1126-27.

After “expend[ing] significant energy and funds” over two years to develop a new SUP proposal, *id.* at 1133, the Church filed the new proposal on May 21, 2003, requesting approval “to build a Christian Education Building of 34,989 square feet.” *Id.* at 1127. The 2003 building proposal was slightly larger in square footage—about 6,500 square feet—than the 2000 proposal that had been approved. *Id.* But “the outward appearance of the two proposals was substantially the same” and the footprint of the 2003 proposal was actually “smaller than the 2000 proposal because it included a larger basement.” *Id.*

The proposed use was large enough to enable the Church to adequately practice its religious beliefs by allowing a permanent home for the school and relieving space constraints at the existing facility that forced the Church to abandon its daycare ministry and precluded other ministries. *See* R.84:33,35–40,44–47/Apx.768,770–75,779–82(describing many ways in which proposal would satisfy the Church’s needs for space for its ministries). Among other things, the 2003 proposal included classroom and athletic space (*e.g.*, a gym) necessary for the school and multi-purpose space

necessary for child care and other ministries that the Church couldn't do in its existing facility. R.84:32–33,73,75–77/Apx.767–68,808,810–12.

“The 2003 proposal was reviewed and approved by the various township departments including community planning and development, EMS/fire, police, engineering, county drain commissioner, county road commissioner.” 384 F.Supp.2d at 1127. The Church’s plans “complied with *every* ordinance regulating lot coverage, setbacks, height, appearance, location and use once the SUP for a school was approved.” *Id.*(emphasis added). Accordingly, in July 2003, the Township Planning Commission voted to approve the SUP for school use and recommended that the Township Board approve the SUP for the building. *Id.*

The Township Board then considered the Church’s SUP application. At its first meeting considering the SUP, the Board discussed whether a partial denial—denying a SUP for the building, but approving the school use—would have the “practical effect” of stopping the entire project. R.85:249–50/Apx.986–87;Ex.H/Apx.346. The Board also requested preparation of a chart displaying land area/building size ratios. *Id.* at 16/Apx.354–55. “The ratios were developed for the purpose of reviewing Plaintiff’s application and they have not been applied to any other applicants

since their creation.” 384 F.Supp.2d at 1127.⁴

At its next meeting, the Board followed the “practical effect” strategy discussed previously. The Board affirmed the Planning Commission’s approval of a SUP for a school use at the site. *Id.* at 1128. However, the Board denied the Church a SUP for its building proposal, thereby denying the space needed for the school use it was theoretically willing to allow. *Id.*

The denial was based “on arbitrary grounds that were not contained in the ordinance.” *Id.* at 1134.⁵ Specifically, the Township justified its denial “on the basis of its interest in the density of the land to building area ratio.” *Id.* But, “the land to building ratio chart used by the Township, although seemingly objective, was in fact meaningless.” *Id.* at 1135. Among other problems, “the Township has no guidelines specifying what is an acceptable ratio and what ratio is too dense.” *Id.*

As the trial court findings spell out at length, the Township’s “arbitrary school density ratio” was fraught with problems. *Id.* For example, the land-to-building ratio was created specifically for the Church’s SUP and was never “applied to any other proposal.” *Id.* Moreover,

[The ratio] does not address enrollment, and accordingly has no

⁴ The Township’s suggestion, Tp.Br.17, that a land-area-to-building-ratio chart was originally developed for the Church’s 2000 SUP application is contradicted by this factual finding of the trial court.

⁵ The Township omits this critical factual finding in its fact statement.

relevance to intensity of use. Its concern is only with the ratio of the size of the physical structure to the size of the land. Moreover, the ratio does not contain any guidelines as to what buildings or parts of buildings should count toward the total square footage. The entire...square footage of the [Church's] project was considered even though 11,000 square feet were devoted to a basement that was not visible to the public. On the other hand, the Township officials were not sure whether the square footage for the public schools to which it was compared included basements, bus garages or portable classrooms. The land to building ratio also fails to take into consideration athletic fields which would affect the amount of land required by a school. Most of the comparison schools have athletic fields, whereas Plaintiff was required to agree not to have any athletic fields.

Id.

There is also “no standard in the ordinance or the Comprehensive Development Plan as to what land to building ratio is appropriate for a school.” *Id.* at 1127. The Plan “does reference criteria established by the [NEA] to evaluate school facilities....[but] these criteria address total land, and not land to building ratio.” *Id.* In addition, “the NEA is a national teachers’ union that promotes the interests of public school teachers....Its recommendations are not based on the same land regulation considerations that concern a township zoning board.” *Id.* at 1135. And, although the Township’s Comprehensive Development Plan asserts “that all of the schools in the Township are in compliance with [the NEA] site standards, that is not in fact the case.” *Id.* at 1127-28. Finally, the Township ignored other non-residential uses in residential areas to which it could have

compared the Church and school, and instead compared the Church's proposal "primarily to public schools even though public schools are not subject to the zoning laws." *Id.* at 1135.

IV. The Township's Denial of the Church's Application to Add Needed Space Has Left the Church Unable to Practice Its Religious Beliefs at Its Current Facility

The trial court's findings of fact and the trial record make clear that the Township's refusal to approve the SUP to add needed space to its current facility inhibited the Church's ability to practice its religious beliefs in numerous ways. *Id.* at 1133 (the Church is "unable to practice its religious beliefs in its current location because the facilities are too small for the needs of the congregation and staff."). For example:

- Due to the lack of space, the recently thriving church is losing current and potential members, thereby losing the ability to minister to them. *Id.* at 1129.
- The current facility lacks space to add new services. *Id.* at 1128.
- The current facility lacks space for seating for new members. *Id.*
- Lack of space in the current facility has meant that the sanctuary was transformed into a multi-purpose room used not only for Sunday worship, but also for daycare during the week, teen ministry activities, banquets, seminars, mid-week services, and other ministries. Not only did this create continual scheduling conflicts among ministries, but church staff and members were forced to take time away from ministry in order to set-up and then break-down the room for various uses. *Id.*;R.84:37–38,40–41,65/Apx.772–73,775–76,800.

- Due to the challenges of sharing many ministries in the sanctuary space, the Church was forced to give up the daycare ministry it had operated for eight years. 384 F.Supp.2d at 1128. *See also id.* at 1133 (“Lack of adequate space...forced Plaintiff to choose between its daycare ministry and [adult] Christian Education ministry.”) Not only did this cost the Church an important ministry, but it also caused loss of goodwill in the community. *See, generally*, Pltf.Ex.9/Apx.659–67(letters from parents upset by the daycare closure).
- Due to the challenges of sharing many ministries in the sanctuary space, the Church was forced to give up its midweek service and cancel youth ministry meetings. R.84:39,97,99/Apx.774,832,834.
- The Church needs additional room for several ministries, including its children’s program on Sundays and weekday evenings, its weekly men’s group, its weekly women’s group, evening seminars for adults, and other special events.⁶ 384 F.Supp.2d at 1128; R.84:81/Apx.816.
- The choir has no place to practice, which inhibits worship services. R.84:37/Apx.772.
- Half the staff is occupying offices in an offsite rented facility, which harms the ministry and administration of the church. 384 F.Supp.2d at 1128. It is difficult for pastors to organize activities, teach classes, and coordinate with the other staff. *Id.*;R.84:36–37/Apx.771–72. One pastor must use a closet as office space. R.84:163–64/Apx.898–99.
- Lack of space harms the children’s ministry and Church outreach efforts. The Vacation Bible School program, a “major outreach of the church,” had to be held offsite, leading to missed drop-offs, late attendance, and angry parents. R.84:43,161–63/Apx.778,896–98.

⁶ The Township notes that some of these ministries—by design—serve relatively small groups. However, the record demonstrates the lack of adequate classroom space for even small, intimate classes to assemble, and the trial court found “additional room” was needed for these ministries. *Id.* at 1128.

An activity designed to be an outreach became a source of frustration and complaint. *Id.*

- The Church needs additional storage space for its ministry items. Because it lacks storage space, even the classrooms the existing facility does have are limited in their utility because the Church is forced to use some of the space in these rooms to store items for its ministries. R.84:88,91/Apx.823,826. Other items are stored offsite in two rented storage units, necessitating sacrifice of ministry time to go retrieve these items when they're needed. R.84:37/Apx.772.

