IN THE CHANCERY COURT FOR RUTHERFORD COUNTY
AT MURFREESBORO

James Estes, et al., PLAINTIFFS v. Rutherford County Regional Planning Commission, and the Rutherford County Board of Commissioners, et al., DEFENDANTS.	)	Civil Action No. 10CV-1443 CHANCELLOR ROBERT E. CORLEW, III

MOTION FOR LEAVE FOR PERMISSION FOR THE UNITED STATES OF AMERICA TO SUBMIT A BRIEF AS AMICUS CURIAE

The United States of America, through the Office of the United States Attorney's Office for the Middle District of Tennessee, respectfully requests permission to file a Brief as Amicus Curiae as to the United States' position on (1) whether Islam is a religion and (2) whether a mosque is entitled to treatment as a place of religious assembly for legal purposes. That brief has been filed contemporaneously with this Motion.

The United States wishes to submit this brief in order to assist the Court in resolving the controversy between the parties. As set forth fully in the brief, under the United States Constitution and other federal laws, Islam is plainly a religion, and a mosque is plainly a place of religious assembly.

Respectfully submitted,

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NO ORAL ARGUMENT IS REQUESTED

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was furnished to the following by facsimile and U.S. Mail: J. Thomas Smith, 2020 Fieldstone Parkway, Suite 900-264, Franklin, TN 37069, facsimile number 800-506-8304; Joe M. Brandon, Jr., 313 Enon Springs Road, E., Smyrna, TN 37167, facsimile number 615-459-3216; and James C. Cope and Josh A. McCreary, 16 Public Square North, Murfreesboro, TN 37130, facsimile number 615-849-2135, this the 18th day of October, 2010.

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IN THE CHANCERY COURT FOR RUTHERFORD COUNTY TENNESSEE AT MURFREESBORO

James Estes, et al.,	)	
	)	
Plaintiffs,	)	
	)	No. 10cv-1443
v.	)	
	)	
Rutherford County Regional Planning Commission, and the Rutherford County Board of Commissioners, et al.	)	
	)	
	)	
Defendants.	)	

BRIEF FOR THE UNITED STATES OF AMERICA AS *AMICUS CURIAE*

The United States respectfully submits this brief as *amicus curiae*.

Plaintiffs have put into controversy whether Islam is a religion and whether a mosque is entitled to treatment as a place of religious assembly for legal purposes. The United States submits this brief to assist this court in resolving these issues. As set forth more fully below, under the United States Constitution and other federal laws, it is uncontroverted that Islam is a religion, and a mosque is a place of religious assembly.

I. INTRODUCTION

On September 16, 2010, a group of landowners in Rutherford County[1] ("the Plaintiffs") filed suit against, among others, the Rutherford County Regional Planning Commission and the Rutherford County Board of Commissioners ("the County"), alleging that the County violated

1. The individual plaintiffs are James Estes, Kevin Fisher, Lisa Moore, and Henry Golczynski.

various provisions of Tennessee law, including the Tennessee Open Meetings Act, Tenn. Code. §§ 8-44-101, *et seq.*, when it approved a site plan authorizing the Islamic Center of Murfreesboro ("ICM") to construct a mosque and Islamic center in Rutherford County, Tennessee.

On September 22, 2010, the Plaintiffs filed an amended complaint requesting damages and a temporary restraining order enjoining the construction of the mosque and Islamic center. In addition to alleging violations of Tennessee law, the amended complaint alleged that the County had violated the Plaintiffs' rights under the Due Process Clause of the United States and Tennessee Constitutions when the County allegedly failed to determine whether the Islamic Center is entitled to protection under the First Amendment. See Amended Complaint 11 (Sept. 22, 2010). Consistent with this allegation, counsel for the Plaintiffs questioned a Rutherford County Commissioner, Robert Peay, about whether the ICM is a religious organization. The Plaintiffs also directly put at issue whether Islam is a religion entitled to First Amendment protection.[2]

II. INTEREST OF THE UNITED STATES

The United States has an interest in these proceedings because the pleadings and testimony implicate federal civil rights statutes by putting at issue whether Islam is a religion and whether operating a mosque is a religious use of property.

The United States Department of Justice ("DOJ") is charged with enforcing the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc-2(f) (authorizing the Attorney General "to institute or intervene in any proceeding" to enforce compliance with RLUIPA). RLUIPA codified First Amendment protections for places of

2. See Trial Tr. Vol. 3, 77, Sept. 29, 2010 ("Q. Can you show me where the United States of America's government has recognized Islam as a religion? . . . Q. I'm telling you it needs to be decided.").

worship and other religious uses of real property with regard to local land use laws, and provided a mechanism for enforcement. 146 Cong. Rec. 16699 (2000) (Joint Statement of Senators Hatch and Kennedy) (noting that RLUIPA's land-use provisions are designed to "enforce the Free Exercise and Free Speech Clauses as interpreted by the Supreme Court."). RLUIPA provides, among other things, that a local government may not use land-use regulations to impose a substantial burden on religious exercise, unless that burden is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc(a). It also provides that a local government may not impose a land use regulation in a way that discriminates against a religious assembly or institution based on religion or religious denomination, or treats a religious assembly or institution on less than equal terms than a nonreligious one. *Id.* at § 2000cc (b)(1), (2). In enacting RLUIPA, Congress intended to provide religious institutions the maximum amount of free-exercise protection permitted by the Constitution. See *id.* at § 2000cc-3(g). See also *Cutter* v. *Wilkinson*, 544 U.S. 709, 714 (2005) ("RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with this Court's precedents.").

The DOJ also has authority to initiate criminal prosecutions under the Church Arson Prevention Act, 18 U.S.C. § 247. That Act makes it a crime to intentionally damage or destroy any religious real property "because of the religious character of that property," or to obstruct or attempt to obstruct "by force or threat of force, any person in the enjoyment of that person's free exercise of religious beliefs." *Id.* at § 247(a)(1), (2). For example, the United States recently obtained the convictions and sentencing of three men under the Church Arson Prevention Act for the 2008 arson of the Islamic Center of Columbia, Tennessee. See Judgment, *United States* v. *Baker, et al.*, No. 1:08-cr-00002 (M.D. Tenn. May 24, 2010).

A prerequisite to enforcement of both of these statutes is that the activity, real property, or "assembly or institution" be "religious." In other words, whether an activity is religious or whether a system of beliefs constitutes a religion is a threshold question in determining whether the DOJ's authority under either RLUIPA or the Church Arson Prevention Act is implicated. Accordingly, whether Islam is judicially determined to be a religion is a question that implicates the Department's law enforcement responsibilities.[3]

III. BACKGROUND

Islam has long been recognized as one of the major world religions. Reputable scholars, the courts, and various branches of the United States' Government recognize Islam as a major world religion and agree on its general contours.[4] The United States, therefore, respectfully requests that the Court take judicial notice of the following facts and authorities.

The opening line of the introduction to *The Oxford History of Islam* describes Islam as one of "the major world religions, with 1.2 billion followers, [and] the second largest and fastest-growing religion in the world." John L. Esposito, *Introduction* to *The Oxford History of Islam* IX (John J. Esposito, ed. 1999).[5] *The Oxford English Dictionary* defines it as "[t]he religious

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3. In addition to its general law enforcement interests in Tennessee and elsewhere under these statutes, the United States has a particular interest in the facts presented in this particular case: The Department's Federal Bureau of Investigation and Bureau of Alcohol, Tobacco and Firearms are currently investigating allegations of arson at the construction site of the proposed ICM mosque in Rutherford County.

4. This Section of the United States' brief is not, and is not intended to be, an exhaustive review of authorities recognizing Islam as a religion, or a comprehensive description of the contours of the Islamic faith. Rather, it is intended only to set forth the most basic generally accepted facts and authorities of which this Court may take judicial notice.

5. See also Bernard Lewis, *The Middle East* 51 (1995) (describing Islam as one of "the great religions of humanity"); Albert Hourani, *A History of the Arab Peoples* 59-79 (2002) (discussing the historical development of Islamic religious science and practice); Fred M. Donner, *The Oxford History of*

system of Muhammad." *Oxford English Dictionary* (2d ed. 1989). This understanding is not new. Over two-hundred years ago, Thomas Jefferson, in commenting on the Virginia Statute of Religious Freedom—a bill he not only authored, but also counted as one of his greatest achievements—wrote that the law was understood "to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan,[6] the Hindoo, and Infidel of every denomination." The Writings of Thomas Jefferson vol. 1 at 45 (H.A. Washington ed., Taylor & Maury 1853). Jefferson thus understood Islam to be a significant religion of the world, alongside Christianity, Judaism, and Hinduism, to which our principles of religious freedom would naturally extend.

Consistent among all three branches of government, the United States has recognized Islam as a major world religion.

The Supreme Court has been clear on this point. The Court, for example, observed in *County of Allegheny* v. *ACLU*, 492 U.S. 573, 590 (1989), that "today [the religion clauses of the First Amendment] are recognized as guaranteeing religious liberty and equality to the 'infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.'" In Justice Scalia's dissenting opinion in *McCreary County v. ACLU*, joined by Justices Rehnquist, Thomas, and Kennedy, he noted that Islam, along with Christianity and Judaism, is one of "[t]he three most popular religions in the United States," and that these three monotheistic faiths account for "97.7% of all believers." 545 U.S. 844, 894 (2005) (internal citation omitted). He added, "All of them, moreover (Islam included), believe that the Ten Commandments were given by God to

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Islam: Muhammad and the Caliphate 1 (John. J. Esposito ed. 1999) (describing Islam as a "religious tradition and civilization of worldwide importance").

6. "Mahometan" is a term occasionally used in the West in the past to describe followers of Mohammed, but has fallen into disuse.

Moses, and are divine prescriptions for a virtuous life. See 13 Encyclopedia of Religion 9074 (2d ed. 2005); The Qur'an 104 (M. Haleem transl. 2004)." *Id.* at 894. See also *Rosenberger* v. *Rectors and Visitors of the University of Virginia*, 515 U.S. 819, 850 (1995) (describing student journal that "promote[s] a better understanding of Islam to the University Community" as forwarding a religious viewpoint legally equivalent to an evangelical Christian student publication).

