

guarantee that the school and church could build anywhere else in the Township”). Moreover, starting at square one would prevent the Fund from engaging in religious exercise for several additional years. Such a burden would be substantial.

Such an argument is logically and legally flawed. It would be no response to tell an employee that he is not entitled to a Title VII religious accommodation because he can get a job elsewhere. Or to tell a student that her religious exercise is not burdened by being unable to wear religious garb because she can attend a different school. As the Ninth Circuit held, “RLUIPA does not contemplate that local governments can use broad and discretionary land use rationales as leverage to select the precise parcel of land where a religious group can worship.” *Guru Nanak Sikh Society of Yuba City*, 456 F.3d at 992 n.20 (emphasis added). And as the Seventh Circuit held, “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

Defendants here are doing exactly that: attempting to “select the precise parcel of land where a religious group can worship.” Def. Mem. at 34.

Their argument is also factually incorrect. *See generally* Rubin Cert. II ¶ 9. Defendants state that they “have suggested alternative locations,” Def. Mem. at 34, but only mention one (the Paterson-Hamburg Turnpike property). This “search” by Defendants involved a five-minute review of a tax map. Rubin Cert. II ¶ 9. Mr. Szabo’s claim that the Fund “declined to even consider this Property on his client’s behalf,” Szabo Cert. ¶ 6, is untrue. Mr. Rubin, counsel for the Fund, ascertained the identity of the owner of this particular parcel, wrote a letter to the owner of this property and the owner indicated that the parcel was not for sale. Rubin Cert. II ¶ 9 & Attachment A. After informing Mr. Szabo of these facts, neither he nor any other employee of the Township suggested any other property as available for the Fund’s use. *Id.* The Defendants also admit that they are not willing to sell the Fund any of its own land. Def. Mem. at 13.

More importantly, the facts presented in this case demonstrate that the taking of the Fund’s property would effect a substantial practical burden on Plaintiffs’ religious exercise. Defendants argue that because the plaintiffs can worship at a Mosque in a different town there is no burden upon their exercise of their religion. This argument invites the Court to ignore the very

specific and detailed description of the impossibility of adequate practice of the Plaintiffs' religion at the Mosque in Paterson. Even Planning Board member Tim Collins has conceded that the facility is "clearly too small for [the Mosque's] needs." Complaint ¶ 13.

Mr. Collins' admission is unquestionably true. The Declaration of Violca Camaj, a female member of the Mosque and a mother of two children points out that there are women and girls over the age of eight in two hundred families who members of the Fund. They have religious obligations to attend weekly prayers and daily prayers at certain times of the year. In Paterson, there is only room for twenty-five women and children. The rest of these women and children have no place to pray there. Camaj Decl. ¶¶ 6-9. Nor is there any place for the women to perform their ritual washing at the Mosque before prayers (*abdest*). Nor is there a place for a resident cleric (*Imam*). She goes on to say:

There is absolutely no support for lives of Albanian Moslem women in our community. We have no place to meet among ourselves for moral or religious support, or religious study or to teach and learn the rituals and traditions that are important to the practice of our faith. The sorts of meetings and activities that regularly happen for women in many other religions are not available to us because we literally have no place for these meetings and prayers.

We cannot learn from our elders how to raise our children properly in our faith, since we can't have regular association with our elders.

We literally do not have the proper facilities for funerals, prayers for the dead, weddings, community activities, and other religious needs.

My children tell me they want to go the same kind of classes that I attended when I was younger to learn my religion. I have to tell them that they can't, because we don't have a place for them to be educated in their faith.

(Camaj ¶¶ 11-14). The congregation's Imam, Arun Polozani, in both his Declarations substantiates all those points. Polozani Decl. I ¶¶ 8-13. He further details the inability of even the adult males to offer daily prayers at a Mosque as their religion urges, *id.* ¶ 10, and their complete inability to perform weddings or funerals, *id.* ¶¶ 13-14, the lack of facilities for religious education of children and adults, *id.* ¶¶ 17-18, for regular counseling, fellowship and spiritual formation. *Id.* ¶¶ 20-21.

The Imam also explains that the lack of any accommodations for their families and the inadequate facilities for *abdest* mean that even the adult men in the community are discouraged from doing so. Polozani Decl. II ¶ 12. He summarizes:

In effect, a small portion of the adult males of the congregation can perform a sort of minimal religious observance at the Mosque in Paterson the women and children are effectively prevented from even these minimum observances and the entire community is unable to engage in many important aspects of our religious faith, such as daily attendance, education, spiritual formation, fellowship and even weddings and funerals.