In addition, the Township's refusal to allow the Church to add needed space has forced its school to hobble along at offsite, temporary facilities, even though "[h]aving the Church and the school in two separate locations is...not feasible." 384 F.Supp.2d at 1133. This has further inhibited the Church's religious exercise. For example:

- The quality of education and administration at the school suffered because "[h]aving the Church and the school in two separate locations is...not feasible." *Id.* The same staff operates the church and the school, so it is difficult to coordinate the staff when they are not on the same property. *Id.* at 1128. This is no mere administrative difficulty—lessons are delayed and interrupted when staff must travel from place to place during the workday, R.84:136/Apx.871, and staff are less effective as teachers and ministers when they must spend their days shuttling between offices. R.84:160–61/Apx.895–96.
- "The Church is severely limited in its ability to recruit for the school because of the uncertainty about the future space and the current lack of programming associated with the lack of space." 384 F.Supp.2d at 1129. More than a hundred families expressed interest in the school, but most were unwilling to commit until space constraints and uncertainty over its permanent home were resolved. *Id.*;R.84:79,139–42/Apx.814,874–77. Accordingly, the

Church lost the ability to minister to a number of students, thereby undermining the very purpose of its existence.

- None of the three temporary facilities the School operated in while awaiting approval of plans to construct a permanent home on Church property were sufficient for its ministry. The first facility was 25 miles from the Church and the Township community the school was seeking to serve, creating overwhelming transportation difficulties. 384 F.Supp.2d at 1128; R.84:17–18/Apx.752–53. The second site, a small house, was too small and detracted from enrollment. 384 F.Supp.2d at 1128. The third site was not suitable for a school because it was a “cobbled together office” and lacked gym facilities. *Id.*;R.84:18–20/Apx.753–55. Moreover, the school had to vacate the site after Spring 2005 because of its impending sale. Pltf.Ex.8/Apx.669. And, in any event, the third site was zoned professional/office and schools are not allowed in that office zoning district. 384 F.Supp.2d at 1128. The inadequate, temporary nature of all these sites detracted severely from enrollment. R.84:18–20,79,139–42/Apx.753–55,814,874–77.
- The lack of a gym at the School’s temporary facilities hindered its programs and effectiveness, especially its promotion of “Biblical masculinity.” R.84:130–31,137–39/Apx.865–66,872–74. The school experimented with multiple arrangements to satisfy its need for gym space, all of which proved unworkable. R.84:20–21/Apx.755–56. As a result, the school “had no room for most of the activities that [it] would normally do,” had to sporadically rent any gym facilities “we could get our hands on,” and even had to resort to using the unsafe parking lot for physical activity.⁷ R.84:21–22,147,160/Apx.756–57,882,895.

Although the Church could have expanded by 14,000 square feet as of right, the court below specifically found that “[a]dding a 14,000 square feet addition to the Church’s present facility...would not resolve the [Church’s]

⁷ The Township failed, despite its best efforts, to identify a single school without a gym onsite. R.84:149–51/Apx.884–86.

space problems” and the associated inability “to practice its religious beliefs at its current location.” 384 F.Supp.2d at 1133. The Church “has grown beyond its current space.” *Id.* The church and the school need to share the use of the buildings and one location in order to function, and an addition of 14,000 square feet for “a total of 25,000 square feet will not accommodate Plaintiff’s need for classrooms, a gymnasium, a sanctuary, day care rooms, offices and meeting rooms.” *Id.* Having the church and the school in two separate locations is...not feasible.” *Id.* See also R.84:77-78/Apx.812–13(testimony of Church’s pastor: “the only way that it can actually truly be a viable entity is by having [the Church and school] together”).

Finally, because both churches and religious schools are not a permitted use anywhere in the Township, the Church would need a SUP to locate a Church and school of any size anywhere in the Township, not to mention one large enough to meet the needs of this particular ministry.⁸ 384 F.Supp.2d at 1134; R.85:234/Apx.971. Accordingly, as the court found,

⁸ The Township’s assertion, Tp.Br.21, that the School could build a 25,000-square-foot school at a different location without a SUP is contradicted by the district court’s factual finding that “private schools are not a permitted use anywhere in the Township.” 384 F.Supp.2d at 1134. The district court rejected the Township’s assertion, made for the very first time at trial, that the Church could have used “temporary trailers.” Tp.Br.21. But even trailers are not permitted, and so also require a SUP. R.84:264/Apx.1001. Moreover, such trailers are by definition temporary and would not have solved its need for a permanent home. *Id.* at 265. Nor would they have addressed the need for a gym or provided space for large assemblies in accordance with Church needs.

there is “no guarantee that the school and church could build anywhere else in the Township.” 384 F.Supp.2d at 1133. This is especially true in light of the arbitrary “density of the land to building area ratio” requirement that the Township uniquely applied to the Church, since “the Township has no guidelines specifying what is an acceptable ratio and what ratio is too dense.” *Id.* at 1135.

STATEMENT OF THE CASE

The Church sued the Township alleging, among other things, violation of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc (“RLUIPA”). The Church claimed that the Township’s discretionary decision to deny its 2003 SUP application to add needed ministry space to its existing facility substantially burdened its religious exercise in violation of RLUIPA by leaving it unable to adequately practice its religious beliefs. The Church also alleged violations of its rights to freedom of religion, speech, assembly, due process, equal protection under the U.S. and Michigan constitutions and some state law administrative claims.⁹ The Church requested injunctive, compensatory, and any other appropriate form of relief.

⁹ These remaining claims were for violations of the Township Zoning Act and for superintending control of municipal zoning authority pursuant to M.C.R. 3.302.

The suit was originally filed in state court. The Township subsequently moved for summary judgment on all counts. The District Court denied that motion in its entirety.

In pre-trial proceedings, the parties narrowed the legal issues for trial to those involving RLUIPA, as a judgment on those claims could afford the Church full injunctive and compensatory relief. The other claims were held in abeyance until the RLUIPA claims were resolved.

A bench trial was held Feb. 28–March 1, 2005. On August 23, 2005, the court rendered its opinion, making extensive factual findings and entering declaratory judgment “declaring that the Township's denial of Plaintiff's application for an SUP to construct a building in excess of 25,000 square feet violated Plaintiff's rights under [RLUIPA §2(a)].” The court also permanently enjoined the Township from preventing the Church from constructing a school and church building in conformity with its 2003 SUP application. The court did not rule on Plaintiff's request for damages under RLUIPA. Judgment for the Plaintiff on its RLUIPA § 2(a) claim was entered on the same day. The court's judgment did not address any of the remaining other claims. No order of judgment or order of dismissal has been entered on the remaining claims.

The Township appealed on September 20, 2005.¹⁰

STANDARD OF REVIEW

Trial court fact findings, made after a bench trial, are binding and reviewed only for clear error. F.R.C.P. 52(a); *Harrison v. Monumental Life Ins. Co.*, 333 F.3d 717, 721–22 (6th Cir. 2003). They may not be overturned unless the reviewing Court is left with a “definite and firm conviction” that an error has been made. *Id.* at 722. This Court reviews the trial court’s legal determinations *de novo*. *Id.* The grant of a permanent injunction is “within the sound discretion of the district court” and therefore reviewed for abuse of discretion. *U.S. v. Miami University*, 294 F.3d 797, 806 (6th Cir. 2002).

SUMMARY OF ARGUMENT

In granting judgment for the Church on its RLUIPA claim, the trial court correctly held: (1) under the facts of this case, the substantial burden standard of §2(a)(1) was properly invoked through the “individualized assessments” trigger of §2(a)(2)(C); (2) the Church’s use and development of its existing property for a religious school and church ministries is “religious exercise” protected by RLUIPA; (3) the Township’s denying the

¹⁰ The court later awarded Plaintiff attorney fees, which is the subject of a separate appeal.

Church the space needed to develop its property for a religious school and church ministries imposed a “substantial burden” on that religious exercise; and (4) the Township failed to carry its burden of proof and persuasion that burdening the Church’s religious exercise was the least restrictive means of advancing a compelling government interest.

ARGUMENT

I. The Township Does Not Challenge the Trial Court’s Finding That RLUIPA §2(a) Applies Because the Township Denied the Church’s Proposed Religious Use of Its Property Pursuant to a System of Individualized Assessments.