Similar statements about Islam and the role of mosques as places of worship have issued from the executive branch. In a January 2001 proclamation declaring Religious Freedom Day, President Clinton described Christianity, Judaism, and Islam as "faiths [ ] observed freely and in peace by millions of people across our country." Proclamation No. 7391, 66 Fed. Reg. 7205 (Jan. 15, 2001). Likewise, in his Religious Freedom Day Proclamation in 2002, President George W. Bush stated: "George Washington forcefully expressed our collective constitutional promise to protect the rights of people of all faiths, in a historic letter he wrote to the Jewish community at Touro Synagogue in Newport, Rhode Island: 'the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens . . . .' Today, our cities are home to synagogues, churches, temples, mosques, and other houses of worship that peacefully welcome Americans of every belief." 2002 Public Papers of the Presidents (January 22, 2002). See also National Day of Prayer Proclamation, April 27, 2001, *reprinted in* 2001 Public Papers of the Presidents (May 7, 2001) ("President Lincoln, who proclaimed a day of 'humiliation, fasting, and prayer' in 1863, once stated: 'I have been driven many times to my knees by the overwhelming conviction that I had nowhere else to go. My own wisdom, and that of all about me, seemed insufficient for the day.' Today, millions of Americans continue to hold

dear that conviction President Lincoln so eloquently expressed. Gathering in churches, synagogues, mosques, temples, and homes, we ask for strength, direction, and compassion for our neighbors and ourselves.").

The United States Congress has also treated Islam as a religion, and identified mosques as centers for religious worship. The Church Arson Prevention Act, 18 U.S.C. § 247, specifically included mosques within the definition of covered "religious real property." See 18 U.S.C. § 247(f) ("As used in this section, the term 'religious real property' means any church, synagogue, mosque, religious cemetery, or other religious real property . . . ."). See also, *e.g.*, S. Res. 387, 110th Congr. (2007) (describing Christianity, Judaism, and Islam as the "world's 3 great monotheistic faiths").

Not only is there widespread agreement that Islam is a religion, but there is general consensus on its origins and contours. Islam originated in the Arabian Peninsula with the life and teachings of Muhammad ibn Abd Allah, who lived circa 570-632 A.D.[7] It is a system of belief generally understood as within the Semitic, prophetic religious tradition that begins with the prophet Abraham and includes Judaism and Christianity.[8] The teachings of Muhammad are believed by Muslims to include messages sent directly from God, conveyed through Muhammad as his messenger, and recorded in the Quran.[9] The religion is monotheistic, and recognizes a

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7. Fred M. Donner, *The Oxford History of Islam: Muhammad and the Caliphate* 1 (John. J. Esposito ed. 1999).

8. John L. Esposito, *Islam: the Straight Path* 3 (1988). See also *The Middle East* at 219.

9. "Orthodox Muslims have always believed that the Qur'an is the Word of God, revealed in the Arabic language through an angel to Muhammad . . . ." Albert Hourani, *A History of the Arab Peoples* 20 (2002). See also Fred M. Donner, *The Oxford History of Islam: Muhammad and the Caliphate* 6-7 (John. J. Esposito ed. 1999). It should be noted that the Quran, although it occupies a position of unique importance, is not the only "religious" Islamic text. The *Sunna of the Prophet*, or the example of Muhammad's life, preserved in *Hadith*, or narratives of Muhammad's life, became a supplement to the

divine creator or "sustainer" of the physical world worthy of worship and receptive to petition.[10] There are five principal facets of the Islamic religion, comprising what is widely known as the Five Pillars of Islam. Those are: (1) the proclamation of the belief that there is no god but Allah and that Muhammad is his messenger; (2) praying five times each day in the direction of Mecca; (3) paying alms for the support of the poor; (4) observing the month-long fast of Ramadan, the ninth month of the Islamic lunar calendar; and (5) making a pilgrimage to Mecca, at least once in the Muslim's lifetime if possible.

IV. ARGUMENT

A. Islam is a Religion Entitled to First Amendment Protection

Every court addressing the question has treated Islam as a religion for purposes of the First Amendment and other federal laws. No court has held otherwise. Islam falls plainly within the understanding of a religion for constitutional and other federal legal purposes, and qualifies as a religion under the various tests courts have developed for analyzing claims that certain apparently secular activities merit protection as religious conduct.

Courts are to exercise caution before determining that a system of belief is not a religion. Indeed, "[f]ew tasks that confront a court require more circumspection than that of determining whether a particular set of ideas constitutes a religion within the meaning of the first amendment." *Africa* v. *Commonwealth of Pa.*, 662 F.2d 1025, 1031 (3d Cir. 1981). See also *Wiggins* v. *Sargent*, 753 F.2d 663, 666 (8th Cir. 1985) (noting that determining whether a belief

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Quran early in the Islamic tradition. *Islam: The Straight Path* 80-83. See also *A History of the Arab Peoples* at 66.

10. See *The Middle East* at 53. In the words of one scholar, Albert Hourani, an Emeritus Fellow of St Antony's College, Oxford, "The God of the Qur'an is a transcendent one." *A History of the Arab Peoples* at 62.

is religious is an "extremely delicate task which must be approached with caution," and reversing a district court determination that a belief system was not a religion). See, *e.g.*, *United States* v. *Seeger*, 380 U.S. 163, 165 (1965) (construing "religion," as used in the Universal Military Training and Service Act, broadly so as to avoid a conflict with the mandate of the First Amendment). In addition, in examining whether a system of beliefs amounts to a religion entitled to First Amendment protection, courts are not to evaluate the reasonableness of, or the content of those beliefs. As the Supreme Court held in *Thomas* v. *Review Board*, 450 U.S. 707, 714 (1981), "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." See also *United States* v. *Ballard*, 322 U.S. 78, 85-88 (1944); *United States* v. *Meyers*, 906 F. Supp. 1494, 1499 (D. Wyo. 1995) ("The Court will not [ ] find that a particular set of beliefs is not religious because it disagrees with the beliefs.").

Within the context of the mandate to define religion broadly, courts have applied various but substantively consistent criteria to determine whether a belief system is a religion for purposes of the First Amendment and other purposes under federal law. According to the Courts of Appeal for the Ninth and Third Circuits, whether a belief system constitutes a religion depends on three factors: (1) whether the belief system "addresses fundamental and ultimate questions having to do with deep and imponderable matters;" (2) whether the system "is comprehensive in nature;" and (3) whether it is recognizable "by the presence of certain formal and external signs." *Alvarado* v. *City of San Jose*, 94 F.3d 1223, 1229 (9th Cir. 1996) (relying

in part on Judge Adam's seminal concurrence in *Malnak* v. *Yogi*, 592 F.2d 197 (3d Cir. 1979)).[11] See also *Africa*, 662 F.2d at 1032 (same).

The Court of Appeals for the Tenth Circuit, also relying on *Malnak*, provided a more detailed schematic for determining whether a system of belief is a religion, identifying five factors, with subparts. *United States* v. *Meyers*, 95 F.3d 1475, 1484 (10th Cir. 1996) (adopting the factors identified by the district court in *United States* v. *Meyers*, 906 F. Supp. 1494 (D. Wyo. 1995)). The Tenth Circuit analyzed the following:

> (1) *Ultimate ideas:* fundamental questions about life, purpose, and death; (2) *Metaphysical beliefs:* beliefs addressing a reality which transcends the physical and immediately apparent world; (3) *Moral or ethical system*: proscription of a particular manner of acting or a way of life that is moral or ethical; (4) *Comprehensiveness of beliefs*: an overarching array of beliefs that coalesce to provide the believer with answers to many of the problems and concerns that confront humans; and (5) *Accoutrements of religion:* the presence of various external signs of religion, including (a) a founder, prophet or teacher, (b) important writings, (c) gathering places, (d) keepers of knowledge, (e) ceremonies and rituals, (f) structure or organization, (g) holidays, (h) diet or fasting, (i) appearance and clothing, and (j) propagation.

Id. These factors are neither exclusive nor determinative; indeed, in applying them, a court should err on the side of concluding that a set of beliefs constitutes a religion. *Meyers*, 906 F. Supp. at 1501.

These legal tests are unnecessary when a court is presented with a major world religion such as Islam. Indeed, the *Meyers* court simply assumed that Islam, as well as other major world religions such as Judaism, Christianity, Hinduism, Buddhism, and Shintoism, Confucianism, and

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11. According to Judge Adams's concurrence in *Malnak* v. *Yogi*, the definition of religion may even include belief systems that "do not teach what would generally be considered a belief in the existence of God," such as "Buddhism, [and] Taoism." 592 F.2d 197, 206 (3d Cir. 1979) (Adams, J., concurring) (citing *Washington Ethical Society* v. *District of Columbia*, 249 F.2d 127 (D.C. Cir. 1957) and extending the definition of "religion" to non-Theist organized groups).

Taoism, qualified as religions under the First Amendment. *Meyers*, 906 F. Supp. at 1503. Other courts have done the same. See, *e.g.*, *Ford* v. *McGinnis*, 352 F.3d 582, 591 (2d Cir. 2003) (treating Islam as a religion for purposes of examining a prisoner's free exercise claim); *Ali* v. *Shabazz*, 8 F.3d 22 (5th Cir. 1993) (unpublished) (same). The issue, instead, has typically come up in cases where secular personal, political, or ideological beliefs have been couched in religious terms for some legal advantage, such as evading criminal laws regarding controlled substances.[12]

Even if these tests were relevant, Islam would plainly meet them. As explained in Section III above, Islam contains beliefs that are both ultimate and metaphysical and that include a comprehensive ethical and moral system. And Islam unmistakably bears the accoutrements of religion: sacred texts, prophets, prayers, rituals, holidays, places of religious assembly, professional clergy, and a body of theology. There is no question that Islam is a religion within the meaning of the Free Exercise Clause and related federal laws.

B. Rutherford County Would Risk Violating RLUIPA Were it not to Treat Islam as a Religion

As explained above, the plaintiffs in this case would have the Court conclude that Islam is a political system, or an ideology, not a system of belief that qualifies as a religion entitled to

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12. The *Meyers* court, for example, concluded that the Church of Marijuana is not a religion. *Id.* at 1509. See also *United States* v. *Quaintance*, 471 F. Supp. 2d 1153, 1070 (D. N.M. 2006) ("Church of Cognizance," whose purpose was to teach adherents how to "live as long a life as possible," not a religion); *Mason* v. *General Brown Cent. Sch. Dist.*, 851 F.2d 47, 51-52 (2d Cir. 1988) (chiropractor's belief in "natural existence" not a religion); *Africa* v. *Commonwealth of Pa.*, 662 F.2d 1025, 1032 (3d Cir. 1981) (MOVE, "a 'revolutionary' organization 'opposed to all that is wrong'" is not a religion); *United States* v. *Kuch*, 288 F. Supp. 439, 444-45 (D.D.C. 1968) (the Neo-American Church, which required using LSD, not a religion).

the protection of federal law. See Amended Complaint at 8 (Sept. 22, 2010) (alleging that the County failed to investigate whether the ICM intended to promote the "political practice of 'Jihad'" or "establish a caliphate"). However, if Rutherford County had adopted this approach, or were the County to adopt this approach in the future, the County would risk violating RLUIPA.