Polozani Decl. II ¶ 14.

The First Amendment and RLUIPA protect all religious exercise, not just the bare minimum. It also protects the religious exercise of women and children, not just adult males. Defendants' contention ignores entirely the inability of the women and children to practice their religion as well as the every member's inability to engage in daily attendance, education, spiritual formation, fellowship and even weddings and funerals.

3. *Defendants Have Not Addressed, Much Less Rebutted, the Fund's Claim that the Township Is Violating Its Free Exercise Rights Under the First Amendment.*

Defendants fail to respond to the Albanian Associated Fund's claim that taking its property would burden the Fund's religious exercise without a compelling governmental interest under the First Amendment. *See generally* Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 34-36. It is important to note that the Third Circuit does not require a showing of a "substantial" burden on religious exercise for Free Exercise claims, but rather any burden imposed by a law that is not neutral and generally applicable must survive strict scrutiny review. *See id.* (citing *See Brown v. Borough of Mahaffey, Pa.*, 35 F.3d 846, 849 (3d Cir. 1994); *Tenafly Eruv Ass'n, Inc.*, 309 F.3d 144, 170 (3d Cir. 2002); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 212 (3d Cir. 2004)). The

targeting of one property in order to prevent its development as a Mosque is not a “neutral and generally applicable” action. *See generally* Plaintiffs’ Memorandum in Support of Plaintiffs’ Motion for Preliminary Injunction at 20-28 (collecting cases demonstrating that individualized land use actions and takings are not neutral and generally applicable laws).

Defendants’ first response is that “Plaintiffs have not established a violation of the right of Freedom of Expression.” Yet the Fund does not even make a Free Speech claim in this litigation. Next, Defendants make a conclusory statement that “Plaintiffs are free to practice their religion as they deem fit . . . .” Def. Mem. at 36. But the Fund is not able to practice according to their beliefs. *See generally* Polozani Decl. II ¶¶ 3-15; Polozani Decl. I ¶¶ 4-25; Camaj Decl. ¶¶ 5-14 (describing burdens on the religious exercise of Muslim women and children). Furthermore, Defendants ignore the substantial authority cited by the Fund demonstrating that being unable to use land for purposes of religious worship does in fact burden religious exercise; they also offer no competing authority. Although these burdens are substantial, they need not be in order to demonstrate that non-neutral/generally applicable governmental action violates the Free Exercise Clause. And they certainly do exist, regardless of the Defendants claiming that they do not.

4. *Defendants Have Not Offered Any Compelling Interest Justifying Its Burdens on the Albanian Associated Fund's Religious Exercise.*

The “compelling” interest relied upon by the Defendants is supported by one paragraph in the Certification of their planner, John P. Szabo, Jr.:

The property on which the AAF proposes to build a mosque and recreation center is environmentally sensitive. As it is located on a ridge and has little top soil and consists of mostly rock.

Szabo, Jr. Cert. ¶ 2. The Township’s entire case depends on its claim that the Fund’s property is “mostly rock.” This is not a compelling interest, which has been described as an “interest of the highest order” or a “paramount” interest. *See generally* Plaintiffs’ Memorandum in Support of Plaintiffs’ Motion for Preliminary Injunction at 48-51 (describing standard and collecting cases). Mr. Szabo has not even been identified as an environmental expert. *See also* Rubin Cert. II ¶ 4 (“the Town of Wayne’s own engineer, Fernando Zapata has twice reported to the Planning Board in writing that the plaintiffs’ plans are in compliance with the Environmental Protection Ordinances, once on January 6, 2005 and again on February 3, 2005.”). And there is also no evidence that the Township has actually identified the Fund’s property (prior to its attempted Taking) as a parcel

targeted for open space. *See id.* ¶ 10. It only did so after learning of the Fund's plan to build the Mosque.