The trial court correctly found that RLUIPA §2(a) applies to this case because the burden was imposed pursuant to a “system of individualized assessments.” *See* 384 F.Supp.2d at 1131; RLUIPA §2(a)(2)(C). This unchallenged determination is supported by overwhelming authority. Legion courts have held that zoning permitting schemes and variance procedures are systems of individualized assessments within the meaning of RLUIPA (and the Free Exercise Clause), thus triggering strict scrutiny when they are applied to impose a “substantial burden.”¹¹ The virtual unanimity

¹¹ *See, e.g., Midrash Sephardi v. Surfside*, 366 F.3d 1214, 1225 (11th Cir. 2004)(finding individualized assessments where zoning “officials may use their authority to individually evaluate and either approve or disapprove of churches and synagogues in potentially discriminatory ways”); *Sts. Constantine and Helen Greek Orthodox Church v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005)(same); *DiLaura v. Ann Arbor Charter Tp.*, 30 Fed.Appx. 501, 510 (6th Cir.

of courts in holding that discretionary zoning permitting schemes and variance procedures represent systems of individualized assessments squares with Congress' findings in enacting RLUIPA. Specifically, Congress found that “[l]ocal land-use regulation, which lacks objective, generally applicable standards, and instead relies on discretionary, individualized determinations, presents a problem that Congress has closely scrutinized and found to warrant remedial measures under its section 5 enforcement authority.” H.R.Rep.No. 106-219, at 17.

As Judge Posner recently noted, because these discretionary systems run the *risk* of religious discrimination, RLUIPA appropriately subjects burdens imposed pursuant to systems of individualized assessment to strict scrutiny, even though the plaintiff does *not* have to prove discrimination. *Constantine*, 396 F.3d at 900(§2(a) “backstops” intentional discrimination provisions in situations where “a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards”). The trial court’s decision on this point was thus in accord with the vast weight of authority and should be affirmed.

2002)(holding that denial of variance was “clearly” a system of “individualized assessments of the proposed uses for the property involved.”); *Shepherd Montessori Center Milan v. Ann Arbor Charter Tp.*, 675 N.W.2d 271, 279-80 (Mich.App. 2003)(denial of variance “invites individualized assessments of the subject property and the use of such property, and contains mechanisms for individualized exceptions”).

Because the Township has not challenged the lower court’s finding of a system of individualized assessments in its initial brief, the Township has waived this issue and cannot raise it on reply. *Radvansky v. Olmsted Falls*, 395 F.3d 291, 318 (6th Cir. 2005)(“[A]ppellant waives an issue when he fails to present it in his initial briefs before this court”)(internal quotation omitted).

II. The Township Does Not Challenge the Trial Court’s Finding That the Church’s Effort To Develop and Use Its Property for a Religious School, a Daycare Ministry, and Other Church Ministries Is “Religious Exercise” Protected By RLUIPA.

Although Congress did not define the term “substantial burden,” it took special care to define the term “religious exercise”:

(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(8)(7)(emphasis added).

Two features of this definition are particularly important. First, by specifying that the “centrality” of a religious practice may not be considered, RLUIPA complies with the admonition in *Employment Div. v. Smith* that

courts must avoid “[j]udging the centrality of different religious practices [because it] is akin to the unacceptable business of evaluating the relative merits of differing religious claims.” 494 U.S. 872, 887 (1990). *See also Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989)(“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”). RLUIPA’s statutory language highlights this admonition of the Supreme Court, which is frequently disregarded by lower courts.

Second, the definition also makes clear that the use or development of land for religious exercise is—itself—protected “religious exercise” under the Act. This aspect of the definition highlights what zoning jargon may tend to conceal: what zoning officials call a “religious use” is core First Amendment activity—religious speech, assembly, worship, instruction, and social service—that necessarily occurs on land.

These definitional features instruct that the scope of protected religious exercise under RLUIPA—*i.e.*, what zoning officials may not substantially burden—is broader than what some courts understood in some pre-*Smith* Free Exercise cases and RFRA cases. For example, this Court had held that the use of land generally did not constitute protected religious exercise under the First Amendment where the plaintiff did not present

evidence that land use was a central tenet of the plaintiff's faith. *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303, 307 (6th Cir. 1983)(finding no substantial burden where plaintiff was prevented from building a church in residential neighborhood because "building and owning a church is a desirable accessory of worship, not a fundamental tenet of the Congregation's religious beliefs").¹²

Decisions like *Lakewood* that apply a centrality test are likely no longer good law in light of the Supreme Court's explicit instruction in *Smith* to avoid the centrality inquiry. But this Court need not reach that question here, because only RLUIPA is at issue on this appeal, and its definition of "religious exercise" precludes the "centrality" inquiry. Thus, this Court should reject any claim, Tp.Br. 28, that *Lakewood* precludes the Church from proving a "substantial burden" on its religious exercise under RLUIPA.

¹² Similarly, the scope of protected religious exercise under RLUIPA is broader than it was under RFRA. Unlike RLUIPA, RFRA as originally passed did not define "religious exercise." Most courts interpreting RFRA therefore imposed a centrality requirement. *See, e.g., Ira C. Lupu, The Failure of RFRA*, 20 U.ARK.LITTLEROCKL.J. 575, 607-17 (1998)(demonstrating that a large percentage of RFRA cases failed because courts required showing that religious exercise was central or compelled by religious beliefs). They did so because Congress, in passing RFRA, declared an express purpose to restore pre-*Smith* jurisprudence *in its entirety*, which included weighing the centrality of religious practice. *See* RFRA § 2(b)(1)(declaring purpose "to restore the compelling interest test as set forth in *Sherbert v. Verner* ... and to guarantee its application *in all cases* where free exercise of religion is substantially burdened")(emphasis added).

Applying RLUIPA’s definition of “religious exercise” to this case, the trial court correctly found that the Church’s development and use of its own property for a religious school, daycare ministry, and other ministries is protected “religious exercise” within the meaning of RLUIPA. 384 F.Supp.2d at 1130. The Township doesn’t challenge that finding and may not do so for the first time on reply.

III. The Trial Court Properly Held That the Township’s Refusal to Allow the Church to Develop Its Existing, Inadequate Property to Add Space for a Religious School, Daycare Ministry, and Other Needed Ministries Imposed a Substantial Burden on Its Religious Exercise.

A. RLUIPA Codifies the Supreme Court’s Free Exercise Jurisprudence that Government Action Imposes a Substantial Burden Where It Has a “Tendency to Inhibit” Religious Exercise.

RLUIPA does not define the term “substantial burden.” However, RLUIPA’s legislative history instructs that Congress intended that the term be given the same meaning that it has been given in the Supreme Court’s Free Exercise cases. As the bill’s co-sponsors stated:

The Act does not include a definition of the term ‘substantial burden’ because it is not the intent of this Act to create a new standard for the definition of ‘substantial burden’ on religious exercise. Instead that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence.

“Joint Statement of Senator Hatch and Senator Kennedy on [RLUIPA],” 100 CONG.REC. S7774-76, S7776 (daily ed. July 27, 2000).

Moreover, even without the instruction of legislative history, it is a familiar canon of statutory construction that “[i]n the absence of contrary indication, we assume that when a statute uses...a term [of art], Congress intended it to have its established meaning.” *See, e.g., McDermott v. Wilander*, 498 U.S. 337, 342 (1991). Here, the term “substantial burden” has a well-established meaning in the Supreme Court’s Free Exercise jurisprudence dating to the Court’s seminal decision in *Sherbert v. Verner*.

In *Sherbert*, the Court held that the government’s denial of unemployment benefits to a Sabbatarian who refused to take a job on Saturday imposed a substantial burden on religious exercise in violation of the Free Exercise Clause. 374 U.S. 398, 399-400 (1963). Although the regulation didn’t specifically prohibit religious practice, the Court rejected the argument that there was no burden merely because all that was at issue was denial of a governmental “benefit or privilege.” *Id.* at 404.

Instead, the Court held that the relevant inquiry for substantial burden was whether the government action had a “*tendency to inhibit* constitutionally protected activity.” *Id.* at 404 & n.6 (emphasis added). In *Sherbert*’s case, the Court held that there was such a “tendency to inhibit”

because withholding employment benefits put “pressure upon her to forego [a religious] practice.” *Id.* at 404.

Subsequent Supreme Court cases re-affirmed and amplified *Sherbert’s* “tendency to inhibit” standard. For example, in *Thomas v. Review Bd.*, 450 U.S. 707, 717(1981), the Court again emphasized that although government action that “compel[led] a violation of conscience” would be a substantial burden, this wasn’t the only way to meet the standard. Instead, the Court held it is sufficient to demonstrate a “coercive impact.” *Id.* Accordingly, the Court held that “condition[ing] receipt of an important benefit” on the restraint of religious practice was a “substantial burden,” because although government “compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.” *Id.* at 717-18. *See also Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 141 (1987)(substantial burden exists where government “put[s] substantial pressure on an adherent to modify his behavior.”)(citations omitted); *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450 (1988)(substantial burden exists where government’s policy has “a *tendency* to coerce individuals into acting contrary to their religious beliefs.”)(emphasis added).

