

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CONGREGATION KOL AMI, et al	:	
	:	CIVIL ACTION
	:	No.: 01-1919
v.	:	
	:	Hon. Lawrence F. Stengel
ABINGTON TOWNSHIP, et al.	:	

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Abington Township has successfully driven Congregation Kol Ami outside its borders. For more than ten years, the Congregation has been searching for a spiritual home reasonably near the homes of its members, many of whom live in Abington. For more than five years, the Township has fought the Congregation's attempts to establish that home in Abington. To this end, the Township characterized a property with a 250-seat chapel, stained glass windows and a consecrated altar as a "residential use," in order to avoid granting continuation of what was undeniably a "religious use." Although the Township had previously decided it would be a "hardship" if the Greek Orthodox church could not use the property, the Township found no such hardship existed for Congregation Kol Ami.

Eventually, this Court concluded that Defendants had imposed a "substantial burden" on the Congregation under RLUIPA in the course of rejecting the Township's motion for summary judgment on that claim. Additional undisputed facts occurring since the date of that ruling only serve to confirm it. Moreover, as a matter of law, the Township is not able to meet the demands of strict scrutiny, both because none of its

asserted interests are compelling, and because it has conceded that less restrictive means were available to advance its asserted interests.

LEGAL STANDARD ON SUMMARY JUDGMENT

Summary judgment is proper if the pleadings and evidence on file “show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(c). To prevail on summary judgment, the movant bears “the burden to demonstrate the absence of any genuine issues of material fact.” *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1362 (3d Cir. 1992). Once the movant meets this burden, “the opponent may not rest on the allegations set forth in its pleadings but must counter with evidence that demonstrates a genuine issue of fact.” *Id.* at 1362-63.

SUMMARY OF ARGUMENT

The undisputed facts demonstrate that the Township violated RLUIPA § 2(a).

1. RLUIPA § 2(a) applies here because the Township’s denial was pursuant to a system of individualized assessments and affected interstate commerce. This Court and numerous other courts have held that highly discretionary systems for seeking special use permits, special exceptions, or variances from zoning prohibitions are “systems of individualized assessments” within the meaning of RLUIPA § 2(a)(2)(C). Abington’s system is no different. Its decision, moreover, delayed the Congregation’s purchase of the land, forced its eventual sale, and prevented entirely construction and ongoing religious use activities, satisfying the jurisdictional element of RLUIPA § 2(a)(2)(B). For these reasons, RLUIPA’s “substantial burden” provision applies here as a matter of law.
2. As this Court has already held, the Township’s refusal to allow the

Congregation to use its property for worship and other religious activity substantially burdened the Congregation's religious exercise. As a result of the Township's discretionary denial of the Congregation's request to use 1908 Robert Road for worship, the Congregation has faced more than five years of uncertainty and delay. It has risked the loss of its precious *Torah*, and the quality and quantity of its religious expression and activity has suffered. It has lost twenty-five percent of its membership. It lacks a spiritual center for its activities, essential for Reform Jewish congregations. This burden far exceeds mere cost and inconvenience: the denial rendered the Congregation's religious exercise "effectively impracticable" within Abington, thus satisfying even the most demanding interpretation of "substantial burden" under RLUIPA.

3. Defendants' actions flunk strict scrutiny. The Township has not asserted and cannot assert a compelling interest to justify its denial of the Congregation's proposed (and since thwarted) religious use: its noise, traffic, light and other aesthetic interests may be "legitimate" or even "important," but not "compelling." The Township likewise failed to use the least restrictive means to advance its interests. It rejected less restrictive alternatives that the Township itself conceded would have allowed the Congregation to use its property for religious worship *and* eliminated (in the Township's own words) any "adverse[] affect[s] [on] the health, safety, and welfare of the community." Plaintiffs' Separate Statement of Undisputed Facts at ¶¶ 49 (hereinafter "SUF"). Instead, the Township chose the most restrictive means—complete denial of the Congregation's desired religious use of the property—to advance its non-compelling interests.

I. THE UNDISPUTED FACTS DEMONSTRATE PLAINTIFFS HAVE SATISFIED THE JURISDICTIONAL ELEMENTS OF RLUIPA § 2(a).

A. The Township's Denial of the Congregation's Proposed Use Affects

Interstate Commerce.

RLUIPA's substantial burden provision applies where "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes." RLUIPA § 2(a)(2)(B). Here, the undisputed facts demonstrate that the Township's decision to substantially burden the Congregation's religious exercise by denying its application to use its property for religious worship affected interstate commerce.

This Court has already held that RLUIPA is a proper use of Congress' interstate commerce power: "burdens [on religious land use] will often, *as in this case*, prevent an institution from renovating and improving property. This may affect interstate commerce by impacting the use of materials, contractors, and planners that move or work in interstate commerce." *Congregation Kol Ami v. Abington Township*, 2004 WL 1837037, at *12 (E.D.Pa. 2004) (emphasis added) (hereinafter "August 2004 Opinion"). Such activities, which "arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect[] interstate commerce" fall within Congress' interstate commerce power. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