None of the other interests occasionally alluded to by Defendants are even relevant, as the Fund will comply with all applicable zoning and building safety regulations. *See Kurtishi Aff.* ¶ 17; Polozani Decl II ¶ 16. The Fund has agreed to locate as many parking spaces as necessary on their property, regardless of the discriminatory requirements for such imposed by the Township, and regardless of the actual need for them. Rubin Decl. II ¶ 7 (“The current plan calls for one hundred and ninety-six parking spaces, about twice the number that defendants claimed would be insufficient.”). Defendants refer to “serious safety concerns,” Def. Mem. at 2, but only support this statement by claiming that the property is “mostly rock” and has “steep slopes.”<sup>1</sup> Other issues such as “storm water runoff,” “disturbance” and catch-all unspecified “unresolved environmental issues,” *id.*, have either been resolved or will be resolved in the Planning Board process. Defendants out-of-context reference to a statement by the Fund's attorney that “there is probably no way to develop this site without some degree of disturbance

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<sup>1</sup> Defendants' unsupported claim that to allow the Fund “to proceed with their development application” would “present[] an overwhelming danger to the public,” Def. Mem. at 19, is, frankly, unsupported by any evidence anywhere in the record and nothing more than irresponsible and inflammatory nonsense.

beyond the requirements of Wayne Township EP Ordinance,” Def. Mem. at 6, is another red herring. The Fund in fact reduced the scope of the application, as the Township well knows, to ensure that it remained within the requirements of the Ordinance. Rubin II Decl. ¶ 3 (“The Site Plan as currently proposed by the plaintiffs is no more than the amount allowed by the Environmental Protection Ordinances.”). Even if environmental concerns were a compelling governmental interest—which they are not—there is not even a suggestion of any endangered species, forests, air or water quality issues. Defendants are defending rocks.

The fact remains that the Fund’s property is zoned for use as a place of worship. The Defendants cannot claim now that there is a compelling interest to keep them out. At the very least, the Plaintiffs have demonstrated a substantial likelihood of success.

5. *Maintaining the Status Quo or Permitting the Planning Board to Continue Reviewing the Fund’s Application Are Less Restrictive Means of Achieving Any Governmental Interest.*

Even assuming that Defendants’ interest in preserving rocks reaches the level of “compelling,” this interest would not be threatened by preserving the status quo pending resolution on the merits. The rocks will stay put. Furthermore, another means of achieving this interest would be to

allow the Fund to continue with its land use application, and permit the Planning Board to enforce Township laws designed to effectuate its environmental goals. Taking its property outright, thereby preventing any use whatsoever for religious exercise, is not the least restrictive means.

**III. IT IS ENTIRELY PREMATURE TO DISMISS THE ALBANIAN ASSOCIATED FUND'S CLAIMS AS ITS COMPLAINT STATES CLAIMS UPON WHICH RELIEF MAY BE GRANTED.**

Plaintiffs respectfully submit that Judge Chesler's recent decision in *Church of the Hills v. Township of Bedminster*, 2006 WL 462674 (D.N.J. Feb. 24, 2006) (Chesler, J.), provides a well-reasoned analysis in rejecting a motion to dismiss in a similar RLUIPA case.

A. The Weight of Authority Is Unanimously Against Dismissing Free Exercise and RLUIPA Challenges to Land Use Regulation On Fed. R. Civ. P. 12(B)(6) Motion.

Religious land use cases are notoriously fact-intensive. Relevant questions presented to the Court include whether religious exercise is substantially burdened by the Defendants' taking and delay, is the Defendants' interest compelling, do the Defendants actually possess that interest, and do the Defendants have any other way of achieving that interest. In addition, there is the question of whether the Defendants discriminated against the Albanian Associated Fund, and whether the taking

is for a public use. See *Church of the Hills*, *supra*; *Westchester Day School v. Village of Mamaroneck*, 379 F. Supp. 2d 550, 556-58 (S.D.N.Y. July 27, 2005) (refusing to dismiss plaintiffs' claims that the denial of permit to construct a new school building violated RLUIPA); *Freedom Baptist Church of Delaware Cy. v. Tp. of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002) (same); *Congregation Kol Ami v. Abington Tp.*, 2004 WL 1837037 (E.D. Pa. 2004) (same). In *Williams Island Synagogue v. City of Aventura*, 329 F. Supp. 2d 1319, 1322 (S.D. Fla. 2004), the district court also denied the city's motion to dismiss. The court

concluded that Plaintiff's substantial burden claim stated a cognizable claim after finding persuasive authority for the proposition that the denial of a zoning variance may force religious institutions, as a result of increased membership and under certain circumstances, to forego their religious precepts in violation of RLUIPA.

*Id.* The court in *Hale O Kaula v. Maui Planning Comm'n*, refused to dismiss claims challenging a denial of a special use permit under RLUIPA and the First Amendment, acknowledging that case turned on factual questions under both:

Regardless of RLUIPA, then, the substantive test before the Court [under RLUIPA and the Free Exercise Clause] is strict scrutiny. Has the County's denial of the special use permit "substantially burdened" Plaintiffs' free exercise of religion? If so, has the County demonstrated a "compelling" interest and that the denial is the "least restrictive means" for meeting that interest?