In sum, these cases make clear that the appropriate standard for determining whether a burden is substantial is to examine whether it has a tendency to inhibit or constrain religious conduct or expression. Or as the Eleventh Circuit put it in reviewing the cases that are the genesis for RLUIPA's substantial burden standard:

The combined import of these articulations [by the Supreme Court in the *Sherbert* line of cases] leads us to the conclusion that a 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.

Midrash, 366 F.3d at 1227; *see also* *Guru Nanak v. Sutter County*, 326 F.Supp.2d 1140, 1152 (E.D.Cal. 2002)(substantial burden exists where government action "inhibits" religious exercise as opposed to causing a "mere inconvenience").

Although the tendency to inhibit test does not mean that every inconvenience placed on religious exercise is substantial (*see infra* p.52), demonstrating the existence of a substantial burden "is not a particularly onerous task." *McEachin v. McGuinness*, 357 F.3d 197, 202 (2d Cir. 2004).

The fact that a “burden would not be insuperable” does “not make it insubstantial.” *Constantine*, 396 F.3d at 901.¹³

B. This Court Should Affirm the Trial Court’s Finding That the Township Substantially Burdened the Church’s Religious Exercise.

1. The Township’s Permit Denial Actually Inhibited Numerous Church Ministries, Reducing Them in Both Quality and Quantity.

The trial court correctly held that the Township’s actions substantially burdened the Church’s religious exercise. The Township’s actions created not just a “tendency to inhibit,” but actually *did inhibit* the Church’s religious exercise in numerous concrete and specific ways. 384 F.Supp.2d at 1133 (the Church is “unable to practice its religious beliefs in its current location because the facilities are too small for the needs of the congregation and staff”).

Child Care Ministry: The Township’s refusal to allow the Church to add needed space forced the Church to abandon the daycare ministry that it had operated for eight years as an integral part of its Christian education mission for children of all ages. 384 F.Supp.2d at 1133 (“lack of adequate space forced Plaintiff to choose between its daycare ministry and its [adult]

¹³ As discussed *infra* at p.49, courts have applied a more stringent interpretation of “substantial burden” in resolving *facial* challenges to zoning ordinances (as opposed to as-applied challenges to the denial of a particular permit).

Christian education ministry.”);R.84:9-13/Apx.744–48. Forcing the Church to choose between its ministries and to ultimately abandon the daycare ministry directly inhibited the Church’s religious exercise.

Religious School: The Township’s refusal to allow the Church to add needed space has denied the Church’s religious school a permanent home. The Township has forced the school to hobble along at offsite, temporary facilities, including a “cobbled together office” without a gym, even though “[h]aving the Church and the school in two separate locations is...not feasible.” *Id.* at 1133. As a result, the quality and quantity of the school’s religious education has suffered. The school suffers from a “lack of programming” due to inadequate space. *Id.* Lessons are rescheduled and interrupted, and teaching staff less effective, because they must travel back and forth between the church and school. *Id.* at 1128; R.84:136,60–61/Apx.871,795–96. Lack of a gym hinders its programs and effectiveness, especially its use of athletics to promote “Biblical masculinity”. R.84:130–31,137–39/Apx.865–66,872–74. And the lack of a permanent location has “severely limited” its ability to recruit, thereby denying the school the opportunity to minister to students and defeating the purpose of its existence. 384 F.Supp.2d at 1133. Finally, the very existence of the school is

threatened since its last temporary site was no longer available after Spring 2005. Pltfs.Ex.8/Apx.669.

Loss of members: In addition to the difficulties serving its current members, this evangelical Church cannot provide space to add services and seating for new members. 384 F.Supp.2d at 1128. The space constraints and confusion over the Church’s VBS programs and child care have also harmed the Church’s outreach and growth efforts. The Church has lost members and a great deal of community goodwill. *See* Pltf.Ex.9/Apx.660–67(letters from parents upset by the daycare closure); R.84:43–44/Apx.778–79. In a marked reversal, the thriving Church—which had recently doubled in size—is now losing current and potential members due to space constraints that would not exist but for the Township’s denial. 384 F.Supp.2d at 1129.

Midweek Worship Service: Denying the Church needed space forced the Church to give up its midweek worship service. R.84:39/Apx.774. Again, the ability of its members to worship was directly inhibited by forcing the Church to choose among its ministries and abandon some due to lack of space.

Music Ministry: The Township’s denial of needed space leaves the choir (or “worship team”) with no place to practice. R.84:37/Apx.772. The

worship team is an important component of the Sunday worship services, Pltf.Ex.6/Apx.654(describing importance of music and worship team), and its lack of space to practice impairs its ability to lead the congregation in musical worship of God.

Lack of room for existing adult education and outreach ministries: The Church seeks to address the spiritual needs of its members and the community through a variety of adult Christian education ministries such as its men’s group, women’s group, evening seminars for adults, and other special events. 384 F.Supp.2d at 1128; R.84:42–47/Apx.777–82(describing church activities which could not be held and plans to use new space). But the Church “*needs* additional room” for these ministries, *Id.* at 1128, and the Township’s denial of the SUP for additional space denied the Church that room. Without the needed additional room for these ministries, the Church’s religious exercise is directly inhibited.

Children’s Ministry: The Township’s refusal to allow the Church to add needed space inhibits the Children’s ministry. The Church has run out of room for its Children’s Church on Sunday mornings and its children’s programs on weekday evenings. 384 F.Supp.2d at 1128; R.84:155–57/Apx.890–92. The Church has no space for VBS. This “major outreach of the church” had to be held at five different parks last year, leading to

confusion, complication, and children missing church activities. R.84:43,161–63/Apx.778,896–98. Scheduling difficulties and frequent moves generated frustration and complaints by the very parents the Church sought to serve. *Id.*

Pastoral Staff: Because of the lack of space and the need for the common ministry staff to try and sustain the “[in]feasible” operation of the church and school at different locations, the pastors and staff face great difficulty in carrying out their ministry. “Half of the church staff is occupying offices in a rented facility offsite.” 384 F.Supp.2d at 1128. Pastors struggle to organize activities, teach classes, and coordinate with the rest of the staff. *Id.*;R.84:36–37/Apx.771–72. Rather than minister to the congregation, they move from place to place and repeatedly break down and reassemble the Church’s existing space. *Id.*;R.84:158–60,164/Apx.771–72. All of these problems directly inhibit the quality and quantity of the ministry the pastoral staff can offer the congregation and community.

In sum, the Township’s refusal to allow the Church space to practice its religious beliefs is more than an inconvenience. It is directly responsible for extinguishing, endangering, and inhibiting numerous ministries, all of which are protected under RLUIPA’s definition of religious exercise. The

district court's finding of substantial burden is amply supported by the factual record.

2. The Trial Court's Finding of a "Substantial Burden" Is Consistent With the Weight of Authority Regarding As-Applied Challenges to the Denial of Zoning Permits.

The trial court's finding of substantial burden falls well within the weight of authority finding a substantial burden in similar cases involving the denial of a particular zoning permit that inhibits religious exercise on a religious institution's own property.

In the only Sixth Circuit land use case applying RLUIPA's substantial burden provision, this Court found a "substantial burden" on facts far less egregious than those presented here. In *DiLaura v. Ann Arbor Charter Township*, 30 Fed.Appx. 501 (6th Cir. 2002) ("*DiLaura I*"),¹⁴ this Court found that denying a variance to allow the plaintiffs to use a particular property in the township as a religious retreat center imposed a substantial burden. *Id.* at 510. This Court held that preventing "gatherings of individuals for the purposes of prayer(the activity [sought by the religious landowner])is a use of land constituting a religious exercise that is substantially burdened." Notably, the Court held that the burden existed

¹⁴ The Church believes this case has precedential value and, because this Circuit has yet to address RLUIPA §2(a) in any published opinion, no published opinion will serve as well. *See* 6 Cir.R. 28(g).

even though the plaintiff had the option of applying for a CUP after the variance was denied. *Id.* at 507.

Here too, the Township denied the Church a SUP which has prevented it from “practic[ing] its religious beliefs” on its current property. 384 F.Supp.2d at 1133. Indeed, as detailed above, the Township’s prevention and inhibition of the Church’s religious exercise on its property is much broader in terms of the range of religious activities curtailed than was present in *DiLaura*. And here, too, the ability to apply yet again for a SUP does not eliminate the substantial burdens the Church is experiencing on its religious exercise now.