As this Court already intimated, the instant case readily satisfies this "jurisdictional hook" of § 2(a)(2)(B). The Congregation's proposed construction activities will affect commerce. Specifically, the Congregation proposed to improve its Property by altering driveways, enlarging a parking lot and adding a corridor. SUF ¶¶ 40-41; Zoning Hearing Board of Abington Township, Opinion and Order of the Board 99-36 (March 20, 2001) FF at ¶ 18 (attached as Exhibit "2" to Dec'l. of Jonathan Auerbach) (hereinafter "March 2001 Bd. Op.")). The Township completely prevented

these construction activities. Such activities have an explicit connection with and effect upon interstate commerce—materials must be purchased, laborers must be paid, financing must be obtained, planners must be hired, machinery must be rented. *See id*; *see also United States v. Rodia*, 194 F.3d 465, 472 (3d Cir. 1999) (jurisdictional element satisfied when activities have an “explicit connection with, or effect upon, interstate commerce”). This is just the sort of activity Congress had in mind when it enacted RLUIPA. *See, e.g.* 146 CONG. REC. S7775; H.R. REP. 106-219, at 28 (identifying “construction projects” as examples of “a specific economic transaction in commerce” that land-use regulations may impermissibly burden). The Township’s activity also delayed the Congregation’s purchase of the land and forced its eventual sale. SUF ¶ 58. Such direct interference with real estate transactions unmistakably affects commerce. Moreover, the Township’s denial of a zoning permit also prevented ongoing religious activities on the property that would involve interstate commerce, such as weddings, funerals, bar/bat mitzvahs, payment of membership dues, and staff employment. SUF ¶¶ 8, 23, 33.

The court’s application of RLUIPA’s commerce clause jurisdictional hook provision in *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203, 1221 (C.D. Cal. 2002), reinforces the conclusion that this jurisdictional provision is satisfied in this case. In *Cottonwood*, the court held that a city’s denial of a conditional use permit that would have allowed an existing church to construct a new church building and engage in religious activity on its property “affect[ed]” commerce within the meaning of RLUIPA’s jurisdictional provision. *Cottonwood*, 218 F.Supp.2d at 1221-22. Specifically, the Court held that the church’s construction of a church building

involved “construction workers, construction materials, transportation vehicles and commercial financial transactions, all of which affect commerce.” *Id.* Similarly, the court found that denying the permit prevented ongoing religious use of the property that affected commerce: “Church activities have a significant impact on interstate commerce. Churches...are ‘major participants in interstate communications and transportation, raising and distributing revenues (including voluntary revenues) interstate, and so on.’” *Id.* (quoting *United States v. Grassie*, 237 F.3d 1199, 1209 (10th Cir. 2001)).

In sum, the undisputed facts establish that denying the Congregation’s use affected interstate commerce—it prevented construction activities, delayed the Congregation’s purchase of land and forced its eventual sale, and prevented ongoing religious use of the property. Because the jurisdictional element of § 2(a)(2)(B) is satisfied, RLUIPA § 2(a) applies.

B. The Township Denied the Congregation’s Proposed Use Pursuant to a System of Individualized Assessments.

The undisputed facts also establish that RLUIPA § 2(a) applies because the “individualized assessment” jurisdictional element of RLUIPA § 2(a)(2)(C) is satisfied as a matter of law. Under that section, RLUIPA’s substantial burden provision applies where “the substantial burden is imposed in the implementation of a land use regulation...under which a government makes...individualized assessments of the proposed uses for the property involved.” 42 U.S.C. § 2000cc(a)(2)(C). Here, there is little doubt that the Township’s decision to deny the Congregation’s application for a special exception, or a variance, or a continuation of the then existing nonconforming religious use of the property, SUF ¶ 39, involved a system of individualized assessments.

As this Court held in *Freedom Baptist Church v. Township of Middletown*, 204 F.Supp.2d 857, 868 (E.D. Pa. 2002), “zoning ordinances must by their nature impose individual assessment regimes. That is to say, land use regulations through zoning codes necessarily involve case-by-case evaluations of the propriety of proposed activity against extant land use regulations.” This Court reiterated that ruling in this case: “RLUIPA’s record is replete with zoning actions, in the form of individualized decisions, which adversely affect religious institutions. Restrictive zoning is a relatively modern invention, and based upon the record presented to Congress, its use to burden religious minorities is likely to increase.” August 2004 Opinion *10.

The Abington zoning code provisions applied here involve exactly such a scheme of case-by-case evaluations. The Zoning Hearing Board (“ZHB”) is instructed to take evidence, hold hearings and make a number of specific, subjective findings. When granting special exceptions or variances, the ZHB must “[g]ive full consideration to the size, scope, extent and *character* of the exception or variance”; “[c]onsider the *suitability* of the particular property for the kind of modification, change, or use requested”; “[t]ake into consideration the *character and type* of development in the area”; “[m]ake certain that the proposed modification or change is *appropriate*”; and “[i]mpose such conditions, in addition to those required in this Ordinance, as are necessary to ensure that the *general purpose and intent* of this article is complied with.” Abington Township Revised Zoning Ordinance, Version 6.0, § 1201.1 (May 9, 1996) (attached as Exhibit 13 to Dec’l. of Jonathan Auerbach). This highly discretionary, subjective, case-by-case determination is precisely the context where strict scrutiny applies to even incidental substantial burdens

after Smith. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963) (subjective “good cause” standard involved individualized assessments.)