229 F. Supp. 2d 1056, 1073-75 (D. Haw. 2002) (denying motion to dismiss). *See also Fortress Bible Church v. Feiner*, 2004 WL 1179307 (S.D.N.Y. 2004) (denying motion to dismiss). *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 326 F. Supp. 2d 1140, 1142 n.1 (E.D. Cal. 2003) (noting that court denied defendants' motion to dismiss); *Grace United Methodist Church v. City of Cheyenne*, 235 F. Supp. 2d 1186 (D. Wyo. 2002) (denying defendants' summary judgment on RLUIPA claim that refusal of permit for church to operate day care center substantially burdened religious exercise); *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) (denying defendants' motion to dismiss RLUIPA claims that denial of conditional use permit and condemnation action substantially burdened religious exercise and discriminated against plaintiffs); *C.L.U.B. v. City of Chicago*, No. 94 C 6151, 1996 WL 89241, \*24 (N.D. Ill., Feb. 27, 1996) (denying motion to dismiss churches' equal protection claims); *Kaahumanu v. County of Maui*, 315 F.3d 1215, 1217 (9<sup>th</sup> Cir. 2003) (noting that district court denied motion to dismiss claims brought under RLUIPA for denial of conditional use permit). In fact, Plaintiffs' research indicates that no such motion has ever been granted under such circumstances.

It is apparent that the allegations contained in the Church's Complaint, if true, state a claim under RLUIPA and the Constitution. Moreover, Defendants' bare assertion of their interests and means used cannot suffice at this stage to prove that the Church's rights were not violated. *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 326 F. Supp. 2d 1128 (E.D. Cal. 2003) ("Even under rational basis review, this bare assertion of legislative purpose, unaccompanied by an attempt to demonstrate why the particular regulation at issue advances that purpose, is insufficient to warrant a rejection of plaintiff's claim at the motion to dismiss stage."). In *Church of the Hills*, this Court ruled:

Accordingly, taking all allegations in the Complaint as true and viewing them in the light most favorable to the Plaintiffs as required for deciding a motion to dismiss under FED. R. CIV. P. 12(b)(6), the Court cannot agree with the Defendants assertion that "[t]he fact that the Plaintiffs cannot engage in worship with their entire congregation at the same time and place does not and cannot establish a substantial burden." (Def. Br. at 40.) The Defendants' motion to dismiss the Plaintiffs' claims on these grounds, therefore, is denied.

2006 WL 462674, at \*6. Here, the Fund's allegations that it cannot engage in religious exercise are of the same type. The Fund cannot engage in worship, funeral, wedding, children and youth religious upbringing, religious opportunities for women, and other religious activities. Complaint ¶¶ 11-25. The Fund alleges that "[t]he subject Property is uniquely situated

to serve the needs of the Plaintiffs.” *Id.* ¶ 26. These allegations must survive a motion to dismiss.

B. Plaintiffs’ Complaint States a Claim that the Township’s Actions Burden Their Religious Exercise In Violation of the First and Fourteenth Amendments, the New Jersey Constitution, RLUIPA.

In *Church of the Hills*, this Court refused to dismiss discrimination claims brought against the Township of Bedminster:

The Plaintiffs’ Complaint alleges that the Township has granted zoning variances to other churches located in R-10 zones within the town. (Compl. at 13, 54.) Consistent with the standard for reviewing a motion to dismiss under FED. R. CIV. P. 12(b)(6), the Court must view this allegation as true and view in the light most favorable to the Plaintiffs. Accordingly, the Court finds that the Plaintiffs have sufficiently alleged that other similarly situated uses within the Township’s R-10 zones were granted variances similar to the ones sought by the Church in the present case. This places the burden on the Township to either refute the allegation or to demonstrate why the denial of the Church’s variances, as opposed to any given to similarly situated churches, were rationally related to a legitimate state interest. The Record at this stage of the case, however, is insufficient for the Township to properly do either. Accordingly, the Defendants motion to dismiss Count V of the Plaintiffs’ Complaint is denied.

2006 WL 462674, at \*6. The denial was predicated upon the church alleging that it was treated differently and worse than similarly situated applicants.

