CAUSE NO. DC-15-02336

CITY OF DALLAS	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
v.	§	DALLAS COUNTY, TEXAS
	§	
MARK B. GOTHELF, JUDITH D. GOTHELF, and CONGREGATION TORAS CHAIM, INC. DBA CONGREGATION TORAS CHAIM,	§	116th JUDICIAL DISTRICT COURT
	§	
Defendants.	§	

DEFENDANTS' MOTION TO TRANSFER VENUE, AND SUBJECT THERETO, THEIR ORIGINAL ANSWER AND COUNTERCLAIM

Defendants Mark B. Gothelf, Judith D. Gothelf, and Congregation Toras Chaim, Inc. dba Congregation Toras Chaim (collectively, the "Defendants") file this Motion to Transfer Venue, and subject thereto, their Original Answer and Counterclaim, and respectfully show the Court as follows:

MOTION TO TRANSFER VENUE

I. Introduction and Summary of Argument

Congregation Toras Chaim ("CTC") is a small Orthodox Jewish congregation that meets at the residence of one of the congregants in Collin County, where about twenty-five neighborhood congregants walk to gather for worship on Saturdays, and a smaller number of congregants gather throughout the week. Last year, a Homeowner's Association and certain neighbors sued CTC in an attempt to enforce deed restrictions that would have effectively forced CTC to close its doors to its congregants. In the case of *In re David R. Schneider*, Cause No. 429-04998-2013 (429th Judicial District Court of Collin County, Texas), Judge Jill Willis granted CTC's summary judgment, correctly recognizing that enforcing the deed restrictions against CTC violates the

Religious Land Use and Institutionalized Persons Act ("RLUIPA") and the Texas Religious Freedom Restoration Act ("TFRA"), which are statutory extensions of the constitutional right of the free exercise of religion.

The City of Dallas is now seeking to enforce a city ordinance in Dallas County district court, despite the fact that (1) constitutional and statutory rights were allegedly violated in Collin County; (2) Collin County courts already adjudicated substantially overlapping factual issues and similar legal issues; and (3) the overwhelming majority of relevant witnesses and the home at issue are in Collin County. For the convenience of the parties and in the interest of justice, Defendants now seek a transfer of the case to Collin County, where a mere two months ago a court adjudicated a dispute based on essentially the same underlying facts, with similar federal, state, and constitutional rights of Collin County citizens at stake. Thus, pursuant to Texas Civil Practice & Remedies Code § 15.002(b), this case should be transferred to Collin County for the convenience of the parties and in the interest of justice.

II. Factual Background

On March 3, 2015, Plaintiff City of Dallas ("Plaintiff") filed its Original Petition, contending that Defendants violated the Dallas City Code by failing to meet requirements set by the City and failing to obtain a Certificate of Occupancy for their use of a property as a meeting location for the CTC. Plaintiff argues that because Defendants do not have thirteen parking spaces, an automatic fire sprinkler system, a separated second floor with a firewall, two first-floor exits, wheelchair-accessible walkways, and wheelchair-accessible restrooms, they can no longer use the property as a place of worship.

Previously, in December 2013, several neighbors and the Homeowners Association for the neighborhood of the meeting location brought a separate lawsuit ("Deed Restriction Lawsuit")[1] against Defendants, alleging that their use of the property was barred by private deed restrictions. (Original Petition and Request for Permanent Injunction, Cause No. 429-04998-2013, attached hereto as Ex. A). The neighbors brought the Deed Restriction Lawsuit in the 429th Judicial District Court of Collin County, Texas. In their Motion for Summary Judgment filed in January 2015, Defendants fully briefed the court in Collin County on the relevant factual and legal issues, explaining how any interpretation of the restrictive covenants favoring the neighbors would prevent their religious activities and would violate TRFRA and RLUIPA. (Defendants' Motion for Summary Judgment, Cause No. 429-04998-2013, attached hereto as Ex. B). Subsequently, the court granted Defendants' Motion for Summary Judgment and dismissed all of the claims brought by the neighbors and the Homeowners Association.

III. Arguments and Authority

This suit should be transferred to Collin County for the convenience of the parties and witnesses and in the interest of justice. Texas Civil Practice and Remedies Code § 15.002(b) allows a court to transfer an action from a county of proper venue to any other county of proper venue "for the convenience of the parties and witnesses and in the interest of justice." Section 15.002(b) is applicable where:

(1) Maintenance of the action in the county of suit would work an injustice to the movant considering the movant's economic and personal hardship;

(2) The balance of interests of all the parties predominates in favor of the action being brought in the other county; and

[1] This lawsuit can be identified as *In re David R. Schneider* (Cause No. 429-04998-2013) and was brought in the 429th Judicial District Court of Collin County, Texas.

(3) The transfer of the action would not work an injustice to any other party.

As a preliminary issue, venue is proper in Collin County under Section 15.002 of the Texas Civil Practice and Remedies Code as (1) "the county in which all or a substantial part of the events or omissions giving rise to the claim occurred"; and (2) "the county of the defendant's principal office in this state, if the defendant is not a natural person." (Declaration of Rabbi Jordan Yaakov Rich, attached hereto as Ex. C, ¶ 2, 9). Further, Plaintiff contends that venue is proper in Dallas County pursuant to Section 54.013 of the Texas Local Government Code. Section 54.013 states that "[j]urisdiction and venue of an action under this subchapter are in the district court or the county court of law of the county in which the municipality bringing the action is located." Since the City of Dallas is partially located in Collin County, venue is proper in Collin County as well. Furthermore, transfer to Collin County is justified because all three prongs of Section 15.002(b) are met.

a. The maintenance of this suit in Dallas County would work an injustice on CTC and its witnesses.