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.¹ The virtual unanimity of courts in

¹ See, e.g., *Midrash Sephardi, Inc. v. Town of 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. 2002) (holding that denial of variance was “clearly” a system of “individualized assessments of the proposed uses for the property involved.”); *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792, at *15 (W.D. Tex. 2004) (“courts have already recognized that land use regulations that require individualized assessment fall within the scope of the remaining strict scrutiny treatment left in the wake of *Smith* and *Hialeah*. . . . The City’s land-use decisions in this case are not generally applicable laws. The applied process of and results of a special use permit application will vary not only from one city to another, but even from one applicant to another within one jurisdiction”) (footnotes omitted); *Guru Nanak Sikh Society v. County of Sutter*, 326 F. Supp. 2d 1140, 1160 n.10 (E.D. Cal. 2003) (“It is . . . beyond cavil that zoning decisions such as the [conditional use permit application] at issue in this case are properly described as ‘individualized assessments.’”); *United States v. Maui County*, 298 F. Supp. 2d 1010, 1016 (D. Haw. 2003) (“If, as the Court finds here, RLUIPA codified existing precedent regarding when to apply the strict scrutiny test (*i.e.*, if a generally applicable and neutral law also contains exceptions based upon ‘individualized assessments’ which can be used in a pretextual manner—as is the *special use permit process*) then it is Constitutional.”) (emphasis added); *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203, 1221-23 (C.D. Cal. 2002) (finding of individualized assessments because “[t]he local agency is required to apply the general zoning law to specific property in question and its decisions are subject to judicial review.”) (internal citations omitted); *Hale O Kaula v. Maui Planning Comm’n*, 229 F. Supp. 2d 1056, 1073 (D. Haw. 2002) (special use permitting “provisions are a system of ‘individualized exemptions’”); *Al-Salam Mosque Fdn. v. Palos Heights*, 2001 WL 204772, at *2 (N.D. Ill. 2001) (“[F]ree exercise clause prohibits local governments from making discretionary (*i.e.* not neutral, not generally applicable) decisions that burden the free exercise of religion, absent some compelling governmental interest. . . . Land use regulation often involves ‘individualized governmental assessment of the reasons for the relevant conduct,’ thus triggering *City of Hialeah* scrutiny.”); *Keeler v. Mayor and City Council of Cumberland*, 940 F. Supp. 879, 885 (D. Md. 1996) (Landmark ordinance “has in place a system of individualized exemptions.”); *Alpine Christian Fellowship v. Cy. Comm’rs of Pitkin*, 870 F. Supp. 991, 994 (D. Colo. 1994) (special use permit denial triggered strict scrutiny because determination was made under discretionary “appropriate[ness]” standard.); *Korean Buddhist Dae Won Sa Temple v. Sullivan*, 953 P.2d 1315, 1344-45 n.31 (Haw. 1998) (“The City’s variance law clearly creates a ‘system of individualized exceptions’ from the general zoning law.”); *Shepherd Montessori Center Milan v. Ann Arbor Charter Tp.*, 675 N.W.2d 271, 279-80 (Mich. App. 2003) (holding that denial of variance “invites individualized assessments of the subject property and the use of such property, and contains mechanisms for individualized exceptions”); *Greater Bible Way Temple of Jackson v. City of Jackson*, Civ. No. 01-003614, slip op. (Mich. Cir. Ct. Feb. 25, 2003) (“There is no question that the City of Jackson’s review of Plaintiff’s request for rezoning was an individualized assessment.”); *Cam v. Marion County*, 987 F. Supp. 854, 861-62 (D. Or. 1997) (acknowledging individualized assessments principle in land use case); *First Covenant Church of Seattle v. Seattle*, 840 P.2d 174, 181 (Wash. 1992) (landmark ordinances “invite individualized assessments

holding that discretionary zoning permitting schemes and variance procedures are 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. *Sts. Constantine and Helen Greek Orthodox Church v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005).

Finally, the Third Circuit's recent decision in *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004), also confirms that the Township's special exception, variance, and nonconforming use procedures are systems of individualized assessments. In *Blackhawk*, the court held that a discretionary “waiver mechanism” that provided exemptions from Pennsylvania's fee system for animal licenses “create[d] a regime of individualized, discretionary exemptions that trigger[ed] strict scrutiny” under the Free Exercise Clause. 381 F.3d at 209. Like the waiver mechanism in *Blackhawk*, the Township's special exception, variance, and nonconforming use procedures are “a system that permits individualized, discretionary exemptions provid[ing] an opportunity for the decision maker to...give disparate treatment to cases that are otherwise comparable.” 381 F.3d at 208 (internal citation omitted). Indeed, the discretionary nature of

of the subject property and the owner's use of such property, and contain mechanisms for individualized exceptions.”).

Abington's zoning procedures are even more sweeping than the waiver mechanism found to be a system of individualized exemptions in *Blackhawk*.

In sum, the Township's special exception, variance, and nonconforming use procedures involve exactly the type of discretionary process Congress intended to target and that numerous courts—including this one—have held to be a system of individualized assessments. August 2004 Opinion *10 (noting the danger that zoning decisions pose to houses of worship). Accordingly, the undisputed facts establish that RLUIPA's substantial burden provision applies under the jurisdictional provision set forth in RLUIPA § 2(a)(2)(C).

II. THE UNDISPUTED FACTS DEMONSTRATE THAT THE TOWNSHIP SUBSTANTIALLY BURDENED THE CONGREGATION'S RELIGIOUS EXERCISE WITHIN THE MEANING OF RLUIPA.

A. This Court's Prior Conclusion that the Township Substantially Burdened the Congregation's Religious Exercise By Denying Its Proposed Use of Its Property for Religious Worship Is Binding Law of the Case.

This Court's prior holding that the Township's refusal to allow the Congregation to establish a permanent home for its ministry substantially burdened its religious exercise under RLUIPA is binding law of the case. August 2004 Opinion 8-9. Matters expressly decided and those necessarily decided by implication are law of the case to be followed in ongoing litigation. *AL Tech Specialty Steel Corp. v. Allegheny Internat. Credit Corp.*, 104 F.3d 601, 605 (3d Cir. 1997); *see also In re City of Philadelphia Litigation*, 158 F.3d 711, 722 (3d Cir. 1998) (holding that the analysis on one claim at summary judgment was law of the case controlling the analysis of a nearly identical claim at trial); 18B Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* 2d § 4478.