As noted above, RLUIPA prohibits local governments from using land-use regulations to discriminate against religious institutions, to treat them on less than equal terms than similarly situated secular land uses, or to substantially burden religious exercise. 42 U.S.C. §§ 2000cc, *et seq*. It was passed in response to Congressional findings showing that religious institutions in general, and minority faiths in particular, frequently faced overt and subtle discrimination in the application of land-use and zoning regulations. See H.R. Rep. No. 106-219, 18-24 (1999); 146 Cong. Rec. 16698 (2000) (Joint Statement of Senators Hatch and Kennedy). It was designed to codify First Amendment protections and provide a mechanism for enforcement. *Id.* at 16699 (noting that RLUIPA's land-use provisions are designed to "enforce the Free Exercise and Free Speech Clauses as interpreted by the Supreme Court."). It reflects Congress's recognition that "places of assembly are needed to facilitate religious practice, as well as the possibility that local governments may use zoning regulations to prevent religious groups from using land for such purposes." *Midrash Sephardi, Inc.* v. *Surfside*, 366 F.3d 1214, 1226 (11th Cir. 2004). RLUIPA also expressly provides that "religious exercise" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," and extends to the "use, building, or conversion of real property for the purpose of religious exercise" 42 U.S.C. § 2000cc-5(7)(A), (B).

"Religious assembl[ies] or institution[s]" protected by RLUIPA include mosques or Islamic centers of the type that ICM proposes to construct in Rutherford County. See *Albanian Associated Fund* v. *Township of Wayne*, No. 06-cv-3217, 2007 WL 2904194 at *7-9 (D. N.J. Oct. 1, 2007) (applying RLUIPA to a claim brought by a mosque). See also *Moxley* v. *Town of Walkersville*, 601 F. Supp. 2d 648, 658-60 (D. Md. 2009) (addressing a RLUIPA action involving a mosque, and assuming, without deciding, that the mosque qualified as a religious assembly). Similarly, free exercise protected by the First Amendment includes the right of Muslims to assemble in a mosque. Thus, in *Islamic Center of Mississippi* v. *Starkville*, 840 F.2d 293, 302-03 (5th Cir. 1988), the Court of Appeals for the Fifth Circuit struck down as unconstitutional a city zoning ordinance that would have prohibited the establishment of a mosque in an area where churches were allowed. There is, therefore, no question that the ICM's proposed Rutherford County Islamic center and mosque constitutes a religious assembly under RLUIPA. Failing to treat mosques as a category equally with churches as a category in application of its zoning laws would be a facial violation of Section 2(b)(2) of RLUIA.

The Plaintiffs claim the County should have investigated the substantive beliefs of the ICM before approving its plans to construct an Islamic center and mosque. See Amended Complaint at 8, 11 (Sept. 22, 2010). They maintain that the failure to undertake such an investigation creates a risk that the ICM's Islamic activities and beliefs will promote "Jihad and terrorism." See *id.* There is no suggestion that the County has a practice of undertaking such investigations with respect to applications by other religious assemblies or institutions. The

County thus acted properly in affording ICM the same treatment that it would have given any religious assembly or institution.

V. CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court conclude (1) that Islam is a religion entitled to protection under the Free Exercise Clause of the First Amendment, and (2) that the ICM's proposed Islamic center and mosque is a place of religious assembly engaged in religious exercise within the meaning of RLUIPA.

Respectfully submitted this 18th day of October, 2010,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was furnished to the following by facsimile and U.S. Mail: J. Thomas Smith, 2020 Fieldstone Parkway, Suite 900-264, Franklin, TN 37069, facsimile number 800-506-8304; Joe M. Brandon, Jr., 313 Enon Springs Road, E., Smyrna, TN 37167, facsimile number 615-459-3216; and James C. Cope and Josh A. McCreary, 16 Public Square North, Murfreesboro, TN 37130, facsimile number 615-849-2135, this the 18th day of October, 2010.

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UNREPORTED CASES

United States District Court

MIDDLE District of TENNESSEE

UNITED STATES OF AMERICA

V.

ERIC IAN BAKER

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:08-00002-01

USM Number: 18692-075

RAYBURN MCGOWAN, JR.
Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to Counts Two and Four of the Superseding Indictment

_____ pleaded nolo contendere to count(s) _____ which was accepted by the court.

_____ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 247	Damage to Religious Property	02/09/08	2
18 U.S.C. § 844(h)	Use of Fire or Explosive to Commit a Felony	02/09/08	4

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

_____ The defendant has been found not guilty on count(s) _____

X Counts One, Three and Five of the Superseding Indictment are dismissed on the motion of the United States.

It is ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and United States Attorney of material changes in economic circumstances.

March 25, 2010
Date of Imposition of Judgment

Signature of Judge

Robert L. Echols, United States District Judge
Name and Title of Judge

April 30, 2010
Date

DEFENDANT: ERIC IAN BAKER
CASE NUMBER: 1:08-00002-01

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **one hundred and eighty-three (183) months, which shall consist of terms of sixty-three (63) months on Count 2 of the Superseding Indictment and one hundred and twenty (120) months on Count 4 of the Superseding Indictment with such terms to be served consecutively.**

__X__ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that Defendant be incarcerated at the federal prison facility closest to Nashville, Tennessee, subject to his security classification and the availability of space at the institution.

The Court recommends that the Defendant be considered for participation in the Bureau of Prisons' Intensive Drug Treatment Program.

__X__ The defendant is remanded to the custody of the United States Marshal.

_____ The defendant shall surrender to the United States Marshal for this district:

_____ at _____ _____ a.m. _____ p.m. on _____

_____ as notified by the United States Marshal.

_____ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

_____ before 2 p.m. on _____.

_____ as notified by the United States Marshal.

_____ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ERIC IAN BAKER
CASE NUMBER: 1:08-00002-01

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a total term of **three (3) years. This term shall consist of terms of three (3) years on each of Counts Two and Four, with such terms to run concurrently.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court.

_____ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

__X__ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

__X__ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

_____ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

_____ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The Defendant shall pay restitution to the victim(s) identified in the Criminal Monetary Penalties section of this Judgment in an amount totaling $101,286.15. Payments shall be submitted to the United States District Court, Clerk's Office, Eighth Floor, 801 Broadway, Nashville, Tennessee 37203. Restitution is due immediately. If the Defendant is incarcerated, payment shall begin under the Bureau of Prisons' Inmate Financial Responsibility Program. Should there be an unpaid balance when supervision commences, the Defendant shall pay the remaining restitution in monthly installments in an amount recommended by the Probation Office and approved by the Court, but the minimum monthly rate shall not be less than 10 percent of Defendant's gross monthly income. No interest shall accrue as long as Defendant remains in compliance with the payment schedule ordered. Pursuant to 18 U.S.C. § 3664(k), Defendant shall notify the court and Untied States Attorney of any material change in economic circumstances that might affect ability to pay.

2. The Defendant shall furnish all financial records, including, without limitation, earnings records and tax returns, to the United States Probation Office upon request.

3. The Defendant shall participate in a program of drug testing and substance abuse treatment which may include a 30-day inpatient treatment program followed by up to 90 days in a residential reentry center at the direction of the Probation Officer. The Defendant shall pay all or part of the cost for substance abuse treatment if the Probation Officer determines the Defendant has the financial ability to do so or has appropriate insurance coverage to pay for such treatment.

4. The Defendant shall abstain from all use of alcohol or alcoholic beverages.

5. The Defendant shall participate in a mental health program as directed by the Probation Office. The Defendant shall pay all or part of the cost for mental health treatment if the Probation Officer determines the Defendant has the financial ability to do so or has appropriate insurance coverage to pay for such treatment.

6. The Defendant shall be required to participate in an adult education program and prove consistent effort, as determined appropriate by the United States Probation Office, toward obtaining a General Equivalency Diploma (GED).

7. The Defendant shall not be involved with gang activity, possess any gang paraphernalia or associate with any person affiliated with a gang. The term gang includes any white supremacist group.

8. The Defendant shall not have any contact with any individuals associated with the Islamic Center of Columbia.

9. The Defendant shall cooperate in the collection of DNA as directed by the Probation Officer.

10. The Defendant is prohibited from owning, carrying or possessing firearms, ammunition, destructive devices or other dangerous weapons.

DEFENDANT: ERIC IAN BAKER
CASE NUMBER: 1:08-00002-01

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on the attached sheet.

	Assessment	Fine	Restitution
TOTALS	**$200**	**$**	**$101,286.15**

_____ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

_____ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Auto-Owners Insurance P.O. Box 517 Brentwood, TN 37024 RE: Claim No. 33-866-2008		$ 98,786.15	
Islamic Center of Columbia Attention: Daoud Abudiab 500 Carter Street Columbia, TN 38401		$ 2,500.00	
TOTALS	$_____	$101,286.15	

_____ Restitution amount ordered pursuant to plea agreement $_____

_____ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments sheet may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

__X__ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

__X__ the interest requirement is waived for the _____ fine __X__ restitution, as long as Defendant remains in compliance with the payment schedule.

_____ the interest requirement for the _____ fine _____ restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ERIC IAN BAKER
CASE NUMBER: 1:08-00002-01

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A X Lump sum payment of $200 (special assessment) due immediately, balance $101,286.15 (restitution) due

_____ not later than _____, or
X in accordance _____ C, _____ D, _____ E, or X F below; or

B _____ Payment to begin immediately (may be combined with _____ C, _____ D, or _____ F below); or

C _____ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D _____ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E _____ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:

Restitution is due in full immediately. Should there be an unpaid balance upon the commencement of the term of supervised release, payments may be made in regular monthly installments in a minimum amount of no less than 10 percent of Defendant's gross monthly income to be recommended by the United States Probation Office and approved by the Court, based upon the Defendant's earning capacity and his ability to pay.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

X Joint and Several

Defendant Eric Ian Baker, Case No. 1:08-00002-01
Restitution $101,286.15 - Joint and Several with Co-Defendants Jonathan Edward Stone and Michael Corey Golden

_____ The defendant shall pay the cost of prosecution.

_____ The defendant shall pay the following court cost(s):

_____ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including the cost of prosecution and court costs.

United States District Court

MIDDLE District of TENNESSEE

UNITED STATES OF AMERICA

V.

JONATHAN EDWARD STONE

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:08-00002-02

USM Number: 18690-075

R. DAVID BAKER
Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to Counts Two and Four of the Superseding Indictment

_____ pleaded nolo contendere to count(s) _____ which was accepted by the court.

_____ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 247	Damage to Religious Property	02/09/08	2
18 U.S.C. § 844(h)	Use of Fire or Explosive to Commit a Felony	02/09/08	4

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

_____ The defendant has been found not guilty on count(s) _____

X Count(s) One, Three and Five of the Superseding Indictment are dismissed on the motion of the United States.