This Court’s ruling in *DiLaura v. Township of Ann Arbor*, 112 Fed.Appx. 445 (6th Cir. 2004)(“*DiLaura II*”), further illustrates this point. There, this Court held that a zoning permit ***approval*** that nonetheless prohibited some (but not all) of the center’s religious exercise on its property imposed a substantial burden. *Id.* In *DiLaura II*, the government had (since *DiLaura I*) granted a permit but imposed restrictions inhibiting religious activities on the property. Among other things, the conditions required charging guests a fee and prohibited the serving of lunch, dinner, and alcohol (including communion wine). *Id.* This Court held that despite the

approved religious use, the conditions imposed a substantial burden by “effectively barr[ing]” the property’s use as a religious retreat center. *Id.*

Similarly, although the Township theoretically approved the Church’s request to operate a school on its property and would have allowed an insufficient 14,000-square-foot addition, it “effectively barred” the school from establishing its needed permanent home on the Church property by denying the SUP to build the space actually needed. *See* 384 F.Supp.2d at 1133 (“[a]dding a 14,000 square foot addition...would not resolve the space problems.”); R.84:75-77/Apx.810–12(same). Moreover, denying the Church the additional space it sought on its property for religious exercise effectively barred not only the school, but also inhibited, frustrated or shut down numerous other ministries. *See supra.* The burden imposed on the Church’s use of its property for religious exercise here is far greater than the *DiLaura* cases.¹⁵

The Seventh Circuit’s substantial burden analysis in *Constantine* is consistent with this Court’s approach in *DiLaura* and the trial court’s decision here. In the most extensive treatment to date of RLUIPA’s substantial burden provision, the court concluded that denying a church that

¹⁵ In neither case did this Court even suggest that the plaintiffs had to seek out alternative properties in order to establish a substantial burden. This is consistent with the standard articulated in *Constantine* and *Sherbert*. *See infra.*

had outgrown its existing facility a variance to construct a new church building violated RLUIPA. Judge Posner’s decision made clear that burdens need not be “insuperable” in order to be substantial under RLUIPA:

The Church in our case doesn’t argue that having to apply for what amounts to a zoning variance to be allowed to build in a residential area is a substantial burden. It complains instead about having either to sell the land that it bought in New Berlin and find a suitable alternative parcel or *be subjected to unreasonable delay by having to restart the permit process....*

The burden here was substantial. *The Church could have searched around for other parcels of land* (though a lot more effort would have been involved in such a search than, as the City would have it, calling up some real estate agents), *or it could have continued filing applications with the City*, but in either case there would have been *delay, uncertainty, and expense*.

That the burden would not be insuperable would not make it insubstantial. The plaintiff in the *Sherbert* case, whose religion forbade her to work on Saturdays, could have found a job that didn’t require her to work then had she kept looking rather than giving up after her third application for Saturday-less work was turned down. But the Supreme Court held that the fact that a longer search would probably have turned up something didn’t make the denial of unemployment benefits to her an insubstantial burden on the exercise of her religion.

Id. at 900-901.

Following *Constantine*, the trial court found a substantial burden.¹⁶

Here, as in *Constantine*, the Church has been denied the ability to develop its

¹⁶ Although the trial court relied extensively on *Constantine*, the Township doesn’t cite this case once. Instead, it pretends it doesn’t exist, at one point saying

property for religious ministries and needs additional space because its congregation is unable to practice its religious beliefs in its current location. And like the *Constantine* church, it has suffered uncertainty, delay, and expense with predictable and devastating results: not only has the quantity and quality of Church ministries been affected, but it has been forced to abandon some ministries entirely and suffered a drop in membership and the ability to attract future members.¹⁷

Numerous other cases support the trial court's holding on substantial burden, demonstrating that it falls squarely within the weight of authority. In *Cottonwood Christian Center v. Cypress*, 218 F.Supp.2d 1203 (C.D.Cal. 2002), the court found a substantial burden where the city refused to grant a CUP for a new church that was needed because the church had outgrown its existing facility. Like the Church here, the inadequate size of the *Cottonwood* church prevented it from doing numerous ministries. *Id.* at 1212. Just as space constraints prevented Cottonwood Christian from conducting outreach to potential new members, *Id.* at 1212, the Church here has run out of space for new members and has lost current members. 384

the trial court's holding "is inconsistent with the test for burden articulated in any federal court of appeals." Tp.Br.41.

¹⁷ The depth of the findings of burden on the Church's religious exercise as a result of the SUP denial is much more extensive in this case, in which a trial was held, than in *Constantine* where the court was reviewing a summary judgment record.

F.Supp.2d at 1128. Cottonwood Christian also faced difficulty in conducting its daycare ministry, its women’s ministries, and various adult classes. *Cottonwood*, 218 F.Supp.2d at 1212. The Church here does not merely face additional difficulties in performing its daycare ministry, it had to shut it down entirely in order to continue with other ministries. 384 F.Supp.2d at 1128. Thus, the burden here is at least as “substantial” as that in *Cottonwood*.

The Court in *Guru Nanak*, 326 F.Supp.2d at 1152, similarly found a substantial burden in the denial of a CUP under analogous circumstances. In *Guru*, the court found that a CUP denial actually inhibited religious exercise by preventing the Sikh congregation from building a place of worship on a particular property. *Id.* at 1152–53. The government claimed that denying use of the congregation’s property for the planned temple did not force the congregation to forego religious exercise. *Id.* at 1150. The Court rejected this reasoning, detailing the many ways in which religious use of the congregation's property would “facilitate Sikh religious practices.” *Id.* This included reading from the Holy Book, communal prayer, religious services, and holiday celebrations. *Id.* Similarly here, a Christian education building is necessary to facilitate the Church’s religious exercise—without this expansion, the Church must forego some religious ministries entirely, while

others are constrained and inhibited by lack of space. *See supra*. Like *Guru*, the SUP denial actually inhibited the Church's religious exercise.

Substantial burdens may also exist where zoning officials prohibit a church from integrating important ministries onto existing church property. Two Michigan cases—one decided under RLUIPA and one under the Free Exercise Clause—underscore this point. In *Greater Bible Way Temple v. Jackson*, 2005 WL 3036527 (Mich.App. 2005), the court found a substantial burden under RLUIPA where the city prohibited the church from adding a ministry building for the elderly and disabled by existing church property. Because service to these groups was an important church ministry, the court found denying the ministry building imposed a substantial burden. *Id.* at *4. Moreover, because the ministry had to be located in close proximity to the church, forcing it to another site would constitute a substantial burden. *Id.*

Similarly, in *Jesus Center v. Farmington Hills*, 544 N.W.2d 698, 703–704 (Mich.App. 1996), the court held that denying an application to run a homeless shelter on church property imposed a substantial burden where that action “flow[ed] from [] religious beliefs and [was] an exercise of those beliefs.” A substantial burden would exist if the church were forced to relocate the shelter, because the church's mission was “greatly facilitated” by operating the shelter and church on the same property. *Id.*

The same is true here—the Church’s school is an important ministry, flowing from its religious beliefs. R.84:15/Apx.750. As the trial court found, a 14,000-square-foot addition “will not accommodate” the school’s needs. 384 F.Supp.2d at 1133. Moreover, “[h]aving the church and the school in two separate locations is also *not feasible*.” *Id.* The Township thus inhibited Church ministry and substantially burdened religious exercise.

Numerous other courts have likewise found a substantial burden where the government denied a zoning permit that prevented religious exercise at a particular piece of property:

- *Congregation Kol Ami v. Abington Township*, 2004 WL 1837037, *9(E.D.Pa. 2004): Finding substantial burden under RLUIPA where township denied variance to allow congregation to move from temporary rented facility to a permanent home on own property.
- *Castle Hills First Baptist Church v. Castle Hills*, 2004 WL 546792, *9–10(W.D.Tex. 2004): Finding substantial burden where city refused to accept and grant zoning permit application to use existing church property for its religious school.
- *U.S. v. Maui Cy.*, 298 F.Supp.2d 1010 (D.Haw. 2003): Allowing RLUIPA substantial burden claim to go forward where county denied church SUP to expand building to allow needed religious activities.
- *Elsinore Christian Center v. Lake Elsinore*, 291 F.Supp.2d 1083 (C.D.Cal. 2003): Finding substantial burden where city denied a CUP to allow church to move from existing inadequate facility to a new property.