As this Court has already held, the Congregation’s “developing and operating a place of worship at 1908 Robert Road *is* free exercise” under RLUIPA § 2(a). August 2004 Opinion 9. There is no dispute that the Congregation intended to develop and operate a place of worship at 1908 Robert Road, SUF ¶¶ 56-57, and that this activity “*is* free exercise”. August 2004 Opinion at 9. Similarly, it is undisputed that the Township denied the Congregation permission to operate this place of worship. SUF ¶¶ 45-47. Based upon these undisputed facts, this Court held that the Township’s denial “create[s] a substantial burden within the meaning of the Act.” August 2004 Opinion at 9. These facts are not in dispute, and these questions of law have already been decided. Accordingly, the Congregation has established a *prima facie* case under RLUIPA § 2(a), and is entitled to judgment in its favor unless Defendants can demonstrate that their reasons for substantially burdening the Plaintiffs’ religious exercise satisfy strict scrutiny. 42 U.S.C. § 2000cc(4)(b).

B. Other Decisions Applying RLUIPA § 2(a) Only Serve to Reinforce This Court’s Prior Conclusion That the Township Substantially Burdened the Congregation’s Religious Exercise.

The undisputed facts make clear the numerous ways in which the Township’s decision to deny the Congregation the ability to use its property as a place of worship has inhibited the Congregation’s religious exercise.

- The synagogue is the physical and spiritual center of a Reform Jewish congregation. Without a synagogue of its own, the Congregation is disjointed and faces difficulty in attempting to gather as a community. As a result of the Township’s denial, the Congregation has now been without a permanent spiritual home for over a decade. SUF ¶¶ 4, 6.
- The Township’s decision to deny the Congregation a permanent spiritual home has forced it to schedule worship services and other religious events in the life of the Congregation at three separate rented locations. As a result the Congregation’s schedule is at the mercy of its various landlords, and religious

ceremonies have been delayed, rescheduled, cancelled, or moved to unsuitable alternative locations on little or no notice. SUF ¶¶ 7, 16, 18-19, 21.

- The Township's decision to deny the Congregation a permanent spiritual home has forced the Congregation to hold weddings in area hotels and funerals at funeral homes and cemeteries instead of in its own synagogue. SUF ¶ 8.
- Because the Township denied the Congregation a permanent spiritual home, the Congregation lacks suitable space for counseling sessions with the Rabbi and members are limited in their ability to access their rabbi. SUF ¶¶ 11-12.
- Because the Township denied the Congregation a permanent spiritual home, the Congregation has no library or other central place to keep its religious books and materials, nor a central place its members may go for religious information so that they may be educated and grow in their faith. SUF ¶ 10.
- Because the Township denied the Congregation a permanent spiritual home, the Congregation lacks suitable space for holding board and committee meetings and for other administrative activities affecting the life of the Congregation. SUF ¶ 9.
- Because the Township denied the Congregation a permanent spiritual home it has no permanent location for its ancient *Torah* and has damaged it by transporting it from place to place. SUF ¶¶ 13-14.
- The Township's decision to deny the Congregation a permanent spiritual home has inhibited the Congregation's religious education of its children. SUF ¶¶ 15, 20-21.
- The Township's decision to deny the Congregation a permanent spiritual home has inhibited the Congregation's ability to communicate its message to the community, to hold meetings and events, and to engage in social action programs in the community. SUF ¶¶ 17, 18.
- The Township's decision to deny the Congregation a permanent spiritual home has resulted in a sharp decline in the Congregation's membership. Members have left the Congregation because of uncertainty and lack of space for important ceremonial events. Those who remain face difficulty in attracting new members, raising funds, and planning for the future. SUF ¶¶ 22-27.

This Court's prior decision correctly applied existing precedents in holding that the Township's refusal to allow it to use its property for worship substantially burdened the Congregation's religious exercise. For example, the Court properly relied on *Cottonwood Christian Center*, 218 F. Supp. 2d at 1226, which held that a city's denial of

a conditional use permit “[p]reventing a church from building a worship site fundamentally inhibits its ability to practice its religion.” This holding applies with equal force in this case, where the Township’s actions prevented the Congregation from developing its property as a synagogue, the physical and spiritual center of community life in the Congregation’s Jewish faith. SUF ¶¶ 4-5.

This Court likewise relied upon *DiLaura v. Ann Arbor Charter Township*, 30 Fed. Appx. 501 (6th Cir. 2002), which found a substantial burden where a town denied a variance to allow a residence to be used for a religious retreat. *Id.* at 510 (preventing “gatherings of individuals for the purposes of prayer (the activity at issue) is a use of land constituting a religious exercise that is substantially burdened”). Here too, the Township has denied the Congregation a variance that would have allowed the Congregation members to gather on their property to engage in all manner of religious exercise. Here, as this Court previously held, the Township’s denial of a special exception and variance “effectively prevented” the Congregation from using its property for worship, August 2004 Opinion at 9, thereby actually inhibiting the Congregation’s religious exercise in various concrete ways. *See also Guru Nanak*, 326 F. Supp. 2d at 1152) (holding that denial of a use permit for a house of worship imposed a substantial burden because the denial “actually inhibit[ed] religious activity in a concrete way”).