Under the first prong of Section 15.002(b), maintenance of this suit in Dallas County would work an injustice on CTC and its witnesses. CTC meets in Collin County, and the neighborhood witnesses that are allegedly impacted by CTC also live in Collin County. (Ex. C, Rich Aff. ¶ 2, 7). CTC meets at the home of one of its Collin County residents, at 7103 Mumford Court, Dallas, Collin County, Texas. (*Id.* ¶ 2). Most meetings have about ten to fifteen participants. (*Id.* ¶ 3). Sabbath services (on Saturdays) have about twenty-five attendees. (*Id*.). Because of the members' sincerely-held religious beliefs, all members *must* walk to the service on Saturdays. (*Id.* ¶ 4).

Therefore, all members live in close proximity to the property at issue in Collin County (in addition to all of the allegedly concerned neighbors).[2] (*Id.* ¶ 7).

It would be unjust to require Defendants to have this suit maintained in Dallas County for three reasons. First, and most importantly, it is unjust for Defendants to have their fundamental and constitutional rights adjudicated outside the county where those rights were allegedly violated.[3] There is a strong interest in transferring a case to the jurisdiction where a constitutional right was allegedly violated. CTC and its members' constitutional rights (including those extended by the federal and state legislatures, respectively, via RLUIPA and TRFRA) are the basis both of Defendants' defenses to Plaintiff's claims and of their own counterclaims. In particular, the right of the CTC members to worship as they choose within their neighborhood according to the dictates of their consciences is constitutionally protected and fundamental to their way of life.

Second, it is unjust for defendants to bear additional expenses and potential delays and inefficiencies arising from having similar underlying facts adjudicated by a court unfamiliar with the overlapping facts and issues similar to those recently decided by a more convenient court. There is a significant interest in having a court with knowledge of the underlying facts decide a

[2] The distance between the George L. Allen Sr. Courts Building in Dallas County and the Collin County Courthouse is approximately 35 miles and an approximately 41-minute drive.

[3] Because of the dearth of written opinions applying the Texas transfer provision, cases interpreting the similar federal statute are persuasive. *American Nat. Ins. Co. v. Int'l Bus. Machines Corp.*, 933 S.W.2d 685, 696 (Tex.App.–San Antonio 1996, pet. denied) (recognizing that "the Texas counterpart to section 1404(a) is section 15.002(b) of the new venue statute"). Numerous federal courts have recognized the strong interest in transferring a case to the jurisdiction where a constitutional right was allegedly violated. *See, e.g.*, *Basargin v. Corrections Corp. of America Inc.*, No. A05–191 CV, 2005 WL 2705002, at *2 (D. Alaska Oct. 17, 2005) ("Inasmuch as the alleged constitutional injuries occurred in Arizona, plaintiff and defendant Goss are located in Arizona, and most of the witnesses are located in Arizona, the court finds that the convenience of the parties and witnesses and the interests of justice would be advanced by transferring this matter to the District of Arizona."); *Bansal v. I.N.S.*, No. Civ.A. 03–1387, 2003 WL 21305332, at *1 (E.D. La. June 5, 2003) (reasoning that it is in the interest of justice to transfer the case to the Eastern District of Texas because "the great majority of plaintiff's allegations relate to alleged violations of his [constitutional and other] rights in the Eastern District of Texas"); *Jones v. Dep't of Correction*, CIV. A. No. 88–3670, 1988 WL 93613, *1 (E.D. La. Sept. 8, 1988) (holding that "it is in the interest of justice that this matter be transferred to the Middle District of Louisiana for further handling in that the alleged constitutional violations are occurring there rather than in the district where plaintiff has filed this litigation").

related case.[4] As discussed above, the neighbors involved in this current litigation previously brought the Deed Restriction Lawsuit against Defendants, which was decided only two months ago in February 2015. Having a court who understands the underlying facts and issues would streamline the litigation for the parties and conserve taxpayers' money (in the case of the City) and judicial resources. The Deed Restriction Lawsuit involves substantially the same facts as the current litigation. For example, based on the parties' briefing, Judge Jill Willis examined the formation of the Congregation Toras Chaim, the Congregation's activities, and the reasons why 7103 Mumford Court was Defendants' only viable option for a place of worship. (Defendant's Motion for Summary Judgment (Ex. B) at 4-8). Further, the court reviewed in detail the ways in which TRFRA and RLUIPA apply to this type of litigation. (*Id*. at 17-30). These religious freedom statutes and the corresponding case law are by no means simple areas of the law, and the application of these laws to the underlying facts that the Collin County court already understands will once again determine the outcome of the lawsuit. Therefore, it is in the parties' and the judicial system's best interest to transfer this suit to a court who has already had significant exposure to these facts and to the applicable law.

Third, it is unjust for defendants to bear the additional expense and inconvenience of traveling outside their county for required proceedings, including hearings and trial. *See supra* note

[4] Courts often recognize the gains in efficiency from transferring to a district that has adjudicated similar disputes. *See, e.g.*, *Mandani v. Shell Oil Co.*, No. C07–4296 MJJ, 2008 WL 268986, at *2 (N.D. Cal. Jan 30, 2008) (where the district court transferred an action to the judicial district that had previously adjudicated a related case, even though the related case had concluded); *Durham Prods., Inc. v. Sterling Film Portfolio, Ltd.*, Series A, 537 F.Supp. 1241, 1243 (S.D.N.Y.1982) ("Litigation of related claims in the same tribunal is strongly favored because it facilitates efficient, economical and expeditious pretrial proceedings and discovery and avoids duplic[ative] litigation and inconsistent results.") (internal quotations omitted); *Hoefer v. U.S. Dep't. of Commerce*, C 00-0918-VRW, 2000 WL 890862, at *3 (N.D. Cal. June 28, 2000) (where there had been a similar lawsuit in a different forum and the court transferred the case to avoid "a significant waste of time and energy" and a "duplicative effort" by the court).