- *Shepherd Montessori*, 675 N.W.2d at 281: Allowing substantial burden claim to go forward where township denied variance to allow plaintiff to operate religious school adjacent to religious daycare.
- *Alpine Christian Fellowship v. County Comm'rs*, 870 F. Supp. 991, 994 (D.Colo. 1994): Finding substantial burden under Free Exercise Clause where County denied a SUP to allow church to operate a religious school on its property. *Id.* (“[g]iven the importance of religious education to...the Church, the importance of conducting the school within the church building is self evident.”)
- *First Covenant Church v. Seattle*, 840 P.2d 174 (Wash. 1992): Finding substantial burden under Free Exercise Clause where landmarking law imposed severe financial burdens upon the church and prohibited alteration of the church building.

In sum, the vast weight of authority demonstrates that permit denials which inhibit religious exercise on a particular property impose a substantial burden under RLUIPA §2(a). The facts demonstrate that the Church’s religious exercise was inhibited in many specific ways. The trial court’s ruling was correct.

C. The Trial Court’s Finding of Substantial Burden Is Further Reinforced by Consideration of the Course of Dealing with the Township.

In addition to its consistency with the weight of authority, the trial court’s decision followed Judge Posner’s decision in *Constantine*, as well as other courts, in considering the entire course of dealing between the

Township and Church. The Township, however, asserts, Tp.Br. 38, that it is somehow inappropriate to consider this course of dealing. To be sure, RLUIPA plaintiffs have not been—and should not be—required to show repeated permit denials before they can make out a substantial burden claim under §2(a). But when they have been denied multiple times, courts do take notice.

For example, in *Constantine*, the court considered the entire course of dealing between the church and city and rejected the suggestion that no burden existed because the church could merely re-apply. 396 F.3d at 899 (recounting the long history and application of arbitrary criteria by the city). Similarly, in *Guru*, the court held that “the evidence plainly indicates that the denial of the use permit, *particularly when coupled with the denial of plaintiff’s previous application*, actually inhibits plaintiff’s religious exercise.” 326 F.Supp.2d at 1152. In short, this factor is neither necessary to, nor dispositive of, the substantial burden inquiry, but certainly relevant when present.

The factor is present here. The Township made a sudden about-face on its SUP policies and applied standards to the Church which it had never applied to anyone before. After weighing the evidence, the trial court made a finding that the Township’s actions were “arbitrary.” 384 F.Supp.2d at

1134. The course of dealing between the Church and Township makes the Township's actions clear—it arbitrarily denied the Church the space needed for its ministries and school, leaving it to begin the whole process anew with no guarantee it could locate anywhere in the Township.

Moreover, the ability of cities to string churches along in a discretionary process because churches are not permitted as of right anywhere is one of the problems that prompted RLUIPA's passage. Congress found that the exercise of unbridled discretion by zoning officials has given rise to a lengthy and pervasive history of abuse. A House report specifically states that RLUIPA is aimed at zoning codes in which there is “no place where a church [can] locate without the grant of a special use permit.” H.R.Rep.No. 219, 106th Cong., 1st Sess. 19 (1999); *id.* at 24 (“Many zoning schemes around the country make it illegal to start a church anywhere in the community without discretionary permission from a land use authority.”) The Township's zoning code requires churches and religious schools to undergo the discretionary special use permitting process before they may assemble for religious exercise *anywhere* in the township. R.85:234/Apx.971; 384 F.Supp.2d at 1134.

As RLUIPA's legislative history indicates, jurisdictions where churches are not permitted in *any* zone as of right are inherently

problematic. They force congregations to seek permits and zoning variances through a subjective process that opens them to the possibility of prejudice. The Seventh Circuit recognized this, describing the “vulnerability of religious institutions...to subtle forms of discrimination when, as in the case of the grant or denial of zoning variances, a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards.” *Constantine*, 396 F.3d at 900. This is precisely the context RLUIPA §2(a) targets, precisely because the risk of discrimination and the difficulty in proving that discrimination are simultaneously especially high.

And so it is here. The delay, uncertainty, and expense the Church faces before it may ever be able to adequately practice its religious beliefs is highlighted by its entire course of dealing with the Township. The Church expended great amounts of time, effort, and money in attempts to satisfy the Township, only to see an unprecedented SUP extension denial and then its SUP denied based upon “arbitrary” criteria codified nowhere. 384 F.Supp.2d at 1135. It has no guarantee of relocating anywhere in the Township. Such arbitrary decisionmaking, made by nonprofessionals operating without procedural safeguards, is precisely the evil RLUIPA is designed to prevent.

D. The Township’s Selective Citation of Inapposite RLUIPA Cases Provides No Basis For Disturbing the Trial Court’s Finding of Substantial Burden.

Instead of discussing *Constantine* and the legion other cases finding a substantial burden where the government denied a religious institution a permit to use property for particular religious exercise, the Township cites cases with little relevance for the type of claim actually brought by the Church. The Township’s inapposite cases fall into four categories.

1. The Township Mistakenly Relies on Cases Involving Facial Challenges.

The Township’s assertion that the trial court erred in finding a substantial burden falters at the outset by relying primarily on *C.L.U.B. v. Chicago*, 342 F.3d 752 (7th Cir. 2003) and *San Jose Christian College v. Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004)(“*SJCC*”). The Township notably omits that these decisions fall into a distinct category of religious land use cases where courts generally hold there is no substantial burden: i.e., cases involving a *facial* challenge to the zoning permitting process, arguing that *merely having to apply* for a permit is a substantial burden. See *C.L.U.B.*, 342 F.3d at 761(rejecting argument that process of applying for a permit to locate a church in R zones was a substantial burden); *SJCC*, 360

F.3d at 1028, 1035 (rejecting argument that requirement of filing a “complete” zoning application was a substantial burden).¹⁸

In contrast, this case involves a challenge to a *particular denial* of a permit to engage in religious exercise. It is a firmly entrenched distinction in religious land-use cases that the general requirement to apply for a permit does *not* impose a substantial burden, but that the particular denial of such a permit may. Thus while facial challenges like those of *C.L.U.B.* and *SJCC* routinely fail, courts like *DiLaura*, *Constantine*, *Cottonwood*, *Guru Nanak*, *Greater Bible Way*, *Jesus Center*, and others evaluating the *denial* of permits for religious institutions consistently hold that such denials may impose a substantial burden.

Though the Township cites *C.L.U.B.* language requiring plaintiffs in that case to show their religious exercise was rendered “effectively impracticable” by the requirement to apply for a permit, this standard cannot be divorced from the context of the facial challenge in which it was announced. The rigorousness of the “effectively impracticable” standard is

¹⁸ Numerous cases likewise reject facial challenges to the requirement of applying for a permit. See, e.g., *Petra Presbyterian Church v. Village of Northbrook*, 2003 WL 22048089 (N.D.Ill. Aug. 29, 2003)(rejecting facial challenge to requirement of seeking a zoning permit); *Tran v. Gwinn*, 554 S.E.2d 572 (Va. 2001)(same); *Open Door Baptist Church v. Clark Cy.*, 995 P.2d 33 (Wash. 2000)(same); *First Assembly of God v. Collier Cy.*, 20 F.3d 419 (11th Cir. 1994)(same); *Lakewood*, 699 F.2d at 305 (same).

consistent with the normal hurdle faced by plaintiffs bringing a facial challenge of showing that “no set of circumstances exists” in which the law can be applied constitutionally. *United States v. Salerno*, 481 U.S. 739, 745 (1987).¹⁹ Exhaustion of alternatives is a reasonable construction of RLUIPA in the context of facial challenges.

But courts—including the Seventh Circuit itself in *Constantine*—have made clear that the rigors of the facial challenge standard are not appropriate for as-applied challenges to a decision to deny a particular use permit. In those cases, the standard is whether the denial inhibits the religious institution’s attempt to use its property for religious exercise in a way that is more than an inconvenience. *See, e.g., Constantine*, 396 F.3d at 900 (distinguishing *C.L.U.B.* from facts in *Constantine* because “the Church in [this] case doesn’t argue that **having to apply** for what amounts to a zoning variance to be allowed in a residential area is a substantial burden”)(emphasis added); *Maui Cy.*, 298 F.Supp.2d at 1017 (holding that because *C.L.U.B.*’s “facial challenge” standard did not apply to “an as-applied challenge” to permit denial); *Guru Nanak*, 326 F.Supp.2d at 1153–54 (refusing to apply *C.L.U.B.* to as-applied challenge). The Seventh

¹⁹ The same is true of *SJCC*’s “significantly great restriction or onus” standard that the court said was “entirely consistent” with *C.L.U.B.*’s standard. *SJCC*, 360 F.3d at 1035.

Circuit’s rejection of its own *C.L.U.B.* standard in *Constantine* is especially fatal to the Township’s argument that *C.L.U.B.* should govern this case.²⁰

Here, as in *Constantine*, the Church’s substantial burden claim challenges precisely the kind of direct, specific zoning prohibition on religious exercise that was missing in *C.L.U.B.* and *SJCC*: the Township denied a SUP application, thus making the Church unable to practice its religious beliefs on its property.