It is ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and United States Attorney of material changes in economic circumstances.

April 22, 2010
Date of Imposition of Judgment

Signature of Judge

Robert L. Echols, United States District Judge
Name and Title of Judge

May 24, 2010
Date

DEFENDANT: JONATHAN EDWARD STONE
CASE NUMBER: 1:08-00002-02

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **seventy-three (73) months. This term shall consists of terms of twenty-four (24) months on Count Two and forty-nine (49) months on Count Four, with such terms to be served consecutively.**

__X__ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that Defendant be incarcerated at the federal prison facility closest to Columbia, Tennessee, subject to his security classification and the availability of space at the institution.

The Court recommends that Defendant be considered for participation in the Bureau of Prisons' Intensive Drug Treatment Program.

The Court recommends that Defendant be allowed to participate in mental health counseling.

__X__ The defendant is remanded to the custody of the United States Marshal.

_____ The defendant shall surrender to the United States Marshal for this district:

_____ at _____ _____ a.m. _____ p.m. on _____

_____ as notified by the United States Marshal.

_____ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

_____ before 2 p.m. on _____.

_____ as notified by the United States Marshal.

_____ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JONATHAN EDWARD STONE
CASE NUMBER: 1:08-00002-02

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a total term of **three (3) years. This term shall consist of terms of three (3) years on each of Counts Two and Four, with such terms to run concurrently.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court.

_____ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

__X__ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

__X__ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

_____ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

_____ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: JONATHAN EDWARD STONE
CASE NUMBER: 1:08-00002-02

SPECIAL CONDITIONS OF SUPERVISION

1. The Defendant shall pay restitution to the victim identified in the Criminal Monetary Penalties section of this Judgment in an amount totaling **$101,286.15, jointly and severally with all co-defendants.** Payments shall be submitted to the United States District Court, Clerk's Office, Eighth Floor, 801 Broadway, Nashville, Tennessee 37203. Restitution is due immediately. If the Defendant is incarcerated, payment shall begin under the Bureau of Prisons' Inmate Financial Responsibility Program. Should there be an unpaid balance when supervision commences, the Defendant shall pay the remaining restitution in monthly installments in an amount recommended by the Probation Office and approved by the Court, but the minimum monthly rate shall not be less than 10 percent of Defendant's gross monthly income. No interest shall accrue as long as Defendant remains in compliance with the payment schedule ordered. Pursuant to 18 U.S.C. § 3664(k), Defendant shall notify the court and United States Attorney of any material change in economic circumstances that might affect ability to pay.

2. The Defendant shall furnish all financial records, including, without limitation, earnings records and tax returns, to the United States Probation Office upon request.

3. The Defendant shall participate in a program of drug testing and substance abuse treatment which may include a 30-day inpatient treatment program followed by up to 90 days in a residential reentry center at the direction of the Probation Officer. The Defendant shall pay all or part of the costs for substance abuse treatment if the Probation Officer determines the Defendant has the financial ability to do so or has appropriate insurance coverage to pay for such treatment.

4. The Defendant shall participate in a mental health program as directed by the Probation Officer. The Defendant shall pay all or part of the cost for mental health treatment if the Probation Officer determines the Defendant has the financial ability to do so or has appropriate insurance coverage to pay for such treatment.

5. The Defendant shall not be involved with gang activity, possess any gang paraphernalia or associate with any person affiliated with a gang. The term gang includes any white supremacist group.

6. The Defendant shall not have any contact with any individuals associated with the Islamic Center of Columbia.

7. The Defendant shall cooperate in the collection of DNA as directed by the Probation Officer.

8. The Defendant is prohibited from owning, carrying or possessing firearms, destructive devices, or other dangerous weapons.

DEFENDANT: JONATHAN EDWARD STONE
CASE NUMBER: 1:08-00002-02

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on the attached sheet.

	Assessment	Fine	Restitution
TOTALS	**$200**	**$**	**$101,286.15**

_____ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

_____ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Auto-Owners Insurance P.O. Box 517 Brentwood, TN 37024 Re: Claim No. 33-866-2008		$ 98,786.15	
Islamic Center of Columbia Attention: Daoud Abudiab 500 Carter Street Columbia, TN 38401		2,500.00	
TOTALS	$_____	$101,286.15	

_____ Restitution amount ordered pursuant to plea agreement $_____

_____ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments sheet may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

__X__ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

__X__ the interest requirement is waived for the _____ fine __X__ restitution as long as Defendant remains in compliance with the payment schedule.

_____ the interest requirement for the _____ fine _____ restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JONATHAN EDWARD STONE
CASE NUMBER: 1:08-00002-02

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ___X___ Lump sum payment of $200 (special assessment) due immediately, balance (101,286.15 (restitution) due

_____ not later than _____, or
___X___ in accordance _____ C, _____ D, _____ E, or ___X___ F below; or

B _____ Payment to begin immediately (may be combined with _____ C, _____ D, or _____ F below); or

C _____ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D _____ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E _____ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ___X___ Special instructions regarding the payment of criminal monetary penalties:

Restitution is due in full immediately. Should there be an unpaid balance upon the commencement of the term of supervised release, payments may be made in regular monthly installments in a minimum amount of no less than 10 percent of Defendant's gross monthly income to be recommended by the United States Probation Office and approved by the Court, based upon the Defendant's earning capacity and his ability to pay.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

___X___ Joint and Several

Defendant Jonathan Edward Stone; Case No. 1:08-00002-02
Restitution $101,286.15 – Jointly and Severally with Co-Defendants Eric Ian Baker (No. 1:08-00002-01) and Michael Corey Golden (No. 1:08-00002-03)

_____ The defendant shall pay the cost of prosecution.

_____ The defendant shall pay the following court cost(s):

_____ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including the cost of prosecution and court costs.

United States District Court

MIDDLE District of TENNESSEE

UNITED STATES OF AMERICA

V.

MICHAEL COREY GOLDEN

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:08-00002-03

USM Number: 18691-075

MICHAEL J. FLANAGAN
Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to Counts Two and Four of the Superseding Indictment

____ pleaded nolo contendere to count(s) _____ which was accepted by the court.

____ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 247	Damage to Religious Property	02/09/08	2
18 U.S.C. § 844(h)	Use of Fire or Explosive to Commit a Felony	02/09/08	4

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

____ The defendant has been found not guilty on count(s) _____

X Counts One, Three, and Five of the Superseding Indictment are dismissed on the motion of the United States.

It is ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and United States Attorney of material changes in economic circumstances.

November 23, 2009
Date of Imposition of Judgment

Signature of Judge

Robert L. Echols, United States District Judge
Name and Title of Judge

January 11, 2010
Date

DEFENDANT: MICHAEL COREY GOLDEN
CASE NUMBER: 1:08-00002-03

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a **total term of one hundred and seventy-one (171) months. This term shall consist of terms of fifty-one (51) months on Count Two and one hundred and twenty (120) months on Count Four with such terms to be served consecutively.**

X The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that Defendant be incarcerated at a federal prison facility in the southeastern region of the United States, subject to his security classification and the availability of space at the institution.

The Court recommends that Defendant be allowed to participate in any alcohol and/or drug treatment programs for which he is eligible.

X The defendant is remanded to the custody of the United States Marshal.

_____ The defendant shall surrender to the United States Marshal for this district:

_____ at _____ _____ a.m. _____ p.m. on _____

_____ as notified by the United States Marshal.

_____ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

_____ before 2 p.m. on _____.

_____ as notified by the United States Marshal.

_____ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: MICHAEL COREY GOLDEN
CASE NUMBER: 1:08-00002-03

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a total term of **three (3) years. This term shall consist of terms of three (3) years on each of Counts Two and Four, with such terms to run concurrently.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court.

_____ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

__X__ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

__X__ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

_____ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

_____ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: MICHAEL COREY GOLDEN
CASE NUMBER: 1:08-00002-03

SPECIAL CONDITIONS OF SUPERVISION

1. The Defendant shall pay restitution to the victim(s) identified in the Criminal Monetary Penalties section of this Judgment in an amount totaling $101,286.15. Payments shall be submitted to the United States District Court, Clerk's Office, Eighth Floor, 801 Broadway, Nashville, Tennessee 37203. Restitution is due immediately. If the Defendant is incarcerated, payment shall begin under the Bureau of Prisons' Inmate Financial Responsibility Program. Should there be an unpaid balance when supervision commences, the Defendant shall pay the remaining restitution in monthly installments in an amount recommended by the Probation Office and approved by the Court, but the minimum monthly rate shall not be less than 10 percent of Defendant's gross monthly income. No interest shall accrue as long as Defendant remains in compliance with the payment schedule ordered. Pursuant to 18 U.S.C. § 3664(k), Defendant shall notify the court and Untied States Attorney of any material change in economic circumstances that might affect ability to pay.

2. The Defendant shall furnish all financial records, including, without limitation, earnings records and tax returns, to the United States Probation Office upon request.

3. The Defendant shall participate in a program of drug testing and substance abuse treatment which may include a 30-day inpatient treatment program followed by up to 90 days in a residential reentry center at the direction of the Probation Officer. The Defendant shall pay all or part of the cost for substance abuse treatment if the Probation Officer determines the Defendant has the financial ability to do so or has appropriate insurance coverage to pay for such treatment.

4. The Defendant shall abstain from all use of alcohol or alcoholic beverages.

5. The Defendant shall be required to participate in an adult education program and prove consistent effort, as determined appropriate by the United States Probation Office, toward obtaining a General Equivalency Diploma (GED).

6. The Defendant shall not be involved with gang activity, possess any gang paraphernalia or associate with any person affiliated with a gang. The term gang includes any white supremacist group.

7. The Defendant shall not have any contact with any individuals associated with the Islamic Center of Columbia.

8. The Defendant shall cooperate in the collection of DNA as directed by the Probation Officer.

9. The Defendant is prohibited from owning, carrying or possessing firearms, ammunition, destructive devices or other dangerous weapons.

DEFENDANT: MICHAEL COREY GOLDEN
CASE NUMBER: 1:08-00002-03

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on the attached sheet.

	Assessment	Fine	Restitution
TOTALS	**$200**	**$**	**$101,286.15**

_____ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

_____ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Auto-Owners Insurance P.O. Box 517 Brentwood, TN 37024 RE: Claim No. 33-866-2008		$ 98,786.15	
Islamic Center of Columbia Attention: Daoud Abudiab 500 Carter Street Columbia, TN 38401		$ 2,500.00	
TOTALS	$_____	$101,286.15	

_____ Restitution amount ordered pursuant to plea agreement $_____

_____ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments sheet may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

__X__ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

_____ the interest requirement is waived for the _____ fine __X__ restitution, as long as Defendant remains in compliance with the payment schedule..