2. Thus, Defendants have shown that maintaining suit in Dallas County would result in severe injustice to Defendants.

b. The balance of interests of all the parties predominates in favor of this lawsuit being transferred to Collin County.

Under the second prong of Section 15.002(b), the balance of interests of all the parties predominates in favor of this lawsuit being transferred to Collin County. First, as mentioned above, Defendants have compelling interests in having their constitutional and other fundamental rights adjudicated in Collin County. *See supra* note 3. Second, as previously mentioned, the parties and the judicial system have a strong interest in transferring the case to a forum where substantially overlapping facts and similar legal issues were already adjudicated. *See supra* note 4. Third, nonparty witnesses have an interest in having this case adjudicated in the more convenient Collin County, where the overwhelming majority of relevant witnesses reside.

Additionally, Collin County itself has a strong interest in in having a dispute touching upon Collin County property (and the constitutional and other rights of its citizens residing there) decided in its own courts. Although venue is only *mandatory* for specified types of suits involving real property,[5] the legislature and courts recognize that disputes affecting land interests *should* generally be decided in the county in which the real property is located.[6]

[5] Section 15.011 of the Texas Civil Practice & Remedies Code states that "[a]ctions for recovery of real property or an estate or interest in real property, for partition of real property, to remove encumbrances from the title to real property, for recovery of damages to real property, or to quiet title to real property shall be brought in the county in which all or a part of the property is located."

[6] *See, e.g.*, In re *City Nat'l Bank*, 257 S.W.3d 452, 455 (Tex. App. – Tyler 2008, pet. denied) ("Once it is demonstrated that the court's judgment would have some effect on an interest in land, then the venue of the suit is properly fixed under the mandatory venue statute."); *see also* In re *City of Corpus Christi*, No. 13-12-00610-cv, 2012 WL 3755604, at *1 (Tex. App. – Corpus Christi 2012) (identifying Section 15.011 of the Texas Civil Practices and Remedies Code as "requiring suits concerning real property to be brought in the county in which the real property is located").

In contrast to the compelling connections to Collin County, this lawsuit has no discernible connection to Dallas County. The only reason the Plaintiff City of Dallas has the ability to bring this lawsuit in Dallas County is the happenstance that the City of Dallas spans multiple counties other than Collin County, including Dallas, Kaufman, Rockwall, and Denton Counties, which would also have been permissible but inconvenient venues. Thus, the compelling interests of Defendants, the justice system, neutral third parties, and Collin County in transferring this case to Collin County clearly predominate over the City of Dallas's negligible interest in maintaining the suit in Dallas County, which has no significant connection to the case.

c. The transfer of this lawsuit to Collin County would not work an injustice to any other party.

A transfer would not create any injustice to either party. In fact, a transfer to Collin County would be more convenient for Defendants and the great majority of potential third party witnesses. Additionally, a transfer to Collin County, parts of which are located within the City of Dallas, would not pose considerable inconvenience on the City of Dallas and its agents. Given the City of Dallas's resources compared to the resources of Defendants and the relevant witnesses, it is more than reasonable for the City of Dallas to litigate this case in Collin County, a county in which the city is partially contained, and in which Dallas seeks to enforce an ordinance against Collin County citizens involving Collin County property and Collin County witnesses.

In sum, all three prongs of 15.002(b) are met, and the balance of interests of all the parties strongly favors transfer to Collin County. Transfer to Collin County poses no injustice to any party, and Collin County is a proper venue for transfer. Thus, the Motion to Transfer Venue should be granted.

ORIGINAL ANSWER

Subject to Defendants' Motion to Transfer Venue and pursuant to Rule 92 of the Texas Rules of Civil Procedure, Defendants deny generally each and every allegation contained in Plaintiff's Original Petition and demand strict proof thereof by a preponderance of the evidence thereto.

AFFIRMATIVE DEFENSES

1. To the extent that the Dallas City Ordinance as applied to CTC prevents CTC's prayer and study gatherings, the ordinance is invalid as applied to CTC under the Texas Religious Freedom Restoration Act, Tex. Civ. Prac. & Rem. Code §§ 110.001, *et seq*. The ordinance as applied to CTC imposes a substantial burden on the religious practice of CTC's members; it does not further a compelling government interest; nor is it the least restrictive means of furthering any such interest that may exist.

2. To the extent the ordinance as applied to CTC prevents CTC's prayer and study gatherings, the ordinance is invalid as applied to CTC under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc, *et seq*. The ordinance as applied to CTC imposes a substantial burden on the religious practice of CTC's members; it does not further a compelling government interest; nor is it the least restrictive means of furthering any such interest that may exist. The ordinance as applied to CTC also violates RLUIPA because it would treat CTC's religious activities on unequal terms with other non-residential uses that are or have taken place throughout Dallas and Collin County. The ordinance as applied to CTC also violates RLUIPA because it would discriminate against CTC on the basis of religion or religious denomination as there are other religious groups across the City of Dallas that meet in similar numbers and frequency that CTC meets, yet the City of Dallas does not enforce the ordinance at

issue in the same way against these groups. Finally, the ordinance as applied to CTC also violates RLUIPA because it imposes and implements a land use regulation that unreasonably limits religious assemblies within a jurisdiction.

3. To the extent that the ordinance at issue forces CTC to comply with a number of requirements that are either impossible for CTC to achieve or incredibly expensive to implement, the ordinance is invalid under the First Amendment of the United States Constitution and officials of the City of Dallas are liable under 42 U.S.C. § 1983. The ordinance as applied to CTC has deprived CTC's rights under the First Amendment and have substantially burdened the religious practices of CTC's members. The ordinance is also invalid under Section 106 of the Texas Civil Practices & Remedies Code as City of Dallas officials have imposed an unreasonable burden on CTC's members because of their religion.