2. The Township Mistakenly Relies On Cases Where The Religious Institution Had Space Available for Religious Exercise at Its Existing Facility.

Although as-applied challenges to permit decisions denying religious exercise on a particular property are more likely to succeed than facial challenges, not all such denials have a tendency to inhibit religious exercise. This is well-illustrated by the Township’s citation to *Episcopal Student Foundation v. City of Ann Arbor*, 341 F.Supp.2d 691 (E.D.Mich. 2004). There, the court found no substantial burden where the government denied a permit to allow a religious institution to destroy historic architecture on its

²⁰ Application of the “effectively impracticable” standard to as-applied challenges to permit denials is also inappropriate because it would render meaningless RLUIPA’s “exclusions and limitations” provision, which prohibits restrictions that exclude religious assemblies from jurisdictions. See RLUIPA §2(b)(3). The Eleventh Circuit declined to follow *C.L.U.B.*’s “effectively impracticable” standard in a substantial burden case for that very reason. *Midrash*, 366 F.3d at 1227.

property so it could expand its facility. The court found the denial did not cause a substantial burden because the institution had a large unused space in its existing facility that it could use. *Id.* at 704. *See also Corporation of the Presiding Bishop v. West Linn*, 111 P.3d 1123, 1130 (Ore. 2005)(no substantial burden in denying permit where church had ample room to operate without “eliminat[ing] or reduc[ing] church activities”).

This is not such a case. The trial court found the Church’s “current facility does not meet the needs of the current members, let alone provide space to add services and seating for new members.” 384 F.Supp.2d at 1128. And although the Township asserts without citation (Tp.Br.41) that the 14,000 square feet the Church could have built without a SUP would meet its needs, the trial court explicitly found otherwise. (“Adding a 14,000 square foot addition...would not resolve the space problems. ...Although Plaintiff intends for the church and the school to share the use of the buildings, a total of 25,000 square feet ***will not accommodate*** Plaintiff’s need for classrooms, a gymnasium, a sanctuary, day care rooms, offices and meeting rooms.”) *Id.* at 1133. The Church is “unable to practice its religious beliefs” in the space available. *Id.* It has been forced to eliminate and reduce church activities—its daycare ministry, its school programming, and more. *Id.* The Church’s existing space is not sufficient, nor is the

expansion allowed without the SUP. Like *Constantine* and *Cottonwood*, preventing the Church from having sufficient space to practice its religious beliefs imposed a substantial burden.

3. The Township Mistakenly Relies on Cases Where the Burden on Religious Exercise of Denying a Zoning Permit Amounted to Mere Inconvenience.

Permit denials that merely inconvenience religious exercise are another case category that doesn't impose a substantial burden. Again, the Township cites cases that effectively illustrate that inconvenience does not have a tendency to inhibit religious exercise. *See Midrash*, 366 F.3d at 1228 (denying permit that resulted in need for congregation members to “walk[] a few extra blocks” to services isn't a substantial burden); *Williams Island Synagogue v. Aventura*, 358 F.Supp.2d 1207, 1216 (S.D.Fla. 2005)(finding no substantial burden where congregants needed only to shift their positions during worship and rearrange seating arrangements to minimize distraction).

In contrast, the burden on the Church reaches much further than such minor inconveniences. It is “unable to practice its religious beliefs” in its current space and the limited expansion the Church could undertake without a SUP “will not accommodate” its religious needs. 384 F.Supp.2d at 1133. The SUP denial of needed space has constrained, endangered, and even prohibited its religious exercise. It has lost members, been forced to

abandon ministries, and lacks space for numerous others. Its school lacks a permanent home and was forced to hobble along in a temporary facility (not available after Spring 2005) that lacks space for programming and severely inhibited the Church's ability to recruit to this ministry. The trial court correctly found these burdens rose far above mere inconvenience.²¹

4. The Township Mistakenly Relies on Pre-Smith and Pre-RLUIPA Jurisprudence That Found a Substantial Burden Only When the Burdened Religious Exercise Was A "Central" Tenet of Plaintiff's Faith.

Finally, the Township mistakenly relies on this Court's 1983 *Lakewood* decision, which held that a burden on religious exercise is substantial only when the burdened religious exercise is a central tenet of the plaintiff's faith. But as discussed *supra* at p.26, since *Lakewood* was decided, the Supreme Court has done away with the centrality inquiry, and RLUIPA expressly provides that religious exercise is protected under the Act regardless of whether it involves a so-called central tenet.

²¹ The Township also cites an inapposite RLUIPA prisoner case—*Adkins v. Kaspar*, 393 F.3d 559, 570(5th Cir. 2004)—that suggests that a substantial burden may not exist if the religious exercise at issue isn't "generally available." Whatever the relevance of *Adkins* to RLUIPA land use cases, its substantial burden standard has no applicability to cases like this one where the burden was imposed pursuant to a system of individualized assessments rather than one of general applicability. *See supra*. The *Adkins* standard is also puzzling, because suggesting that there's no substantial burden when the religious exercise at issue isn't "generally available" contradicts the plain statement in RLUIPA §3(a)(RLUIPA's prisoner provisions) that its terms apply even when the burden "results from a rule of general applicability."

IV. The Trial Court Correctly Found That the Township Failed to Meet Its Burden of Demonstrating That the “Substantial Burden” in This Case Satisfies Strict Scrutiny.

Once a Plaintiff demonstrates that a Defendant substantially burdened its religious exercise, RLUIPA shifts the burden of proof to the *Defendant* to “demonstrate[] that imposition” of that burden “is the least restrictive means of furthering [a] compelling governmental interest.” RLUIPA §§2(a)(1) & 4(b). The trial court correctly ruled that the Township failed RLUIPA’s strict scrutiny standard as a matter of law and of fact.

A. The Township Waived Any Argument That It Satisfied Strict Scrutiny.

“It is well-settled that this court will not consider arguments raised for the first time on appeal unless our failure to consider the issue will result in a plain miscarriage of justice.” *Overstreet v. Lexington-Fayette Urban County*, 305 F.3d 566, 578 (6th Cir. 2002). The Township failed to make any argument in the lower court that it satisfied strict scrutiny. It waived opening and closing arguments, and neither its pre- or post-trial briefs attempt to demonstrate that its permit denial was the least restrictive means of advancing a compelling government interest. *See* R.78;R.86/Apx.515–20. The only time the Township discussed strict scrutiny at all was when it claimed it wasn’t necessary to discuss it if the trial court found no substantial

burden. R.86/Apx.515–20. Therefore, the Township has waived any strict scrutiny argument it might have made. *U.S. v. Ninety-Three Firearms*, 330 F.3d 414, 424 (6th Cir. 2003)(“[Appellant] waived this argument by failing to raise it before the district court.”).

B. The Township Failed to Demonstrate a Compelling Government Interest.

Even if the Court were to address the Township’s strict scrutiny arguments, it should reject them.

1. Courts Construe the Compelling Interest Standard Narrowly.

The Supreme Court has emphasized the stringency of the strict scrutiny analysis RLUIPA codifies, calling it “the most rigorous of scrutiny...[A] law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests. The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not water[ed]...down but really means what it says.” *Church of the Lukumi Babalu Awe, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)(internal citations omitted); *Sherbert*, 374 U.S. at 406 (“It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, ‘only the

gravest abuses [by religious adherents], endangering paramount interests, give occasion for permissible limitation [on the religious exercise].”).

Courts scrupulously follow the Supreme Court’s instruction to classify only “paramount interests” of “the highest order” as worthy of burdening religious exercise. *See Sherbert*, 374 U.S. at 40 (protecting public safety and order); *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972)(same); *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989)(avoiding disclosure of sensitive governmental information); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 633 (1989)(railway safety); *United States v. Lee*, 455 U.S. 252, 260 (1982)(compulsory participation in the Social Security system); *Warsoldier v. Woodford*, 418 F.3d 989, 998 (9th Cir. 2005)(prison security a compelling government interest under RLUIPA).

In the land use context, compelling interests have been described as those in preventing “a clear and present, grave and immediate danger to public health, peace and welfare,” *First Covenant Church*, 840 P.2d at 187, such as fire safety and occupancy limits. *See, e.g., Antrim Faith Baptist Church v. Commonwealth*, 460 A.2d 1228, 1230 (Pa.Cmwlth. 1983)(“[J]ust as the state is entitled to prevent church buildings from being constructed too flimsily over the heads of the worshipers, the state is entitled to see to it that fire-safety precautions are taken”).