_____ the interest requirement for the _____ fine _____ restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: MICHAEL COREY GOLDEN
CASE NUMBER: 1:08-000002-03

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A X Lump sum payment of $200 (special assessment) due immediately, balance $101,286.15 (restitution) due

_____ not later than _____, or
X in accordance _____ C, _____ D, _____ E, or X F below; or

B _____ Payment to begin immediately (may be combined with _____ C, _____ D, or _____ F below); or

C _____ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D _____ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E _____ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:

Restitution is due in full immediately. Should there be an unpaid balance upon the commencement of the term of supervised release, payments may be made in regular monthly installments in a minimum amount of no less than 10 percent of Defendant's gross monthly income to be recommended by the United States Probation Office and approved by the Court, based upon the Defendant's earning capacity and his ability to pay.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

X Joint and Several

Defendant Michael Corey Golden, Case No. 1:08-00002-03
Restitution $101,286.15 - Joint and Several with Co-Defendants Eric Ian Baker and Jonathan Edward Stone

_____ The defendant shall pay the cost of prosecution.

_____ The defendant shall pay the following court cost(s):

_____ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including the cost of prosecution and court costs.

Not Reported in F.Supp.2d, 2007 WL 2904194 (D.N.J.)
(Cite as: 2007 WL 2904194 (D.N.J.))

H
Only the Westlaw citation is currently available.

United States District Court,
D. New Jersey.
ALBANIAN ASSOCIATED FUND and Imam Arun Polozani, Plaintiffs,
v.
The TOWNSHIP OF WAYNE and The Township of Wayne Planning Board, Defendants.
Civil Action No. 06-cv-3217 (PGS).

Oct. 1, 2007.

A. Michael Rubin, Rubin & Connelly, Wayne, NJ, for Plaintiffs.

Anthony P. Seijas, Scarinci & Hollenbeck, LLC, Lyndhurst, NJ, Ryan Gregory Lee, U.S. Department of Justice, Washington, DC, for Defendants.

OPINION

SHERIDAN, U.S.D.J.

***1** This matter comes before the Court on a motion for summary judgment by defendant and a motion for partial summary judgment by plaintiff. For the reasons stated below, both motions are denied in their entirety.

Plaintiff, Albanian Associated Fund (collectively with Imam Arun Polozani referred to as "plaintiffs" or "the Mosque"), is an entity created for the purpose of establishing and maintaining a Mosque and to provide a place of public worship and prayer in accordance with the traditions of the Islamic religion. Currently, the congregation convenes at a facility located on River Street in Paterson, New Jersey. That property, purchased by plaintiffs in 1985, houses a 3,000 square foot facility that accommodates approximately 70 to 100 individuals. Over the years, the Mosque's congregation grew to approximately 200 families, 70% of which reside in the Township of Wayne (collectively with the Township of Wayne Planning Board referred to as the "Township"). According to the Imam, the current facilities are considered by plaintiffs to be inadequate because:

> [t]he hall is not large enough to allow both men and women to pray, women are required to pray in the basement where they cannot face Mecca or see the Imam as is required by the religion; the women cannot engage in cleansing, a requirement for prayers; women could not participate in the holiday activities; the Mosque cannot offer youth activities; and funerals cannot be held at the Mosque.

As a result, on September 6, 2001, plaintiffs entered into a contract for the purchase of property known as Block 3517, Lot 40 on the Tax Map of the Township of Wayne, New Jersey. The eleven (11) acre property is located in a land use zone where a "house of worship" is a conditional use. This parcel is claimed by defendants to be defined by ordinance as "environmentally sensitive" because it consists almost entirely of rocky steep slopes. Plaintiffs dispute this contention, maintaining that the phrase "environmentally sensitive" is not defined by any Township ordinance. The property, which has always been undeveloped, was previously the subject of two variance applications, one for a residential subdivision in 1987 and the other by the North Haledon Nursing Home Association in April 1994. While the residential subdivision was granted, the variance sought by the North Haledon Nursing Home Associations was denied due to the Township Board of Adjustment's finding that "[t]he subject property is environmentally sensitive as defined by the Township Environmental [sic] containing steep slopes and soil consisting of bedrock within one and one-half feet of the surface and bedrock at the surface."

Defendants maintain that prior to plaintiffs' pur-

chase of the subject property, in June 2001, mayoral hopeful, Scott Rumana, proposed an Open Space Plan as part of his campaign platform. According to campaign literature, Rumana, along with his campaign team, comprised of Councilman Christopher Vergano, Councilman Joseph Schweighardt, and Councilwoman Harriet Rossi, pledged that "[f]or our future [they] will fight to preserve precious open spaces." On June 26, 2001, Rumana was elected as Mayor. It was only after this proposal was introduced that plaintiffs contracted to purchase and, on October 5, 2001, subsequently closed on the subject property.

*2 On October 17, 2002, plaintiffs submitted a Land Development Application with a Site Plan to develop the property as a religious facility. Representatives for the Mosque first appeared before the Defendant Planning Board on March 24, 2003. Since that time, plaintiffs' application has been revised, withdrawn, and resubmitted for several reasons including environmental issues regarding storm water management, height and fencing requirements, parking issues, and traffic concerns. Because the property is located between two county roads, the County of Passaic also retained jurisdiction to review and approve the plan for storm water drainage.

In November 2003, nearly two and a half years after the open space proposal was first introduced, and while plaintiff's site plan application remained pending before the Defendant Planning Board, the Township residents voted to approve the Open Space Referendum, which would put aside a portion of resident tax dollars to purchase and preserve open spaces. According to one councilman, the plaintiff's application to build its Mosque was one of the reasons that the entire Open Space Referendum was put on the ballot. Following voter approval, an Open Space Committee was formed on January 1, 2004, with the Mayor chairing the Committee. It is an ad hoc committee. The Committee, which retains no binding authority or voting power, was assembled solely to identify properties to be preserved for open spaces to the Township Council. [FN1] The Referendum charged the Committee with submitting a "prioritized list of properties to be acquired and/or properties from which development rights should be acquired" to the Council. Only after such a list had been compiled by the Committee and approved by the Council is the Council empowered to acquire any property for open space purposes. The Committee, however, never submitted a prioritized list of properties to be acquired, but rather provided a list of all undeveloped land in the Township. Certainly, with no intention of acquiring all open space in the Township, plaintiffs maintain, and the mayor admitted at his deposition, that the Committee pursued properties on an individualized property-by-property basis.

> FN1. If this is true, then the Committee may not be subject to some important procedural safeguards against arbitrary municipal action such as the Open Public Meeting Act. The Court can not determine same from the record before it.

Defendants claim that at the third meeting of the Open Space Committee, on May 20, 2004, the subject property was identified as a candidate to be preserved. The record is void of any indication if or when the Township notified the Mosque that its property was subject to the Open Space Initiative. Plaintiffs, however, argue that nowhere in the minutes of the Open Space Committee was there a recommendation to acquire the Mosque's property. In fact, at the first two meetings of the Committee, there was no mention of the plaintiffs' property. While the Mosque's property was mentioned at the May 20, 2004 meeting, plaintiffs argue that it was never identified as a candidate or recommended for open space. At that meeting, according to plaintiffs, the Committee discussed the priorities for acquisition and listed other properties for acquisition.

*3 On March 14, 2005, a public hearing was held where the Planning Board adopted the Open Space and Recreation Plan, which provided that "[a] preservation plan for the remaining undeveloped and

environmentally sensitive parcels located within the Township is required in order to preserve those final tracts that, if developed, would severely impact the future quality of life of the Township's residents."

On January 18, 2006, the Council held a closed session meeting to discuss the subject property.[FN2] The exact subject matter of the session has been held privileged.[FN3] Plaintiffs maintain that it was at this closed meeting that defendants decided on the acquisition of the subject property. Believing that it had the requisite legal grounds to acquire the property via eminent domain, the plaintiffs' property was the subject of discussion at a January 26, 2006 Committee meeting. Plaintiffs contend that the mayor simply informed the Committee at this January 26, 2006 meeting that the Township was acquiring the property. On April 5, 2006, the Township passed Resolution 139 in furtherance of the Open Space and Recreation Plan, authorizing an appraisal report of the plaintiffs' property for use in condemnation proceedings. Defendants maintain that the Council focused only on the environmentally sensitive nature of the property and the fact that a development application was pending. According to defendants, the proposed structure and use had no bearing on the Council's decision.

> FN2. Prior to this meeting, defendants state that Mayor Rumana read the New Jersey Appellate Division's opinion in *Mt. Laurel Township v. Mipro Homes, LLC,* 379 N.J.Super. 358 (App.Div.), *affirmed by,* 188 N.J. 531 (2006), a ruling heavily relied upon by this Court in granting plaintiffs' motion for a preliminary injunction in November 2006, one month prior to the New Jersey Supreme Court's opinion affirming the decision.
>
> FN3. Following an *in camera* review of the minutes of the January 18, 2006 meeting, the Magistrate Judge found the minutes to be irrelevant, not discoverable, and subject to the attorney-client privilege. The parties did not appeal that decision.

Defendants point to the deposition testimony of several members of the Council to establish that the decision to acquire the property was not motivated by an improper purpose. Councilman Christopher Vergano testified that "it wasn't about them. It was the 10 acres of property. It could have been Our Lady of Consolation that owned the property. It wouldn't have mattered." Councilman Gerald Porter suggested that none of the members of the Council even knew the property belonged to plaintiffs, ("They didn't tell me it was the Albanian's or anything. None of us knew that."). Councilwoman Ann Mary O'Rourke offered the following:

> Did I look at it having implications for the free exercise of religion? No, because at that time we were looking into the possibility of acquiring the property, so I did not look at it at all as being something where we were infringing on somebody's exercise of religion. I would look at it as if it was any organization, corporation, or anything at that point because it was just looking into the possibility of acquiring it.

Councilman Mario Ianelli testified that his decision had "nothing to do with the application being for a Mosque and everything to do with it being developed." Likewise, Councilman Benedict Martorana stated that "[t]he nature of the land use wasn't important, just the impacts on the land. There was no concern about the proposed use, no discussion on the proposed use, whether that was of any concern at all to the Committee." Councilmen Alan Purcell, Joseph Schweighardt, and Joseph Scuralli each testified that their decision to vote in favor of acquiring the land centered around the environmental concerns about the property. Councilman Joseph DiDonato stated that he voted to acquire the property because of flooding and parking conditions.

***4** The Township offered plaintiffs compensation in the amount of $510,000. Additionally, according to the Township, alternative locations were suggested

within the Township upon which plaintiffs may want to build its Mosque. Plaintiffs rejected the monetary compensation and found the alternative sites suggested by the Township to be unavailable. The Township advised plaintiffs that it would initiate condemnation proceedings.