4. To the extent that the ordinance at issue discriminates against CTC's members because of their religious character and inhibits their right to freely exercise their religious faith, the ordinance is invalid under Article I, Section 6 of the Texas Constitution.

5. To the extent that the ordinance at issue inhibits CTC's right to freely express their religious faith to its congregants and the community, the ordinance is invalid under Article I, Section 8 of the Texas Constitution.

6. To the extent that the ordinance discriminates against CTC in the application of the City of Dallas's code on the basis of religious status and on the basis of CTC's exercise of a fundamental right, the ordinance is invalid under Article I, Section 3 and 3a of the Texas Constitution.

7. To the extent that the City of Dallas's effective denial of CTC's certificate of occupancy was arbitrary, capricious, unreasonable, and unduly burdensome on CTC, the ordinance is invalid as its application to CTC was a clear abuse of the City of Dallas's municipal discretion.

COUNTERCLAIM

COMES NOW Mark B. Gothelf, Judith D. Gothelf, and Congregation Toras Chaim ("Defendants" or "Counterplaintiffs") and, subject to their Motion to Transfer Venue, file this their Counterclaims against Plaintiff/Counterdefendant City of Dallas, and would respectfully show the Court and Jury as follows:

1. Pursuant to Texas Rule of Civil Procedure 47(c), Counterplaintiffs state that this counterclaim seeks declaratory and permanent injunctive relief. Counterplaintiffs ask that the court order Counterdefendant to cease and desist from imposing burdensome and/or costly requirements on Counterplaintiffs to obtain a Certificate of Occupancy, including those specifically discussed herein or any similarly burdensome or costly requirements. Counterplaintiffs seek monetary relief of $100,000 or less and nonmonetary relief, including costs and attorney's fees.

I.

Introduction

2. This lawsuit is necessitated by Counterdefendant City of Dallas's ("Counterdefendant") unlawful attempt to prevent Defendants from engaging in religious activity. Defendants currently use the property located at 7103 Mumford Court in Dallas, Collin County, Texas, as a meeting place and a place of worship. Additionally, a young man named Avrohom Moshe Rich lives at the property full time. The City of Dallas has violated the Texas Religious Freedom Restoration Act ("TRFRA"), the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), the Free Exercise Clause through its violation of Section 1983, Chapter 106 of the

Texas Civil Practice and Remedies Code, and the Texas Constitution by effectively preventing Defendants from using the 7103 Mumford as a place of worship.

3. The City of Dallas contends that Defendants have not properly obtained a Certificate of Occupancy ("CO") for the religious use of the property. The City of Dallas has rejected Defendants' request to obtain a CO because Defendants do not have thirteen parking spaces, an automatic fire sprinkler system, a separated second floor with a firewall, two first-floor exits, wheelchair-accessible walkways, and wheelchair-accessible restrooms. Installing thirteen parking spaces outside of the home would be physically impossible given the limited space and requiring Defendants to unnecessarily purchase these additional features would cost Defendants approximately $200,000, thereby effectively preventing Defendants from using the property as a religious space.

II.

Parties, Jurisdiction, and Venue

4. Counterplaintiff Mark B. Gothelf and Counterplaintiff Judith D. Gothelf are individual Texas residents who jointly own the property at issue.

5. Counterplaintiff Congregation Toras Chaim, Inc. d/b/a Congregation Toras Chaim is a Texas corporation that occupies the property at issue.

6. Counterdefendant City of Dallas is a municipal corporation incorporated and operating under the laws of the State of Texas. The City of Dallas has already appeared in this action.

7. The Court has jurisdiction over this matter because the amount in controversy is within the jurisdictional limits of this Court.

8. Venue is proper as this matter is a counterclaim related to the underlying action; however, as briefed above, Counterplaintiffs contend that, pursuant to Texas Civil Practice and Remedies Code § 15.002(b), this suit should be transferred to Collin County for the convenience of the parties and witnesses and in the interest of justice.

III.

Background Facts

9. Congregation Toras Chaim ("CTC") is a small community of Orthodox Jews that has been in existence since 2007.

10. There is only one other congregation of Orthodox Jews in the entire Dallas-Fort Worth area that shares the Congregation's particular outlook on spiritual life.

11. CTC meets at 7103 Mumford Court in Dallas, Collin County, Texas.

12. Most meetings of CTC have between ten and fifteen attendees. Sabbath services may have approximately twenty-five attendees.

13. Because of the members' sincerely-held religious beliefs that they must (1) walk on the Sabbath and (2) cannot carry anything on the Sabbath, including their children, outside of a designated area known as an eruv, only locations within walking distance and inside the North Dallas Eruv are suitable sites for CTC to meet.

14. Before 2013, CTC met at the home of Rabbi Jordan Yaakov Rich about two blocks away from the present meeting place.

15. In 2013, Mark Gothelf bought the house at 7103 Mumford Court ("the Mumford home"). The Gothelfs considered living in this home but then decided against it because of their concerns about anti-Semitism in the neighborhood.

16. Now, Rabbi Rich's son, Avrohom Moshe Rich, lives at the Mumford home full-time. CTC uses the Mumford home part of the time.

17. In 2013, the City of Dallas notified CTC that it should seek a Certificate of Occupancy ("CO") to use the Mumford home as a place of worship.

18. The City of Dallas requires anyone using or occupying a building or land for a non-residential purpose to apply and obtain a CO. *See* Dallas City Code § 51A-1.104.

19. Before an applicant can obtain a CO, the City of Dallas requires the applicant to demonstrate that it can comply with all of the alleged applicable laws for the type of use proposed, including inapplicable parking laws, fire and building safety laws, and handicap accessibility laws.