Although it was decided after the Court’s 2004 order, the Seventh Circuit’s recent decision in *Sts. Constantine and Helen Greek Orthodox Church v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005), further bolsters this Court’s holding that the Township substantially burdened the Congregation’s religious exercise. In perhaps the most extensive treatment of RLUIPA’s substantial burdens provision, Judge Posner, writing

for a unanimous Seventh Circuit panel, held 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 to satisfy the Planning Commission about a contingency for which the Church has already provided complete satisfaction. . . .

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. Here, like the church in *Sts. Constantine*, the Congregation has been denied the ability to develop its property for religious worship. And like the church in that case, it has suffered uncertainty, delay, and expense with predictable and devastating results: not only has the quantity and quality of the religious activities of the Congregation been affected, SUF ¶¶ 4-21, but its membership has sharply declined. SUF ¶¶ 22-27. Indeed, the Congregation’s situation is even more compelling than the facts in *Sts. Constantine*. Unlike the church in that case, 396 F.3d at 898, the Congregation has no existing permanent home, SUF ¶ 4, and after years of searching in vain for an alternative property, it was finally forced out of the Township altogether. SUF ¶¶ 28, 61.

In sum, the Court’s August 2004 order falls squarely within the vast weight of

authority² holding that denials of a zoning application that prevent the use of property for religious worship impose a substantial burden under RLUIPA.³

² See also *Living Water Church of God v. Charter Township of Meridian*, 384 F.Supp.2d 1123, 1133-34 (W.D. Mich. 2005) (finding substantial burden under RLUIPA where denial of zoning permit prevented expansion of church building that was inadequate for existing church needs and was limiting ability to recruit new participants in the church’s ministries); *Castle Hills First Baptist Church*, 2004 WL 546792, at *9 (holding that summary denial of permit to allow church to use part of existing church property for youth ministry imposed a substantial burden on religious exercise); *Guru Nanak*, 326 F. Supp. 2d at 1152 (denial of a use permit that prevented development of property as a temple imposed a substantial burden because the denial “actually inhibit[ed] religious activity in a concrete way, and cause[d] more than a mere inconvenience.”); *Al-Salam Mosque Found. v. City of Palos Heights*, 2001 WL 204772, at *2 (N.D. Ill. Mar. 1, 2001) (“affirmatively prevent[ing] a religious organization from establishing a place of worship” is “a burden on the exercise of religion”); *Abierta v. City of Chicago*, 949 F. Supp. 637, 643 (N.D. Ill. 1996) *rev’d on other grounds*, *Biblia Abierta v. Banks*, 129 F.3d 899 (7th Cir. 1997) (loss of church property caused by rezoning “substantially burdened the church’s ability to worship and conduct . . . funerals”); *Alpine Christian Fellowship v. Cy. Comm’rs*, 870 F. Supp. 991 (D.Colo. 1994) (finding substantial burden where denial of special use permit prevented use of property as a religious school); *Western Presbyterian Church v. Bd. of Zoning Adjustment*, 862 F. Supp. 538 (D.D.C. 1994) (holding that the city’s use of its zoning powers to block a church’s ten-year old ministry to feed the poor constituted a substantial burden on religious exercise); *Shepherd Montessori Center Milan v. Ann Arbor Charter Tp.*, 259 Mich. App. 315 (Mich. App. 2003) (reversing grant of summary judgment for defendants on “substantial burden” issue where denial of zoning permit prohibited new religious day-care facility); *Jesus Center v. Farmington Hills*, 544 N.W.2d 698 (Mich. App. 1996) (finding substantial burden where zoning board prohibited organization from using its property for religious ministry).

³ This Court’s prior order properly chose not to rely upon inapposite RLUIPA cases involving facts quite different from those present in this case. For example, in *C.L.U.B. v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) and *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1028, 1035 (9th Cir. 2004), the courts found no substantial burden because the plaintiffs in both those cases challenged the mere requirement to have to go through the zoning permitting process – *not* the denial of any particular permit. Here, by contrast, the Congregation’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 an application seeking either a special exception, variance, or non-conforming use, thus prohibiting the Congregation from using a particular property for religious worship, assembly, and speech. See *United States v. Maui*, 298 F. Supp. 2d 1010, 1017 (D. Haw. 2003) (distinguishing *C.L.U.B.* on similar grounds). Moreover, each of the five *C.L.U.B.* plaintiffs was eventually successful in locating property within the city limits. In contrast, the Congregation, after searching for alternative properties for years, has been driven outside of the Township in order to secure a permanent place of worship. SUF ¶¶ 28, 61.

Similarly, the facts in *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), sharply contrast with the burdens imposed on the Congregation in this case. In *Midrash*, the court found that zoning regulations that prevented congregants from using one property and required them to “walk[] a few extra blocks” to another available site did not impose a substantial burden. *Id.* at 1228. Here, by contrast, the burden on the Congregation reaches much further: not only has the Congregation been forced to abandon the Township altogether in order to find a permanent place to worship (as opposed to walking a few blocks) SUF ¶¶ 28, 61, but their members have endured all sorts of other burdens on their religious exercise such as inadequate facilities religious education of children, inadequate facilities for religious counseling and adult education, SUF ¶ 12, uncertainty, rescheduling and possible cancellation of religious activity when rented facilities are unavailable, SUF ¶¶ 18, 19, 21; damage to its sacred *Torah*, SUF ¶ 14; and a plummeting membership. SUF ¶¶ 22-27. If “walking a few extra blocks” were the extent of the burden, the Congregation would not have fought so hard and so long to have this property as a permanent home. Cf. *Williams Island Synagogue v. City of Aventura*, 358 F.Supp.2d 1207, 1216 (S.D.Fla. 2005)

III. THE UNDISPUTED FACTS DEMONSTRATE THAT THE TOWNSHIP HAS FAILED THE STRICT SCRUTINY TEST APPLICABLE UNDER RLUIPA.

Once a Plaintiff has demonstrated that a Defendant has implemented a land use regulation so as to substantially burden its religious exercise, RLUIPA shifts the burden of proof to the Defendant to “demonstrate[] that imposition” of that burden “is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest.” RLUIPA § 2(a)(1). The undisputed facts establish that Defendants cannot satisfy this strict scrutiny standard.