On July 17, 2006, the Mosque filed the instant Verified Complaint and thereafter moved for a preliminary injunction seeking to "enjoin the defendants from taking any action under powers of eminent domain or otherwise interfering with plaintiffs' quiet enjoyment of their property ... pending final disposition of this action." On November 1, 2006, the Court heard the motion for a preliminary injunction. In the course of that hearing, it was made apparent that despite approximately 102 properties identified for the Open Space and Recreation Plan, only the plaintiffs' property was being pursued through condemnation. As a result, the Court granted a preliminary injunction enjoining defendants from taking any action under powers of eminent domain pending final disposition of this action.[FN4] After postponing several scheduled hearings in which the Court sought testimony to determine whether the preliminary injunction should continue, the parties agreed to keep the injunction in place while the Court considered dispositive motions. Defendants filed a motion for summary judgment and plaintiffs have moved for partial summary judgment. The United States of America, Department of Justice, Civil Right Division, Housing and Civil Enforcement Section, was granted leave to file a brief as *amicus curiae,* which was submitted solely in support of plaintiffs' claim under RLUIPA, Section 2(b)(2).

> FN4. In defendants' motion papers, defendants identify other property that the Township has acquired, namely the St. Joseph's/Sunrise Assisted Living property, the Solari property, and the Van Houten Burroughs property. Defendants made no mention as to when these properties were acquired or by what means.

Discussion:

I.

At the outset, notwithstanding the extensive briefing, what is obvious from oral argument and a settlement conference is that the parties bitterly dispute the facts. Accordingly, the Court can not render a decision on the motions because of these factual and credibility issues which this Court can better judge through trial. These disputes include, but are not limited to:

a) whether reasonable alternative sites exist;

b) when and how the Mosque parcel was deemed "environmentally sensitive" and subject to eminent domain proceedings, or whether it was a method to quell community opposition to the development of the Mosque; and

c) whether the condemnation actually is a burden on the exercise of religion by members of the Mosque.

"Eminent domain is the power of the State to take private property for public use ... It is a right founded on the law of necessity which is inherent in sovereignty and essential to the existence of government[.]" *Township of W. Orange v. 769 Assocs.*, 172 N.J. 564, 571 (2002) (quoting *State v. Lanza,* 27 N.J. 516, 529 (1958)). "Generally, a government entity may take, or condemn, private property where it is essential for public use, and where just compensation has been made to the owner." *Borough of Essex Fells v. Kessler Inst. for Rehab.*, 289 N.J.Super. 329, 336 (Law.Div.1995).

***5** The issue of "open space" and a municipality's motive in selecting properties for open space was addressed by the Appellate Division of the Superior Court of New Jersey in *Mount Laurel v. Mipro Homes, LLC,* 379 N.J.Super. 358 (App.Div.2005). In that case, Mount Laurel had adopted an Open Space Recreation Plan, creating a list of properties sought to be acquired. *Id.* at 364-65. Not included

on the list was a 16.3-acre parcel which had been approved for an assisted living facility that included units affordable to low- and moderate-income residents. *Id.* at 365-66. In 2001, MiPro [FN5] purchased the site and altered the plans in order to construct 23 single-family residences on the property. *Id.* at 366. Upon realization of the proposed use, Mount Laurel's governing body added the site to the list of parcels to be acquired under its open space acquisition program. *Id.* at 366. Following unsuccessful attempts to acquire the site by voluntary acquisition, Mount Laurel brought a condemnation action. In challenging the municipality's actions, MiPro argued that the condemnation was an effort to thwart residential development which was an unlawful purpose in exercising the power of eminent domain. *Id.* at 367. Despite finding that the municipality had no plan to devote the property to active recreational use, the Appellate Division held that:

> FN5. Although the Appellate Division repeatedly referred to the appellee as "Mipro," in a footnote in the dissenting opinion to the New Jersey Supreme Court's opinion affirming the Appellate Division's ruling, Justice Rivera-Soto explained that "MiPro's written submissions all capitalize the 'p' in MiPro, and both the majority and I have adopted that convention." *MiPro Homes,* 188 N.J. at 535 n. 1.

> a municipality has statutory authority to condemn property for open space; ... the selection of properties for open space acquisition on which residential development is planned does not constitute an improper exercise of the eminent domain power; and that Mipro did not present evidence that could support a finding that Mount Laurel's decision to condemn its property constituted an abuse of the eminent domain power.
> *Id.* at 368.

In so holding, the court indulged an extensive overview of the idea of "open space." The court's historical recitation provided that "[o]ur Legislature has long recognized that preservation of open space constitutes a public use, and therefore municipalities may utilize the eminent domain power to acquire property for this purpose. As early as 1917, the Legislature enacted the 'Home Rule Act,' L.1917, c. 152, art. XXXVI, § 1, now codified in *N.J.S.A.* 40:61-1, which provides that a municipality may acquire property for 'open spaces' by exercise of the power of 'condemnation .' " *Id.* at 371.

The significance of *Mipro,* in the context of this case, is that the plaintiff there argued that although the condemnation was for a facially valid purpose, such action was improper because the motivation in bringing the condemnation action was to prevent MiPro's proposed residential development. In response, the court explained that "[i]t is well-established that a reviewing court will not upset a municipality's decision to use its eminent domain power in the absence of an affirmative showing of fraud, bad faith or manifest abuse." *Id.* at 375 (citing *Township of West Orange,* 172 N.J. at 571 (quoting *City of Trenton v. Lenzner,* 16 N.J. 465, 473 (1954), *cert. denied,* 348 U.S. 972 (1955)) (internal quotations omitted).

> ***6** Bad faith is referred to as the doing of an act for a dishonest purpose. The term also "contemplates a state of mind affirmatively operating with a furtive design or some motive of interest or ill will." *Borough of Essex Fells v. Kessler Institute for Rehab.,* 289 N.J.Super. 329, 338 (Law.Div.1995), citing *Lustrelon Inc. v. Prutscher,* 178 N.J.Super. 128, 144 (App.Div.1981). The party making the claim that the government has conducted itself in bad faith or in a fraudulent manner has the burden of proof. Furthermore, evidence showing that the government acted in bad faith must be clear and convincing. Only then will the condemnation be set aside.

Essex County Improvement Auth. v. RAR Dev. Assocs., 323 NJ.Super. 505, 515-16 (Law.Div.1999).

The *Mipro* Court further stated that "[c]ourts will

generally not inquire into a public body's motive concerning the necessity of the taking ..." *Mipro Homes,* 379 NJ. Super, at 375 (quoting *Borough of Essex Fells,* 289 N.J.Super. at 337). Because the court found the condemnation action was brought for a legitimate public purpose and, further, not motivated by some discriminatory or improper reason, the general rule to not inquire into a governing body's motive concerning the taking applies. *Id.* at 377.

The court, however, suggested that where there has been an "affirmative showing of fraud, bad faith or manifest abuse" or indication of a discriminatory or improper purpose, the general rule becomes inapplicable and motive may be inquired. While finding the municipality's reasoning sound, the court theorized that had Mount Laurel attempted to condemn the property of MiPro's predecessor, which planned an assisted living facility, a finding of abuse of eminent domain power might have been warranted. *Id.* at 376-77.

In order to set aside the condemnation action, the plaintiffs bear the burden of proving fraud, bad faith, or manifest abuse by clear and convincing evidence. *Gloucester County Improvement Authority v. Shoemaker,* 2006 WL 2096069, at *5 (App.Div. July 31, 2006) (citing *Essex County Improvement Auth., supra,* 323 N.J.Super. at 515-16; *Borough of Essex Fells, supra,* 289 N.J.Super. at 342).

Therefore, the issue is whether defendants can demonstrate that plaintiffs cannot, as a matter of law, establish by clear and convincing evidence that the taking for open space is pretext for discrimination or whether questions of material fact exist sufficient to overcome the motion for summary judgment. Taking a more narrow approach, plaintiffs here must demonstrate an "affirmative showing of fraud, bad faith or manifest abuse" or indication of a discriminatory or improper purpose so as to inquire into the motive behind the condemnation. Certainly, the deposition testimony of the council members, for the most part, is facially innocent. However, at the summary judgment stage, the Court may not weigh the evidence or make credibility determinations. *Boyle v. County of Allegheny,* 139 F.3d 386, 393 (3d Cir.1998); *see also Gulley v. Elizabeth City Police Dept.,* No. 04-4445, 2006 WL 3694588, at *8 (D.N.J. Dec. 13, 2006) ("[I]n adjudicating a motion for summary judgment, the Court is not at liberty to make such credibility determinations.").

*7 The circumstances of this case and the manner in which the plaintiffs' property was pursued, at the very least, supports an indication of discriminatory or improper purpose for which plaintiffs are entitled to inquire into the Council's motives in condemning the plaintiffs' property and raise the issue of credibility before the trier of fact.

II.

The Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc et. seq. ("RLUIPA"), "has two particular provisions at issue in this case. First, the RLUIPA has a substantial burden provision that requires land-use regulations that substantially burden religious exercise to be the least restrictive means of advancing a compelling governmental interest. Second, the Act has a nondiscrimination provision, which prohibits land-use regulations that disfavors religious uses relative to nonreligious uses." *Lighthouse Institute for Evangelism v. City of Long Branch,* 406 F.Supp.2d 507, 514 (D.N.J.2005). The section of the RLUIPA relating to land use regulations establishes a "general rule" that:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly or institution (A) is in furtherance of a compelling government interest; and (B) is the least restrictive means of furthering that compelling govern-

ment interest.

42 U.S.C. § 2000cc(a)(1).

This "general rule" is carefully circumscribed to apply only to cases in which: (A) the substantial burden is imposed on a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability; (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved. *Church of Hills of Twp. of Bedminster v. Twp. of Bedminster,* No. 05-3332, 2006 WL 462674, at *3 (D.N.J. Feb. 24, 2006) (citing 42 U.S.C. § 2000cc (a)(2)).

A.

Defendants argue that the Court need not inquire as to any substantial burden, much less a compelling interest, because the RLUIPA does not apply to takings. In *Faith Temple Church v. Town of Brighton,* 405 F.Supp.2d 250 (W.D.N.Y.2005), the District Court for the Western District of New York held that a town's eminent domain proceedings did not constitute a "land use regulations" for purposes of the RLUIPA.