20. In October 2013, CTC retained Liberty Institute to investigate the city's position and represent CTC in the dispute with the City of Dallas. CTC has since also retained the undersigned attorneys from the law firm Fish & Richardson, P.C.

21. On November 19, 2013, Liberty Institute met with Amy Allen, assistant city attorney, representatives from CTC, and representatives from the City of Dallas's code enforcement division. Liberty Institute informed the City of Dallas that the part-time use of the Mumford Home as a worship space is functionally the same as a private home owner having a Bible study at his home. Liberty Institute explained that this type of action is protected by the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.* and the Texas Religious Freedom Restoration Act ("TRFRA"), Tex. Civ. Prac. & Rem. Code § 1119.991 *et seq*. The City of Dallas instructed CTC to seek a CO and indicated its willingness to work with CTC to avoid RLUIPA/TRFRA litigation.

22. On January 14, 2014, CTC applied for a CO. Eulises Chacon, Permit Center Manager, refused to accept the application, noting that "this is a house, not a church" and stating

that because CTC would engage in "religious education," CTC would also need a CO for use as an "educational facility," which would be denied because educational facilities are not permitted in residentially zoned regions.

23. Attorney Amy Allen subsequently corrected some of Eulises Chacon's misconceptions and instructed CTC to file again with a proposed parking agreement. Although Liberty Institute and CTC did not believe that the city's parking requirements were necessary due to CTC's Orthodox Jewish religious beliefs and the nature of RLUIPA, CTC agreed to acquire a shared parking agreement. Eventually, CTC was able to enter into a shared parking agreement with the First Chinese Baptist Church of Dallas.

24. On March 6, 2014, CTC filed yet another application for the CO requested by the City of Dallas. The City of Dallas again rejected CTC's application, stating that it would be futile because the application did not include a firewall between the portions of the Mumford Home in which Avrohom Rich primarily lived and the portions used by CTC (despite Avrohom's use of the entirety of the premises).

25. On May 12, 2014, following another round of discussion with the City of Dallas, CTC filed another application for a CO. This application was accepted.

26. On June 18, 2014, Liberty Institute, CTC, Amy Allen, and representatives from the City of Dallas's code enforcement division, including Eulises Chacon, met to discuss the application of the CO. At that meeting, the City of Dallas notified CTC that the shared parking agreement would not be acceptable because the First Chinese Baptist Church of Dallas was located in a residentially-zoned district, and was therefore incapable of serving as the off-site parking location. The City of Dallas also told CTC that it needed to follow all ADA-mandated requirements such as wheelchair-accessible restrooms, a disabled parking space, widened internal walkways,

and additional requirements such as the firewall that was previously discussed, a sprinkler system, and two exits on the first floor. Liberty Institute explained that the ADA does not apply to religious uses and that RLUIPA would exempt CTC from these requirements because of the substantial burden of making the requested modifications. *See* 42 U.S.C. § 12187 ("The provisions of this subchapter shall not apply to . . . religious organizations or entities controlled by religious organizations, including places of worship.").

27. On October 6, 2014, the City of Dallas sent Mark Gothelf a letter stating that the application for the Certificate of Occupancy was incomplete. First, the City stated that thirteen off-street parking spaces and one additional off-street parking space are required. Second, the City also stated that an approved automatic fire sprinkler system is required. Alternatively, the City stated that CTC could provide for a separated second floor with a fire barrier or could reduce occupancy in the sanctuary to 49 or less by reducing the size of the assembly area or installing fixed pews. Third, the City required two exits from the first floor, an accessible route, two accessible restrooms, and egress illumination and exit signage.

28. Despite a strong conviction that the requirements being demanded by the City of Dallas were not in accordance with the law, in an effort to avoid litigation, CTC agreed to hire an architect to price the modifications requested by the City of Dallas. CTC hired Steve Norman to perform the analysis. Mr. Norman's analysis in November 2014 demonstrated that the cost of implementing the City of Dallas's demands would be approximately $200,000. Furthermore, adding thirteen parking spaces in the front of the home would be physically impossible, as there is quite literally not enough space to do so.

29. On December 3, 2014, Liberty Institute wrote a letter to the City of Dallas with a proposal to avoid litigation. Liberty Institute said that CTC would: (1) install fixed seating and/or

reduce the size of the room in which CTC mainly meets to that the maximum occupancy will be below the 50-person threshold; (2) file another application for a CO that has a maximum occupancy of less than 50 persons; and (3) install illuminated exit signage. In exchange for those actions, CTC asked that the City of Dallas drop is demands for thirteen parking spaces, an automatic sprinkler system, a separated second floor with a firewall, two exits, wheelchair-accessible walkways, and wheelchair-accessible restrooms.

30. On January 9, 2015, the City of Dallas responded to Liberty Institute's letter and stated that it intends to enforce relevant parking, fire safety, and accessibility laws for the type of CO submitted. The City therefore declined CTC's suggested proposal and demanded that CTC take steps to comply with the requirements and obtain a CO.

31. On January 23, 2015, Liberty Institute responded and stated that it was willing to file a new application for a Certificate of Occupancy with a reduced maximum occupancy.

32. On January 29, 2015, the City of Dallas responded and told Liberty Institute that the CO application allegedly expired on October 31, 2014. The City said that it had previously raised "several life and safety issues, including that CTC did not have the appropriate fire sprinkler system, fire barriers, fire exits, and egress illumination and signage for its usage." The City then imposed multiple deadlines for CTC to meet, including (1) applying for a CO by February 13, 2015; and (2) complying with the life safety requirements it previously imposed on CTC by February 27, 2015.

33. CTC could not meet these requirements by these deadlines, particularly because the City of Dallas persisted in requiring the costly modifications to the property as a condition of the CO.