A. The Township Cannot Demonstrate That Denying the Congregation’s Use Serves Any Compelling Interest.

1. The Supreme Court has applied 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 Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993) (internal quotations and citations omitted). *See also Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (“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

(finding no substantial burden where congregants needed only to shift their positions during worship and rearrange seating arrangements to minimize distraction).

for permissible limitation [on the exercise of religion].’’) (internal citation omitted); *DeHart v. Horn*, 390 F.3d 262, 275 (3d Cir. 2004) (recognizing that RLUIPA, like RFRA, incorporates *Sherbert*’s strict scrutiny test); *Freedom Baptist Church of Delaware County v. Township of Middleton*, 204 F.Supp.2d 857, 869 (E.D. Pa. 2002) (recognizing that RLUIPA codifies *Lukumi*).

Courts have scrupulously followed 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). *See also Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989) (avoiding disclosure of sensitive governmental information a compelling government interest); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 633 (1989) (regulating railway safety a compelling government interest); *United States v. Lee*, 455 U.S. 252, 260 (compulsory participation in the Social Security system a compelling government interest); *Adams v. C.I.R.*, 170 F.3d 173 (3d Cir. 1999) (compulsory income tax collection a compelling government interest); *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 Dep’t of Labor & Industry*, 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's asserted interests are not compelling as a matter of law.

Although the Township has generally asserted that prohibiting the Congregation from using its property for religious worship was necessary to advance health, safety, and welfare interests, the only specific interests it has identified are aesthetics, preservation of property values, and traffic. As discussed below, none of these interests rise to the level of a compelling government interest as a matter of law.

Aesthetics. Most of the concerns the Township asserted as a basis for substantially burdening the Congregation's religious exercise fall under the rubric of aesthetics and neighborhood privacy concerns. See SUF ¶ 47; March 2001 Bd. Op. FF ¶¶ 182, 189-90 (citing concerns over reduction of residential character, noise increase, landscaping, and light spillover onto neighboring properties). See also Zoning Hearing Board of Abington Township, Opinion and Order of the Board 99-36 (August 15, 2001) FF at ¶¶ 42-54 (attached as Exhibit "12" to Dec'l. of Jonathan Auerbach) (hereinafter "Aug. 2001 Bd. Op."). 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" interests. See, e.g., *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1569-70 (11th Cir. 1993) (holding that "interest[] in aesthetics . . . is not a compelling government interest"); *XXL of Ohio, Inc. Commerce v. City of Broadview Heights*, 341 F.Supp.2d 765, 789-90 (N.D. Ohio 2004) (internal citations omitted) (rejecting "aesthetics" and protection of "neighborhood character" as a compelling government interest); *Castle Hills*, 2004 WL 546792, at *16 (W.D. Tex. 2004) (preserving neighborhood privacy concerns not a compelling government interest); *Ohio Citizen Action v. City of Mentor-On-The-Lake*, 272 F.Supp.2d 671, 685 (N.D. Ohio 2003)

(interest in protecting residents' privacy did not rise to the level of compelling interest); *Cottonwood*, 218 F. Supp. 2d at 1227-28 (purely aesthetic harms, such as the elimination of blight, are not compelling); *King Enterprises, Inc. v. Thomas Township*, 2002 WL 1677687, at *18 (E.D. Mich. 2002) ("Although 'safety' and 'aesthetics' are substantial government interests, they are not compelling..."); *Open Door Baptist Church v. Clark County*, 995 P.2d 33, 41 (Wash. 2000) (furthering "aesthetic and cultural interests" is not a compelling interest); *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 886 (D. Md. 1996) (holding that such important interests as safeguarding the heritage of a city and fostering civic beauty are not compelling); *Alpine Christian Fellowship*, 870 F. Supp. at 994 (holding that avoiding additional "noise impacts" of religious school not a compelling interest); *Society of Jesus v. Boston Landmarks Comm.*, 564 N.E. 2d 571, 574 (Mass. 1990) ("The government interest in historic preservation, though worthy, is not sufficiently compelling to justify restraints on the free exercise of religion, a right of primary importance.").⁴

Protection of Property Values: Nor is the Township's asserted interest in maintaining property values, *see* Aug. 2001 Bd. Op. FF ¶¶ 183-85, a compelling government interest. *See, e.g., XXL of Ohio, Inc. Commerce v. City of Broadview Heights*, 341 F.Supp.2d at 789-90 ("[T]he interests served by the ordinance are traffic safety, aesthetics, and *the protection of property values* and 'neighborhood character'. No court has found any of these concerns to be a compelling government interest sufficient to withstand strict scrutiny") (emphasis added, internal citations omitted);

⁴ *See also Congregation Comm. v. City Council of Haltom City*, 287 S.W.2d 700, 704-05 (Tex. Civ. App. 1956) ("Neither is mere inconvenience to neighbors . . . a valid reason to deny a church the right to exist in a residential district. It is hard to visualize a church being constructed in a residential district without

Keeler, 940 F. Supp. at 886 (holding that the interest of stabilizing and improving property values is not compelling); *Board of Zoning Appeals v. Schulte*, 172 N.E.2d 39, 44 (Ind. 1961) (rejecting “interest in protecting property from depreciation” as a basis for preventing proposed land use for religious worship and instruction in an exclusive residential neighborhood).