2. The Township Failed to Prove a Paramount Interest of the Highest Order.

Here, “[t]he Township justified its denial of the SUP...on the basis of its interest in the density of the land to building ratio.” 384 F.Supp.2d at 1134. However, the Church is not aware of a single case in any jurisdiction—and the Township has not cited one—holding that an “interest in the density of the land to building ratio” qualifies as a compelling government interest. Indeed, the Township doesn’t even claim that this interest is compelling, but instead concedes that it is merely an “important” interest. Tp.Br.44. For this reason alone, the Township fails strict scrutiny as a matter of law.

At best, the “interest in the density of the land to building ratio” appears to fall into the category of an aesthetic interest. See Tp.Br.45 (asserting that density interest “ensur[es] compatible use of land and preserve[s] a wholesome urban environment that is not marred by too much density”). Though some courts have held that aesthetics and neighborhood privacy are “legitimate” or “important” interests, courts are unanimous in holding that they are *not* “compelling” as a matter of law. See, e.g., *Dimmitt v. Clearwater*, 985 F.2d 1565, 1569-70 (11th Cir. 1993)(“interest[] in aesthetics ... is not a compelling government interest”); *XXL of Ohio v. Broadview Heights*, 341 F.Supp.2d 765, 789-90 (N.D. Ohio 2004)(rejecting

“aesthetics” and protection of “neighborhood character” as a compelling government interest); *Cottonwood*, 218 F.Supp.2d at 1227-28(same); *King Enterprises v. Thomas Township*, 2002 WL 1677687, *18(E.D.Mich. Jul. 24, 2002)(same); *Open Door Baptist Church*, 995 P.2d at 41(same); *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 886(D.Md. 1996)(same). *See also Guru*, 326 F.Supp.2d at 1154 (defendant’s reluctance to assert incompatibility of land use as a compelling interest “is understandable, for [RLUIPA’s] strict scrutiny standard...is a difficult one to meet”).

Moreover, even assuming that an interest in land density ratio might, in some hypothetical, never-before-seen set of circumstances, rise to the level of “compelling,” the Township did not carry its burden of proving the existence of a compelling interest in this case. RLUIPA assigns the government the burden of production and persuasion consistent with constitutional strict scrutiny jurisprudence. *Burson v. Freeman*, 504 U.S. 191, 199 (1992)(“[t]o survive strict scrutiny...a State must do more than *assert* a compelling state interest, it must *demonstrate* that its law is necessary to serve the asserted interest.”). Furthermore, RLUIPA §2(a)(1) provides that the government must “demonstrate[] that imposition of the [substantial] burden on *that person, assembly, or institution*,” (*i.e.*, the plaintiff) advances a compelling interest by the least restrictive means, not

merely that application of the law *in general* advances a compelling interest. In other words, “a court does not consider the [policy] in its general application, but rather considers whether there is a compelling government reason, advanced in the least restrictive means, to apply the [policy] to the individual claimant.” *Kikumura v. Hurley*, 242 F.3d 950, 962 (10th Cir. 2001).

Here, the trial court made factual findings that the Township did not carry its burden. 384 F.Supp.2d at 1135. Among other things, it found that the Township’s density ratio, far from being objective or neutral, “had no guidelines specifying what is an acceptable ratio and what ratio is too dense” and was in fact “arbitrary,” hardly the hallmark of a compelling government interest. *Id.* Moreover, it found that the Township had not demonstrated what “negative impact” the additional square footage in the Church’s 2003 proposal would have on “adjacent property owners, neighborhoods, or infrastructures,” let alone that any such negative impact was a compelling interest. *Id.* The court’s factual findings on this point are not clearly erroneous, and the Township does not even attempt to claim they are.

In short, no compelling interest exists for the Township’s decision to deny the Church the space needed to alleviate the substantial burden on its religious exercise.

C. The Township Failed to Prove That It Used the Least Restrictive Means of Serving Its Asserted (Non-compelling) Interest.

Under strict scrutiny, “it is the *Government’s obligation* to prove that the [less restrictive] alternative will be ineffective to achieve its goals.” *United States v. Playboy Entertainment Group*, 529 U.S. 803, 816 (2000)(emphasis added). To make this showing, the Township must “demonstrate[] that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.” *Warsoldier*, 418 F.3d at 999. *See also U.S. v. Hardman*, 297 F.3d 1116, 1130-31 (10th Cir. 2002)(ruling against the government because “[t]he record is devoid of hard evidence” of narrow tailoring and “does not address the possibility of other, less restrictive means of achieving these interests.”)

The Township’s contention that the District Court erred by not identifying any less restrictive means ignores the fact that it is the *Township’s* burden to prove that it has no other means available of serving its interest that is less restrictive of religious exercise. The court’s factual finding that the Township failed to carry its burden is not clearly erroneous, and the Township makes no attempt to meet this rigorous standard.

In any event, the record does show that that the Township had multiple less restrictive means at its disposal, and it simply failed to use any

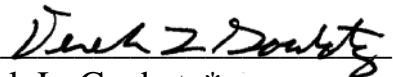
of them. Under strict scrutiny, “[i]f a less restrictive alternative would serve the Government's purpose, the [government] *must* use that alternative.” *Playboy*, 529 U.S. at 813 (emphasis added). Here, if the Township believed that the intensity of the Church’s 2003 proposed use would generate some negative impacts, it could have allowed the use subject to particular conditions tailored to those impacts. *See, e.g.*, 384 F.Supp.2d at 1126–27 (2000 SUP granted with conditions).²² But instead, the Township chose the *most* restrictive means: complete denial of the Church’s request to add the space it needed to practice its religious beliefs.

CONCLUSION

The trial court’s judgment should be AFFIRMED.

Dated: April 20, 2006

THE BECKET FUND FOR RELIGIOUS
LIBERTY

By: 

Derek L. Gaubatz*

Anthony R. Picarello, Jr.

Lori E. Halstead

The Becket Fund for Religious
Liberty

1350 Connecticut Ave., N.W.

Suite 605

Washington, D.C. 20036

(202) 955-0098

²² The record reveals the Church was consistently willing to voluntarily accept such limitations to address the Township’s concerns—it agreed to cut enrollment by half, pay for street improvements to ease traffic, alter its start times to avoid conflict with nearby schools, and forego athletic fields. *Id.* at 1126–27.

Steven M. Jentzen
Steven M. Jentzen, P.C.
106 S. Washington
Ypsilanti, MI 48197
(734) 482-5466

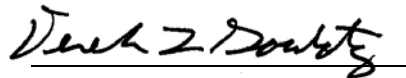
** Counsel of Record*

*Attorneys for Plaintiff-Appellee
Okemos Christian Center*

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to FED. R. APP. P. 32(a)(7)(C) and Sixth Circuit Rule 32 (a), the foregoing Appellee's Final Brief on Appeal is proportionally spaced, has a typeface of 14 points or more, and contains fewer than 14,000 words, as calculated by Microsoft Word.

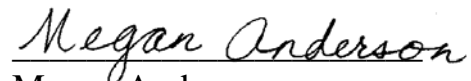
Dated: April 20, 2006


Derek L. Gaubatz

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2006, a copy of Plaintiff-Appellee's Final Brief on Appeal was served on the following by depositing same in the United States Mail with postage prepaid:

Mary Massaron Ross
David K. Otis
Plunkett & Cooney, P.C.
535 Griswold, Suite 2400
Detroit, MI 48226


Megan Anderson

DESIGNATION OF APPENDIX CONTENTS

| <u>Description of Entry</u> | <u>Date</u> | <u>Record No.</u> |
|---|--------------------|--------------------------|
| Plaintiff's Exhibit 5, Documents relating to Dominion Leadership Academy | 2/28/2006 | R. 111 |
| Plaintiff's Exhibit 6, Documents relating to Okemos Christian Center | 2/28/2006 | R. 111 |
| Plaintiff's Exhibit 9, Documents relating to the closing of the childcare ministry at Okemos Christian Center | 2/28/2006 | R. 111 |
| Plaintiff's Exhibit 10, Letter from Dr. Lanny Johnson and reply letter from Craig Dumont | 2/28/2006 | R. 111 |
| Defendants' Exhibit V-2, Letters regarding SUP extension | 2/28/2006 | R. 111 |
| Defendants' Exhibit H, Township Board Regular Meeting Minutes | 8/5/2004 | R. 34 |
| Plaintiff's Post-Trial Findings of Fact and Conclusions of Law | 4/1/2005 | R. 87 |