34. On March 3, 2015, the City of Dallas filed its Original Petition in Dallas County, seeking temporary and permanent injunctive relief ordering Defendants to immediately demonstrate that the property at issue meets all requirements necessary to obtain a Certificate of Occupancy for any non-residential use conducted at the Mumford House, namely, the costly and onerous requirements discussed herein that would effectively require CTC to cease religious activities at the Mumford House.

IV.

Causes of Action

A. Violation of the Texas Religious Freedom Restoration Act, Civ. Prac. & Rem. Code § 110.001 *et seq.* ("TRFRA")

35. Counterplaintiffs reallege the previous paragraphs as if stated in full herein.

36. TRFRA provides that "a government agency may not substantially burden a person's free exercise of religion [unless it] demonstrates that the application of the burden to the person . . . is in furtherance of a compelling governmental interest [and] is the least restrictive means of furthering that interest." Tex. Civ. Prac. & Rem. Code § 110.003.

37. TRFRA "requires the government to tread carefully and lightly when its actions substantially burden religious exercise." *Barr v. Sinton*, 295 S.W.3d 287, 289 (Tex. 2009).

38. By requiring CTC to implement a number of unnecessary changes to its place of worship which either are (1) impossible for CTC to achieve or (2) exorbitantly expensive for CTC to accomplish, Dallas City Code § 51A-1.104 and the City of Dallas's imposed requirements have substantially burdened CTC's free exercise of religion.

39. The City of Dallas's ordinance as applied to CTC does not further a compelling governmental interest. As *Holt v. Hobbs* makes clear, the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability,

unless the government demonstrates that application of the burden to the person – (1) is in furtherance of a compelling government interest; and (2) is the least restrict means of furthering that compelling governmental interest." 135 S. Ct. 853, 860 (2015).

40. Even if the City of Dallas's ordinance as applied to CTC furthered a compelling government interest, which it does not, the ordinance as applied to CTC is not the least restrictive means of furthering that alleged interest.

41. As stated in *Barr v. City of Sinton*, "[a]lthough the government's interest in the public welfare in general, and in preserving a common character of land areas and use in particular, is certainly legitimate when properly motivated and appropriately directed, the assertion that zoning ordinances are *per se* superior to fundamental, constitutional rights, such as the free exercise of religion, must fairly be regarded as indefensible." 295 S.W.3d 287, 305 (Tex. 2009).

B. Violation of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA") – Substantial Burden

42. Counterplaintiffs reallege the previous paragraphs as if stated in full herein.

43. RLUIPA provides that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution – (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling state interest." 42 U.S.C. § 2000cc(a)(1).

44. By requiring CTC to implement a number of unnecessary changes to its place of worship which either (1) are impossible for CTC to achieve or (2) are exorbitantly expensive for CTC to accomplish, Dallas City Code § 51A-1.104 and the City of Dallas's imposed requirements have substantially burdened CTC's free exercise of religion.

45. The City of Dallas's ordinance as applied to CTC does not further a compelling governmental interest. As *Holt v. Hobbs* makes clear, the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, unless the government demonstrates that application of the burden to the person – (1) is in furtherance of a compelling government interest; and (2) is the least restrict means of furthering that compelling governmental interest." 135 S. Ct. 853, 860 (2015).

46. Even if the City of Dallas's ordinance as applied to CTC furthered a compelling government interest, which it does not, the ordinance as applied to CTC is not the least restrictive means of furthering that alleged interest.

47. As stated in *Barr v. City of Sinton*, "[a]lthough the government's interest in the public welfare in general, and in preserving a common character of land areas and use in particular, is certainly legitimate when properly motivated and appropriately directed, the assertion that zoning ordinances are per se superior to fundamental, constitutional rights, such as the free exercise of religion, must fairly be regarded as indefensible." 295 S.W.3d 287, 305 (Tex. 2009).

48. Pursuant to 42 U.S.C. § 1988, when pursuing a claim under RLUIPA, the prevailing party may be awarded attorney's fees as part of the costs.

C. Violation of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA") – Equal Terms

49. Counterplaintiffs reallege the previous paragraphs as if stated in full herein.

50. RLUIPA provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1).

51. Upon information and belief, Counterplaintiffs contend that there are nonreligious groups across the City of Dallas that meet in similar numbers and frequency that CTC meets;

however, the City of Dallas uses its discretion and does not enforce the ordinance at issue in the same way against these other groups as it does against CTC, as seen through the imposed requirements discussed above.

52. Pursuant to 42 U.S.C. § 1988, when pursuing a claim under RLUIPA, the prevailing party may be awarded attorney's fees as part of the costs.

D. Violation of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA") – Nondiscrimination

53. Counterplaintiffs reallege the previous paragraphs as if stated in full herein.

54. RLUIPA provides that "[n]o government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." 42 U.S.C. § 2000cc(b)(2).

55. Upon information and belief, Counterplaintiffs contend that there are other religious groups across the City of Dallas that meet in similar numbers and frequency that CTC meets; however, the City of Dallas uses its discretion and does not enforce the ordinance at issue in the same way against these other groups as it does against CTC, as seen through the imposed requirements discussed above.

56. Pursuant to 42 U.S.C. § 1988, when pursuing a claim under RLUIPA, the prevailing party may be awarded attorney's fees as part of the costs.

E. Violation of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA") – Unreasonable Limitations and Exclusions

57. Counterplaintiffs reallege the previous paragraphs as if stated in full herein.

58. Counterdefendants deprived and continue to deprive Counterplaintiffs of their rights to the free exercise of religion—as secured by the Religious Land Use and Institutionalized

Persons Act—by imposing and implementing a land use regulation that unreasonably limits religious assemblies within a jurisdiction.

59. Pursuant to 42 U.S.C. § 1988, when pursuing a claim under RLUIPA, the prevailing party may be awarded attorney's fees as part of the costs.