Traffic/Parking: Finally, the Township’s asserted interests in traffic safety and parking difficulties, SUF ¶ 47, March 2001 Bd. Op. FF ¶¶ 182, 188, 191, are also not compelling as a matter of law. The Eighth Circuit has emphatically rejected traffic safety as a basis for satisfying strict scrutiny: “[I]nterests in traffic safety . . . have *never* been held to be compelling.” *Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (8th Cir. 1995) (emphasis added). Other courts have followed suit. *See, e.g., Dimmitt*, 985 F.2d at 1569-70 (11th Cir. 1993) (holding that interest in “traffic safety . . . is not a compelling government interest”); *XXL of Ohio*, 341 F.Supp.2d at 789-90 (“[T]he interests served by the ordinance [include] . . . traffic safety. No court has found . . . [this] concern[] to be a compelling government interest sufficient to withstand strict scrutiny”); *Elsinore Christian Center v. City of Lake Elsinore*, 270 F.Supp.2d 1163, 1172 (C.D. Cal. 2003) (expressing skepticism that parking difficulties amount to a compelling government interest); *Love Church v. Evanston*, 671 F. Supp. 515, 519 (N.D. Ill. 1987), vacated based on standing, 896 F.2d 1082 (7th Cir. 1990) (“While traffic concerns are legitimate, we could hardly call them compelling.”); *American Friends of Soc’y of St. Pius v. Schwab*, 417 N.Y.S.2d 991, 993 (N.Y.A.D. 1979) (“[C]onsiderations of the surrounding area and potential traffic hazards . . . are outweighed by the constitutional prohibition against the

inconveniencing someone. To restrict churches to areas where no one will be inconvenienced would be, in effect, excluding churches from residential districts.”)

abridgement of the free exercise of religion and by the public benefit and welfare which is itself an attribute of religious worship in a community.”); *State ex rel. Tampa Company of Jehovah’s Witnesses, etc. v. Tampa*, 48 So. 2d 78, 79 (Fla. 1950) (“The contention that people congregating for religious purposes cause such congestion as to create a traffic hazard has very little in substance to support it. Religious services are normally for brief periods two or three days in the week and this at hours when traffic is at its lightest.”).⁵

3. The Township’s asserted interests are not compelling as a matter of fact.

Even assuming, *arguendo*, that any of the Township’s asserted interests could be considered a paramount interest of the highest order, the undisputed facts still establish that its interests are not compelling as a matter of fact in this case. This conclusion follows from the Township’s own admission in its August 2001 opinion that its alleged health, safety, and welfare issues could be addressed through the simple expedient of imposing certain conditions on the Congregation’s use of its property. Specifically, the Township stated that it “finds that granting this application [for a special exception subject to 26 conditions] will not adversely affect the health, safety and welfare of the community.” SUF ¶ 49, Aug. 2001 Bd. Op. at 14; *see also id.* at CL ¶ 10 (“The Board finds that the Applicant’s proposed use of the Property as a synagogue and religious school is consistent with the spirit, purpose, and intent of the Ordinance.”); *id.* at CL ¶ 5(d) (finding that Congregation’s proposed religious use, subject to 26 conditions, would not “substantially increase the congestion in the public streets or adversely affect

⁵ In *Westchester Day School v. Village of Mamaroneck*, 386 F.3d 183, 190-91 (2d Cir. 2004), the Second Circuit recently suggested in dicta that it is not impossible for some situation to arise some day in which traffic concerns might be compelling. But the court also acknowledged that there is not a single case ever to have found this interest compelling. *Id.* Even if this academic possibility exists at all—and it is doubtful that it does—the literally unprecedented showing that would be necessary is certainly absent in this case,

Township transportation.”).⁶

Very rarely, of course, is a court faced with a circumstance where the government itself admits that the proposed use “will not . . . adversely affect . . . the public health, safety, morals or general welfare.” But this admission that the Township’s asserted compelling interests are so easily alleviated through imposing conditions on the Congregation’s use of the Property forecloses, as a matter of fact, any argument that the Township’s original decision to completely prohibit the Congregation’s proposed religious use under *any* circumstances advances “interests of the highest order.” *Lukumi*, 508 U.S. at 546. In short, no compelling interest exists for the Township’s decision to flatly prohibit the Congregation’s use of its property for religious worship.⁷

B. The Township Cannot Demonstrate That Denying the Congregation’s Use Is the Least Restrictive Means of Serving Any of Its Asserted Interests.

where the Township has already admitted that any traffic concerns are not so severe that they defy mitigation. *See infra* Aug. 2001 Bd. Op. CL ¶ 11

⁶ Notably, this court’s July 20, 2001 order, *see* 2001 U.S. Dist. LEXIS 10224, at *13-14 (E.D. Pa. July 20, 2001) requiring the Township to conduct the August 2001 special exception hearing and issue the August 2001 hearing *did not compel* the Township to grant the special exception or make any specific findings, including its finding that the Congregation’s use would not adversely affect the health, safety, or welfare of the community.

⁷ The Township’s willingness to allow a prior non-conforming religious use on the property, as well as the continued existence of more than 25 other houses of worship in the Township’s residential districts also forecloses, as a matter of fact, any argument that the Township’s decision to prohibit the Congregation’s proposed religious use satisfies strict scrutiny. SUF ¶¶ 36, 43. This conclusion follows from the *Lukumi* Court’s unequivocal statement that:

Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that “a law cannot be regarded as protecting an interest ‘of the highest order’ . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.”