> Faith Temple does not appear to contend ... that the Town's condemnation of the Groos parcel would involve a "landmarking law." Landmarking laws generally involve the "regulat[ion] and restrict[ion of] certain areas as national historic landmarks, special historic sites, places and buildings for the purpose of conservation, protection, enhancement and perpetuation of these places of natural heritage." Nothing of that nature is involved here. The eminent domain proceedings here also do not amount to a "zoning law" or "the application of such a law."
>
> *8 * * *
>
> Given these differences between zoning and eminent domain, it seems very unlikely that Congress assumed that courts would interpret RLUIPA's reference to zoning laws as including eminent domain proceedings as well. The simple fact is that Congress chose to limit the application of RLUIPA to cases involving "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land...." Conspicuously absent is any mention of eminent domain. Eminent domain is hardly an arcane or little-known concept, and the Court will not assume that Congress simply overlooked it when drafting RLUIPA.

Id. at 254-55 (citation omitted).

The District Court for the Northern District of Illinois held that Chicago's proposed expansion of O'Hare airport did not implicate the RLUIPA because, *inter alia,* the city's authority to acquire the land did not stem from a zoning regulation or landmarking law. *St. John's United Church of Christ v. City of Chicago,* 401 F.Supp.2d 887, 899 (N.D.Ill.2005). The RLUIPA only applies to government actions that "impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person." 42 U.S.C. § 2000cc. The term "land use regulation" is defined as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land...." 42 U.S.C. § 2000cc-5(5). "In [*St. John's United Church of Christ*] the City is seeking to exercise eminent domain power. Nothing in the ... complaint leads to the inference that the City's authority to acquire the land stems from any zoning regulations or landmarking law." *St. John's United Church of Christ,* 401 F.Supp.2d at 899.

> Land use regulations limit the use of property. Condemnation is, in one sense, the ultimate limitation on the use of property. It does not follow, however, that condemnation is a land use regulation as this term is used in the statute. Congress could have included "takings" within the reach of RLUIPA but did not. This Court is no [sic] persuaded that it should construe the concept of zoning so broadly that any acquisition of land by the City pursuant to eminent domain proceedings is an act of zoning.
>
> * * * *
>
> It is important to note that this Court's holding that the City does not act pursuant to a zoning or landmarking law should not be taken to mean that all condemnation proceedings necessarily are outside the scope of RLUIPA. This Court expresses no opinion with respect to that conclu- sion.
>
> *Id.* at 900.

Plaintiffs rely principally on *Cottonwood Christian Center v. Cypress Redevelopment Agency,* 218 F.Supp.2d 1203 (C.D.Cal.2002), for the proposition that eminent domain proceedings are within the context of the RLUIPA. However, the Court does not reach this question because, as indicated in the Court's oral decision on the motion to dismiss, and reiterated in plaintiffs' opposition brief, the RLUIPA challenge does not go to the actual taking, but rather the implementation of the open space plan which is a land use regulation. The taking is merely a method of implementation. The open space plan, in the Court's opinion, is clearly a "land use regulation" within the meaning of the statute. The plan, which by defendants' own admission created "[a] preservation plan for the remaining undeveloped and environmentally sensitive parcels located within the Township ... to preserve those final tracts ...," is a "landmarking law, or [ ] application of such a law, that limits or restricts a claimant's use or development of land." [FN6]

> FN6. The United States submits that there are genuine issues of material fact concerning the Township's motivations to take the Mosque's property while the Mosques conditional use permit application was pending. Moreover, because there is evidence to support the conclusion that the challenged discrimination arises from the implementation or imposition of a land use regulation triggering, the government argues that summary judgment should be denied.

B.

*9 "To prevail under the substantial burden prong of the RLUIPA, plaintiffs must demonstrate that the regulation at issue actually imposes a substantial burden on religious exercise." *Lighthouse Institute for Evangelism,* 406 F.Supp.2d at 515. The RLUIPA does not define the term "substantial burden," but in a recent precedential Third Circuit opinion, the court established a definition of "substantial burden" for purposes of RLUIPA by adopting "a disjunctive test that couples the holdings of *Sherbert* and *Thomas.* " [FN7] *Washington v. Klem,* No. 05-2351, at 15 (3d Cir.2007) (A Pennsylvania Department of Corrections restriction on the number of books inmates could have in their cells substantially burdened an inmate's religious exercise because he was required to read four books a day about the African people and then proselytize the learning; such restriction was not the least restrictive means to further a compelling government interest.). Under *Washington,* a substantial burden will exist where:

> FN7. Under the *Sherbert* view, a substantial burden exists where a person is required to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning the precepts of her religion ... on the other hand." *Sherbert v. Verner,* 374 U.S. 398, 404 (1963). Under *Thomas v. Review Bd.*

> *of the Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981), there is a substantial burden when the state "put[s] substantial pressure on an adherent to modify his behavior and violate his beliefs." The *Washington* court praises the Fifth Circuit in *Adkins* for combining these two tests and thus decides to emulate that decision. *Washington*, No. 05-2351, at 15 n. 7, *referring to Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir.2004) ("a government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs.").

1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts of his religion in order to receive a benefit; OR 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs. *Id.*

Under the non-precedential Third Circuit view used prior to *Washington*, a substantial burden was one that "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise ... effectively impracticable." *Lighthouse Inst. for Evangelism, Inc. v. City of Long Beach*, 100 F. Appx. 70, 77 (3d Cir.2004) (quoting *Civil Liberties for Urban Believers (C.L.U.B.) v. City of Chicago*, 342 F.3d 752, 761 (7th Cir.2003), *cert. denied*, 541 U.S. 1096 (2004)), *cert. denied*, 543 U.S. 1120 (2005).

The standard adopted by the *Washington* court was in the context of the "Institutionalized Persons" provision of RLUIPA; although the court appears to adopt this standard "[f]or the purposes of RLUIPA," and thus would apply the standard even to the Land Use provision, the standard enunciated in the opinion specifically mentions *inmates*, which makes it unclear as to whether this same standard actually does apply to the rest of the RLUIPA sections. What is clear, however, is that establishing a substantial burden under either standard requires more than merely inhibiting or constraining any religious exercise. Thus, the Court does not answer the question as to the applicability of *Washington*, because under both the *Washington* standard and the *Lighthouse* standard, the result will be the same.

Defendants argue that requiring plaintiffs to find property within the Township that is not the subject property does not amount to a substantial burden. See *Lighthouse Institute for Evangelism*, 406 F.Supp.2d at 515 ("Here, the circumstance that the Ordinance and Redevelopment Ordinance require plaintiffs to find a location outside the narrowly drawn Broadway Redevelopment Zone, simply does not amount to a substantial burden."). However, in *Lighthouse*, the court found that "[t]here is evidence which demonstrates that suitable alternative venues are available ... in 90% of the rest of the City ..." While defendants assert that "there is absolutely no evidence here to demonstrate that there were not suitable venues in Wayne," it appears to the Court that there are disputed facts as to whether alternative sites are available or are affordable. One such parcel, identified by the Township, was found not to be for sale.[FN8]

> FN8. Three other properties suggested by the town planner were being developed or had development applications pending before the planning board. None of the properties suggested were on the market.

***10** It is also argued that plaintiffs cannot establish a substantial burden because it operated and continues to operate its house of worship in the Paterson facility. However, over the past 22 years, the Mosque's congregation has grown from fewer than 100 individuals to over 200 families. "Churches and synagogues cannot function without physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to as-

semble for religious purposes." *Mintz v. Roman Catholic Bishop of Springfield,* 424 F.Supp.2d 309, 312 (D.Mass.2006) (quoting 146 Cong. Rec. S. 7774-5 (July 27, 2000)). The fact that the plaintiffs continue to utilize its inadequate facility (i.e., no room for religious education; female members of the Mosque are unable to attend prayer sessions because of space limitations; female members cannot see the Imam, which is the proper method for Muslim prayer; female members cannot perform "abdest" ritual washing before prayers because of lack of facilities), does not, *per se,* render any burdens placed upon plaintiffs by defendants insubstantial. The *Washington* decision is also instructive in this case. The Third Circuit held that, despite the existence of a supposed "palatable alternative" for his religious practice of reading four new books a day (i.e. reading in the library once a week or simply using fewer books), the inmate plaintiff's right to practice his religion was still substantially burdened by the book limitation. *Washington,* No. 05-2351 at 18-19. Similarly, just because Plaintiffs in this case can practice some aspects of their religion in the Paterson facility does not mean there is no substantial burden on their religious exercise.

The fact finder could reasonably determine that the Township's actions have created a substantial burden on the Mosque. From the facts before the Court, such a holding cannot be made as a matter of law.

C.

The RLUIPA contains two subsections under subpart (b). Subsection (b)(1) is the "Equal Terms" provision, which indicates that the government shall not "impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." Subsection (b)(2), "Nondiscrimination," prohibits the government from imposing or implementing "a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination."

RLUIPA subsection (b)(1), the "Equal Terms" provision, "codifies existing Free Exercise, Establishment Clause and Equal Protection rights against states and municipalities that treat religious assemblies or institutions 'on less than equal terms' than secular institutions," and thus subsection (b) is constitutional under section 5 of the Fourteenth Amendment. *Midrash Sephardi, Inc., v. Town of Surfside,* 366 F.3d 1214, 1239 (11th Cir.2004); *Freedom Baptist Church v. Twp. Of Middletown,* 204 F.Supp.2d 857 (E.D.Pa.2002). Furthermore, under *Cleburne,* since the Equal Protection Clause of the Fourteenth Amendment "essentially [directs] that all persons similarly situated should be treated alike" and Congress is empowered by section 5 to "enforce this mandate," the "similarly situated" analysis becomes an essential part of the RLUIPA analysis. *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 440 (U.S.1985).

***11** Although the Plaintiffs complaint alleges only a violation of subsection (b)(2) ("Nondiscrimination") and does not mention (b)(1) ("Equal Treatment"), the Third Circuit, unlike some other circuits,[FN9] appears to treat the two subsections as both incorporating the "similarly situated" analysis. *See Lighthouse Institute for Evangelism, Inc. v. City of Long Branch,* 406 F.Supp.2d 507 (D.N.J.2005); *Lighthouse Institute for Evangelism v. City of Long Branch,* 100 Fed. Appx. 70, 77 (3d Cir.2004).[FN10]

FN9. *See, e.g. Midrash Sephardi, Inc. v. Town of Surfside,* 366 F .3d 1214, 1230 (11th Cir.2004) (noting that the district court below assumed that the "similarly situated" analysis applies to subsection (b), but holding that a "natural perimeter" approach was more relevant, and that the "district court erred by not considering RLUIPA's statutory categorization as the relevant 'perimeter' ").