F. Violation of the Free Exercise Rights and 42 U.S.C. § 1983

60. Counterplaintiffs reallege the previous paragraphs as if stated in full herein.

61. As set forth in the First Amendment of the United States Constitution, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

62. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ." 42 U.S.C. § 1983.

63. By enforcing its ordinance by forcing CTC to comply with a number of requirements that are either impossible for CTC to achieve or incredibly expensive to implement, City of Dallas officials, specifically, those in the City Attorney's Office and the Building Inspection Division, have deprived CTC's rights under the First Amendment and have substantially burdened the religious practices of CTC's members.

64. The City of Dallas's ordinance as applied to CTC does not further a compelling governmental interest. As *Holt v. Hobbs* makes clear, the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, unless the government demonstrates that application of the burden to the person - (1) is in

furtherance of a compelling government interest; and (2) is the least restrict means of furthering that compelling governmental interest." 135 S. Ct. 853, 860 (2015).

65. Even if the City of Dallas's ordinance as applied to CTC furthered a compelling government interest, which it does not, the ordinance as applied to CTC is not the least restrictive means of furthering that alleged interest.

66. According to *Employment Division, Department of Human Resources v. Smith*, the Free Exercise Clause exempts religious conduct from burdens imposed by neutral laws of general applicability if the claims are brought in contexts that entail individualized governmental assessment of the reasons for the relevant conduct. 494 U.S. 872, 884 (1990).

67. Upon information and belief, Counterplaintiffs contend that there are religious and nonreligious groups across the City of Dallas that meet in similar numbers and frequency that CTC meets; however, the City of Dallas uses its discretion and does not enforce the ordinance at issue in the same way against these other groups as it does against CTC, as seen through the imposed requirements discussed above.

G. Violation of Chapter 106 of the Texas Civil Practice & Remedies Code Because of Race, Religion, Color, Sex, or National Origin

68. Counterplaintiffs reallege the previous paragraphs as if set forth fully herein.

69. Section 106.001 *et seq.* of the Texas Civil Practice & Remedies Code provides that a City official "may not, because of a person's race, religion, color, sex or national origin . . . refuse to grant a benefit to the person" or "impose an unreasonable burden on the person." As discussed above, Defendants violated these provisions.

H. Violation of the Constitution of Texas: Religious Freedom: Article 1, Section 6

70. Counterplaintiffs reallege the previous paragraphs as if set forth fully herein.

71. Defendants have deprived and continue to deprive Plaintiffs of their right to free exercise of religion—as secured by Article I, Section 6 of the Constitution of Texas—by discriminating against Plaintiff because of its religious character and by inhibiting its right to freely exercise its religious faith.

I. Violation of the Constitution of Texas: Freedom of Speech: Article 1, Section 8

72. Counterplaintiffs reallege the previous paragraphs as if set forth fully herein.

73. Defendants have deprived and continue to deprive Plaintiffs of their right to speak on matters of religion—as secured by Article 1, Section 8 of the Constitution of Texas—by inhibiting its right to freely express its religious faith to their congregants and the community.

J. Violation of the Constitution of Texas: Equal Protection: Article 1, Section 3 and 3a

74. Counterplaintiffs reallege the previous paragraphs as if set forth fully herein.

75. Defendants have deprived and continue to deprive Plaintiffs of their right to equal protection of the laws—as secured by Article 1, Section 3 and 3a of the Constitution of Texas—by discriminating against Plaintiff in the application of its Code on the basis of religious status and on the basis of Plaintiff's exercise of a fundamental right.

K. Abuse of Municipal Discretion

76. Counterplaintiffs reallege the previous paragraphs as if set forth fully herein.

77. The City's effective denial of a certificate of occupancy was arbitrary, capricious, unreasonable, and a clear abuse of the City's power. There is no viable, legitimate governmental interest or purpose that is forwarded by the effective denial of the certificate of occupancy. The effective denial of the certificate of occupancy was arbitrary, unjust, and unduly burdensome to the Church. Accordingly, the denial of the certificate of occupancy was a clear abuse of municipal discretion.

THEREFORE, CTC respectfully requests that it be awarded its damages, attorney's fees, reasonable costs, and all other relief to which Defendants may show themselves to be justly entitled. Further, CTC requests that the court declare that the City of Dallas's actions violate TRFRA, RLUIPA, and the First Amendment, and enjoin the City of Dallas from preventing it from meeting in its place of worship or enforcing the aforementioned requirements on Counterplaintiffs. CTC requests that the court enjoin the City of Dallas from requiring that CTC provide thirteen parking spaces, including a disabled space; an automatic sprinkler system; a separated second floor with firewall; two exits; wheelchair-accessible walkways; and wheelchair-accessible restrooms, or any other requirements that are similarly onerous or costly.

Prayer for Relief

WHEREFORE, PREMISES CONSIDERED, Counterplaintiffs pray that the Court:

(1) declare that The City of Dallas's actions violate TRFRA, RLUIPA, and the First Amendment of the United States Constitution;

(2) enjoin the City of Dallas from requiring Counterplaintiffs to do the following, either as a condition of receiving a CO or through any other means:

   (a) install fixed seating and/or reduce the size of the room in which CTC mainly meets so that the maximum occupancy will be below the 50-person threshold;

   (b) file another application for a CO that has a maximum occupancy of less than 50 persons;

   (c) add thirteen parking spaces, including a disabled space;

   (d) install an automatic sprinkler system;

   (e) add a separated second floor with firewall;

   (f) add two exits; add wheelchair-accessible walkways;

(g) add wheelchair-accessible restrooms as a condition of a Certificate of Occupancy; and

(h) any similarly onerous or expensive requirements that impose a substantial burden on CTC's religious exercises;

(3) grant Counterplaintiffs damages;

(4) grant Counterplaintiffs attorney's fees and costs; and

(5) grant any and all such further or additional relief to which Counterplaintiffs are entitled.