Here, the Fund similarly alleges in its Complaint that “the Township has treated the Mosque differently and worse than similarly situated applicants by

imposing requirements upon it that it has not imposed on other applicants, by imposing different legal standards upon it that it has not imposed on other applicants, and by imposing delays on the Mosque's application that it has not imposed on other applicants." Complaint ¶ 31. *See also id.* ¶ 36 ("the Board has not previously required such technical issues to be finalized with other similarly situated applicants"), ¶¶ 41-42, 46-47 (treating the Fund worse in terms of parking review); ¶ 48 (treating the Fund worse in terms of structural engineering review); ¶ 49 (treating the Fund worse in terms of excavation); ¶ 50 (treating the Fund worse in terms of storm drainage issues). The Fund also alleges that "the Mosque's inequitable treatment by the Township was based on placating community residents that are biased against the Mosque." *Id.* ¶ 37. *See generally id.* ¶¶ 66-71 (reciting facts demonstrating community hostility to Mosque).<sup>2</sup> Dismissing the Fund's claims would be similarly inappropriate.

C. Plaintiffs' Complaint States a Claim that the Township Discriminated Against Them In Violation of the First and Fourteenth Amendments, the New Jersey Constitution, RLUIPA, and the New Jersey Law Against Discrimination.

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<sup>2</sup> Defendants assert that they "establish that Plaintiffs were, in fact, treated like others similarly situated." Def. Mem. at 37. This is not the correct standard. Defendants cannot "establish" this other than by demonstrating that Plaintiffs fail to state a claim upon which relief can be granted. This they cannot do.

The New Jersey Law Against Discrimination prohibits the exercise of land use regulations in a manner that discriminates on the basis of creed. N.J.S.A. 10:5-12.5. In Point V(c), the Defendants argue that the Plaintiffs “do not even articulate the basis for any contention that the Township Defendants have violated the NJLAD.” Although they do not state it explicitly, the implication is that the claim of violation of the NJLAD should be dismissed. The Verified Complaint, at ¶¶ 35-65, alleges numerous specific facts demonstrating discriminatory treatment of the Plaintiffs’ application. Paragraphs 66-73 also allege extensive facts about the vehement opposition to the Plaintiffs’ plans to construct their Mosque by a large number of Township voters. The allegations of the complaint clearly are sufficient that the Plaintiffs may be able to prove facts that would entitle them to relief, and the complaint may not be dismissed.

D. Defendants Do Not Move to Dismiss Plaintiffs’ Claim Under RLUIPA’s Nondiscrimination Provision or Plaintiffs’ Fifth Amendment Claim.

The Albanian Associated Fund’s Complaint asserts claims under 42 U.S.C. § 2000cc(b)(2), alleging that “Defendants have deprived and continue to deprive the Albanian Mosque of its right to the free exercise of religion, as secured by the Religious Land Use and Institutionalized Persons Act, by imposing and implementing a land use regulation that discriminates

against it on the basis of religion.” Complaint ¶¶ 78-79. Defendants do not address this claim—they only address RLUIPA “Substantial Burdens” claim, 42 U.S.C. § 2000cc(a)—and, as such the § 2000cc(b)(2) claim should not be dismissed.

Similarly, Plaintiffs assert that the Township’s eminent domain action violates the Fifth Amendment to the United States Constitution by “failing to establish the requisite “public use” for the taking of the Property.” Complaint ¶ 85. Satisfying the unreasonable hostility of opposing neighbors is not a legitimate public purpose and therefore Count VII should not be dismissed. Defendants do not address this count.

Dated: September 25, 2006

**STORZER & GREENE, P.L.L.C.**

\_\_\_\_\_/s/ Robert L. Greene\_\_\_\_\_  
Robert L. Greene, Esquire  
**STORZER & GREENE, P.L.L.C.**  
1025 Connecticut Avenue  
Suite One Thousand  
Washington, D.C. 20036  
Tel. (202) 857-9766  
Fax (202) 857-9799

**RUBIN & CONNELLY**  
A. Michael Rubin, Esquire  
1330 Hamburg Turnpike

Wayne, N.J. 07470  
Tel. (973) 694-4222  
Fax: (973) 694-2935

**THE BECKET FUND FOR  
RELIGIOUS LIBERTY**

Derek Gaubatz, Esquire  
Jared N. Leland, Esquire  
1350 Connecticut Avenue, NW,  
Washington, D.C. 20036  
Tel. (202) 955-0095  
Fax (202) 955-0090

*Attorneys for Plaintiffs, Albanian  
Associated Fund and Imam Arun  
Polozani.*