FN10. The *Amicus curiae* brief submitted

> by the United States takes the position that Sections 2(a) and 2(b) of the RLUIPA operate independently and that a plaintiff need not show a substantial burden to prove the requirements for a violation of section 2(b). However, the *Lighthouse* court has indicated otherwise. The court noted that "[g]iven the legislative history, it seems clear that Section (a)'s 'substantial burden' test is applicable to the more precise provisions in Section (b) As such, plaintiffs' failure to demonstrate a substantial burden under Section (a) is fatal to his claims under Section (b)." Because this Court, as explained above, cannot find that Plaintiffs lack a substantial burden as a matter of law under Section (a), it will not dismiss its claims under Section (b).

Defendants argue that "[i]t is undisputed that the [plaintiffs have] identified no similarly situated applicants who were treated more favorably." However, plaintiffs point to defendants granting permission to develop land that is deemed 'environmentally sensitive' on 32 of 34 waiver applications since the enactment of the open space plan.[FN11] Plaintiffs argue that defendants "continue to allow development on other parcels of land that have steep slopes, wetlands, rocky areas, and other factors that the Township claims to want to protect under its Open Space Plan."

> FN11. Plaintiff's application does not require a waiver of the Environmental Protection Ordinance.

More telling, however, is the treatment of the St. Joseph Catholic Hospital's property. The owners of this lot of approximately 23 acres submitted an application for a zoning change to allow it to sell some property to a private developer in order to construct age-restricted housing on the property. Finding the property to be environmentally sensitive in light of the rocky terrain, steep slopes, and wetlands, the Open Space Committee recommended its acquisition and the Township Council agreed. However, the Township did not acquire all 23 acres, but rather entered into a deal with St. Joseph Catholic Hospital to convey most of the property to the Township while separating a portion for the hospital to build an office building. Additionally, the hospital was granted a zoning change for a parcel the hospital owned across the street, so that age-restricted housing could be built on that parcel.

In this case, defendants are seeking to take plaintiffs entire 11-acre parcel, despite the Township's own estimate that between eight and nine acres would remain open even if plaintiffs were permitted to build their Mosque and religious education building on the property.

In light of these facts, plaintiffs have submitted sufficient evidence identifying potentially similarly situated applicants being treated differently from plaintiff to raise a triable issue of material fact and thus to preclude summary judgment [FN12] on the nondiscrimination provision of the RLUIPA. [FN13] Given this issue of fact on the RLUIPA claim, the Court need not address whether plaintiff was actually discriminated against (i.e., analyzing the Township's intent to determine if their actions were discriminatory); such question is left for the fact-finder.

> FN12. The Court has insufficient evidence before it to determine whether plaintiffs' lack of expert testimony precludes its demonstration of similarly situated applicants.
>
> FN13. As noted by the *Lighthouse* court, there is "a question as to the proper test under section (b) once the parties have established that similarly situated entities are being treated differently." *Lighthouse,* 406 F.Supp.2d at 518 n. 5. The court continued, "[i]f section (b) was meant to codify the existing equal protection analysis, then a party need only establish a rational basis for the different treatment. However, if section (b) retains the more strict test of

section (a), then parties must demonstrate a compelling interest that is the least restrictive means." *Id.* The Court declines to decide this issue as the plaintiff has already demonstrated a triable issue of fact on the "similarly situated" analysis to survive summary judgment and thus the issue is moot for purposes of this decision.

III.

The First Amendment, which is applicable to the States pursuant to the Fourteenth Amendment, provides that "Congress shall make no law ... prohibiting the free exercise [of religion]." U.S. Const. amend. I; *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940). This First Amendment protection of the free exercise of religion provides the "right to believe and profess whatever religious doctrine one desires," and does so by prohibiting "all 'governmental regulation of religious beliefs as such.' " *Employment Div., Dep't of Human Res. of Or. v. Smith,* 494 U.S. 872, 877 (1989) (citing *Sherbet v. Verner,* 374 U.S. 398, 402 (1963)), *superseded by statute on other grounds,* 107 Stat. 1488, 42 U.S.C. § 2000bb (1993).[FN14] "[T]he 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts." *Id.* When performance of or abstention from certain acts as an exercise of religion comes into conflict with a law or other government action, the free exercise analysis is dependent upon the nature of the challenged law or government action, prompting either strict scrutiny or rational basis review. *Smith,* 494 U.S. at 879; *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531 (1993); see also *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly,* 309 F.3d 144, 165-66 (3d Cir.2002) (discussing application of Free Exercise Clause). The framework for this analysis is delineated by two Supreme Court decisions: *Smith,* 494 U.S. 872 (1989) and *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993).

FN14. *Smith* stood for the proposition that "the First Amendment's Free Exercise Clause does not inhibit enforcement of otherwise valid laws of general application that incidentally burden religious conduct." *Cutter v. Wilkinson,* 544 U.S. 709, 714 (2005). Congress responded to *Smith* by passing the Religious Freedom Restoration Act ("RFRA") of 1993, which prohibited the government from " 'substantially burdening' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest' " *Id.* at 714-15 (citing *City of Boerne v. Flores,* 521 U.S. 507, 515-16 (1997)). The Supreme Court, in *City of Boerne,* invalidated RFRA "as applied to States and their subdivisions, holding that the Act exceeded Congress' remedial powers under the Fourteenth Amendment." *Id.* at 715 (citing *City of Boerne,* 521 U.S. at 532-36). Congress then went on to pass the more narrowly focused RLUIPA.

***12** In *Smith,* members of the Native American Church, who ingested peyote for ceremonial purposes, challenged Oregon's general criminal prohibition of the use of peyote. *Smith,* 494 U.S. at 878-79 . The Supreme Court held that, as a general proposition, a law that is neutral and of general applicability need not be justified by a compelling governmental interest to avoid violating the Free Exercise Clause, even if the law has the incidental effect of burdening a particular religious practice. *Lukumi,* 508 U.S. at 531 (discussing *Smith,* 494 U.S. at 879). Later, in *Lukumi,* the Supreme Court found that "if the law is not neutral (i.e., if it discriminates against religiously motivated conduct) or is not generally applicable (i.e., it proscribes particular conduct only or primarily when religiously motivated), strict scrutiny applies and the burden on religious

conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling governmental interest." *Tenafly Eruv Ass'n,* 309 F.2d at 165 (citing *Lukumi,* 508 U.S. at 532, 546).

The *Smith* court noted two exceptions to the general rule that religiously neutral laws of general applicability do not violate the Free Exercise Clause. First, the Court recognized that a law which was neutral and general in its terms and applicability, but was nevertheless deliberately enacted to impact some religious practice, would still be subjected to strict scrutiny. *Smith,* 494 U.S. at 877-78. Second, the Court mentioned, in dictum, that the "only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action," were ones which "involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press ..." *Id.* at 881. This exception has come to be known as the "hybrid rights" exception.

In analyzing plaintiffs' claim under the Free Exercise Clause, "if the law is not neutral (i.e., if it discriminates against religiously motivated conduct) or is not generally applicable (i.e., it proscribes particular conduct only or primarily when religiously motivated), strict scrutiny applies and the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling governmental interest." *Tenafly Eruv Ass'n,* 309 F.2d at 165 (citing *Lukumi,* 508 U.S. at 532, 546). "Neutrality and general applicability are interrelated, and ... failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi,* 508 U.S. at 531.

In determining neutrality, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Lukumi,* 508 U.S. at 533. In analyzing the object of a law, the evaluating court begins with the text to examine whether the law is discriminatory on its face. As "[f]acial neutrality is not determinative," the court then looks to the "effect of a law in its real operation," although "adverse impact will not always lead to a finding of impermissible targeting." *Lukumi,* 508 U.S. at 534, 535. Evidence may be direct or circumstantial, including "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Lukumi,* 508 U.S. at 540 (internal citations omitted).

***13** As to general applicability, "[a]ll laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." Plaintiffs argue that the Township's selection of land for open space is akin to a system of "individualized governmental assessment." In fact, the mayor himself testified that "[e]very single property that we have pursued has been on an individual property-by-property basis." In the typical situation, such assessments involve a discretionary exemption from a general requirement which the government "may not refuse to extend ... to cases of 'religious hardship' without compelling reason." *Lukumi,* 508 U.S. at 537 (quoting *Bowen v. Roy,* 476 U.S. 693, 708 (1986)). "Thus, religious practice is being singled out for discriminatory treatment." *Id.* at 538 (citing *Bowen,* 476 U .S. at 722, and n. 17 (Stevens, J., concurring in part and concurring in result); *id.,* at 708 (opinion of Burger, C.J.); *United States v. Lee,* 455 U.S. 252, 264, n. 3 (1982) (Stevens, J., concurring in judgment)).

The Court notes that 101 other properties are listed on the Township' s Open Space Inventory list. The list was not created in a prioritized fashion as required by the Referendum. Only four (4) properties were ultimately pursued, admittedly on an individualized basis. Discretionary exceptions that were granted to at least one of the properties, namely the St. Joseph Catholic Hospital property, described above, were not extended to the Mosque.

Given the standard for summary judgment, viewing all evidence in the light most favorable to the non-moving party and giving that party the benefit of all reasonable inferences, this Court cannot find that defendants are entitled to judgment as a matter of law. *Creque v. Texaco Antilles Ltd.*, 409 F.3d 150, 152 (3d Cir.2005). In the Court's view, it cannot be said, as a matter of law, that the Mosque was not being singled out for discriminatory treatment.

IV.

Plaintiffs' motion for partial summary judgment asks the Court to find, as a matter of law, that the protection of open space is not a compelling governmental interest. Defendants do not argue that whether a stated interest is "compelling" is determined by any one other than the Court. In fact, there is a substantial amount of case law that establishes that such a determination is a matter of law to be decided by the Court. *U.S. v. Hardman*, 297 F.3d 1116, 1127 (10th Cir.2002) ("Whether something qualifies as a compelling interest is a question of law."); *Citizens Concerned About Our Children v. School Bd.*, 193 F.3d 1285, 1292 (11th Cir.1999); *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F .3d 1513, 1522 (10th Cir.1994); *Northern Contracting, Inc. v. State of Illinois*, No. 00 C 4515, 2004 WL 422704, at *24 (N.D.Ill. March 3, 2004) ("Whether there is evidence sufficient to support a finding that a race-conscious governmental action is supported by a compelling interest and is narrowly tailored is a question of law." citing *Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir.2000)).

***14** Plaintiffs make clear, however, that its motion does not address whether the Township actually possesses these interest. Thus, plaintiffs seek to have the Court hold that if, in fact, it should become known that the Township's interest are solely predicated on the protection of open space, such is not a compelling interest sufficient to survive strict scrutiny.

The Court need not rule in the abstract or make determinations based on plaintiffs' hypotheticals. Should this matter proceed to trial, defendants will be provided a full opportunity to present their interests, and at the appropriate time, if necessary, this Court will determine whether a compelling interest has been demonstrated.

The motions are denied in their entirety. A pre-trial conference is to be scheduled.

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