Lukumi, 508 U.S. at 547 (citing several First Amendment cases); *see also Tenaflly Eruv Ass’n v. Borough of Tenaflly*, 309 F. 3d 144, 172 (3d Cir. 2002) (“Because the Borough has tolerated equally permanent house numbers, it hardly has a compelling interest in refusing to allow the inconspicuous *lechis* on the ground that they are permanent.”). Here, banning the Congregation from using its property for religious worship because of the purported harms such a religious use would cause in a residential neighborhood fails to satisfy strict scrutiny given that the Township has allowed a prior non-conforming religious use of the property and continues to tolerate more than 25 other houses of worship in residential districts that produce similar impacts on the Township’s asserted interests.

Even if the Township could demonstrate a compelling interest, the undisputed facts establish that its decision to completely deny the Congregation's use of its property for worship was not the least restrictive means to further any such interest. RLUIPA § 2(a)(1)(B). Under strict scrutiny, "[i]f a less restrictive alternative would serve the Government's purpose, the [government] *must* use that alternative." *United States v. Playboy Entertainment Group*, 529 U.S. 803, 813 (2000) (emphasis added). To meet this burden, "it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Id.* at 816. Here, the Township cannot do so. In fact, it rejected less restrictive alternatives that the Township itself conceded would have allowed the Congregation to use its property for religious worship *and* eliminated any "adverse[] affect[s] [on] the health, safety and welfare of the community." SUF ¶ 49; Aug. 2001 Bd. Op. CL ¶ 11.

Specifically, the Township's August 2001 opinion granted the Congregation a special exception to use its property for religious worship subject to 26 conditions. SUF ¶ 51, Aug. 2001 Bd. Op at 14-16. The Township found that allowing the Congregation to use its property for religious worship subject to these conditions would, among other things, prevent overcrowding, Aug. 2001 Bd. Op. CL ¶ 5(a), FF ¶¶ 41(1), 41(4), 41(5); eliminate noise and light spillover to neighboring properties, *id.* at CL ¶¶ 5(b), FF ¶¶ 44, 45, 49, 50; provide adequate onsite parking, *id.* at CL ¶ 5(d), FF ¶¶ 69, 84, 85, 95, 96; control traffic flow on Roberts Road, *id.* at CL ¶ 5(d); and alleviate the impact upon public facilities, *id.* at CL ¶ 5(e). In the Township's own words, "The Board finds that granting this application will not adversely affect the health, safety and welfare of the community." *Id.* at CL ¶ 11. Moreover, the Township conceded that allowing the

Congregation to use its property as a synagogue subject to the 26 conditions would “not substantially injure or detract from the use of the surrounding property or from the character of the neighborhood, and is consistent with the Comprehensive Plan.” *Id.* at CL ¶ 9.

In short, the Township’s August opinion demonstrates that a less restrictive alternative (*i.e.*, the imposition of the 26 conditions on the Congregation’s religious use of its property) was available that would have advanced the Township’s alleged health, safety, and welfare interests without imposing a substantial burden on the Congregation’s religious exercise. By rejecting this less restrictive alternative and choosing to instead impose the most restrictive means available to advance its asserted interests—*i.e.*, a total prohibition on the Congregation’s proposed religious use of its property—the Township failed the least restrictive means prong of RLUIPA’s strict scrutiny test.

In addition, the Township also failed RLUIPA’s least restrictive means test by failing to independently pursue feasible measures to advance its alleged interests that would have avoided burdening religious exercise. Municipalities fail strict scrutiny when they restrict fundamental rights rather than remedy secondary effects directly. *See, e.g., Grove v. City of York, Penn.*, 342 F.Supp.2d 291, 304 (M.D. Pa. 2004) (city could have addressed asserted safety interest by adding policemen rather than restricting free speech rights); *Ohio Citizen Action v. City of Mentor-On-The-Lake*, 272 F.Supp.2d 671, 684 (N.D. Ohio 2003) (city could have addressed asserted safety interest by adding sidewalks and improving lighting instead of restricting free speech rights). Here, the Township failed to adopt basic remedial steps that could have addressed its interests and avoided burdening religious exercise. Specifically, the record demonstrates that the addition of

sidewalks on Roberts Road, March 2001 Bd. Op. FF ¶ 43-44, or the use of traffic officers for holiday services, Aug. 2001 Bd. Op. Opinion and Order ¶¶ 9, 25, would have eliminated a number of Defendants' traffic safety concerns. The Township was also free to utilize simpler methods such as adding a "No Right Turn" sign across from the Congregation's driveway, Aug. 2001 Bd. Op. Opinion and Order ¶ 10, or placing a barricade across Roberts Road on special occasions, when attendance was high. Again, rather than take these simple steps, the Township chose the most restrictive means of denying the Congregation's religious use of its property altogether. It thus fails strict scrutiny.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Partial Summary Judgment should be granted.

Respectfully submitted,

Jonathan Auerbach, Esquire
Berger & Montague, P.C.
1622 Locust Street
Philadelphia, PA 19103
Telephone: (215) 875-3000
Facsimile: (215) 875-5707

Anthony R. Picarello, Jr., Esquire
Derek L. Gaubatz, Esquire
The Becket Fund for Religious Liberty
1350 Connecticut Ave., N.W., Suite 605
Washington, D.C. 20036
Telephone: (202) 955-0095
Facsimile: (202) 955-0090

Attorneys for Plaintiffs

November 4, 2005