Dated: April 6, 2015

Respectfully submitted,

By: */s/ Chad B. Walker*

Chad B. Walker
cbwalker@fr.com
Texas Bar No. 24056484
Grant K. Schmidt
gschmidt@fr.com
Texas Bar No. 24084579
FISH & RICHARDSON P.C.
1717 Main Street, Suite 5000
Dallas, TX 75201
(214) 747-5070 (Telephone)
(214) 747-2091 (Facsimile)

Kelly J. Shackelford
kshackelford@libertyinstitute.org
Tex. Bar No. 18070950
Jeffrey C. Mateer
jmateer@libertyinstitute.org
Tex. Bar No. 13185320
Justin E. Butterfield
jbutterfield@libertyinstitute.org
Tex. Bar No. 24062642
LIBERTY INSTITUTE
2001 W. Plano Parkway, Ste. 1600
Plano, Texas 75075
(972) 941-4444 (Telephone)
(972) 941-4457 (Facsimile)

ATTORNEYS FOR DEFENDANTS, MARK B. GOTHELF, JUDITH D. GOTHELF and CONGREGATION TORAS CHAIM, INC. DBA CONGREGATION TORAS CHAIM

CERTIFICATE OF CONFERENCE

The undersigned certify that they contacted Chris Bowers and Melissa Miles, counsel for Plaintiff City of Dallas, on April 6, 2015, via telephone. Mr. Bowers and Ms. Miles confirmed that they are opposed to Defendants' Motion to Transfer Venue.

/s/ Grant K. Schmidt
Grant K. Schmidt

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on April 6, 2015 to all counsel of record pursuant to Rule 21a of the Texas Rules of Civil Procedure.

/s/ Grant K. Schmidt
Grant K. Schmidt

EXHIBIT A

429-04998-2013

CAUSE NO. ____-____-00

IN THE MATTER OF	§	IN THE DISTRICT COURT
	§	
DAVID R. SCHNEIDER,	§	
PLAINTIFF,	§	
	§	OF COLLIN COUNTY, TEXAS
VS.	§	
	§	
JUDITH D. GOTHELF,	§	
MARK B. GOTHELF, AND	§	
CONGREGATION TORAS CHAIM, INC.	§	
DEFENDANTS.	§	____TH JUDICIAL DISTRICT

ORIGINAL PETITION AND REQUEST FOR PERMANENT INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Petitioner, David R. Schneider ("Schneider"), complaining of Defendants, Judith D. Gothelf & Mark B. Gothelf (collectively "Gothelfs"), Congregation Toras Chaim, Inc. ("the Congregation"), and cause for action would show unto this court as follows:

I. The Parties

1. Plaintiff, David R. Schneider, is an individual residing at 7035 Mumford, Dallas, Collin County, Texas.

2. Defendant, Judith D. Gothelf, is an individual residing in Dallas County who may be served at her home address, 6406 Dykes Way, Dallas, TX 75230.

3. Defendant, Mark B. Gothelf, is an individual whose residence is unclear. He owns a house in Collin County at 7103 Mumford Ct, Dallas, TX 75252 but does not appear to reside there. His listed mailing address for that property is 1 Wilder Rd, Monsey, NY 10952. Certified mail to him at

both of those addresses was returned undeliverable. However, he may be residing at the home of his mother (and co-Defendant) Judith D. Gothelf at 6406 Dykes Way, Dallas, TX 75230.

4. Defendant, Congregation Toras Chaim, Inc., is Texas nonprofit corporation whose principal place of business is in Collin County and which may be served at the address of its registered agent, National Registered Agents, 350 N. St. Paul St., Suite 2900, Dallas, TX 75201.

II. Jurisdiction and Venue

5. This Court has jurisdiction over the subject matter of this litigation because the property in question is in Collin County.

6. Venue is proper in Collin County, Texas pursuant to Tex. Civ. Prac. & Rem. Code Ann. $ 15.002 because Schneider's and Defendants residences/place of business are either situated in Collin County, Texas when all or part of the causes of action accrued, and because the causes of action, in whole or in substantial part, arose in Collin County, Texas.

III. Facts Applicable to All Claims

7. Plaintiff Schneider and Defendant Congregation are neighbors within a community of approximately 247 homes in

Dallas, TX, called the Highlands of McKamy IV/V ("the Highlands of McKamy"). Their locations are directly across the street from each other, both corner lots. The homes of the Highlands of McKamy are expensive, ranging from approximately $250,000 to over $500,000 in price. This is an established, quiet neighborhood, most houses being 25 or more years old.

8. Schneider purchased his home at 7035 Mumford on Febuary 13, 2013. Schneider's home was purchased for use as a single-family dwelling. He resides there with his wife and one adult child attending college. This house is covered by deed restrictions which every homeowner agrees to upon purchase.

9. The Gothelfs purchased a house at 7103 Mumford on or about May 31, 2013. Neither of the Gothelfs currently reside physically at 7103 Mumford Ct., nor as far as the Plaintiff Schneider knows, have they ever resided there. This house is also covered by the same deed restrictions (as those of Schneider) which every homeowner agrees to upon purchase.

10. On or about July 1, 2013, the Congregation moved its base of operations to 7103 Mumford, the house recently purchased by the Gothelfs. The Congregation is a self-described "shul", or more commonly "synagogue". The nature of the relationship between the Defendant Co-owners and the Defendant Congregation is unclear. However, it appears they have jointly established a subterfuge to hide and conceal

the true purpose of the purchase of the house by the Gothelfs. To wit which is to operate what others would call a church in a deed-restricted neighborhood intended for residential usage only. Neither of the Gothelfs physically reside at 7103 Mumford Ct.

11. That the Congregation is operating as described can be seen from this and other similar items from the Congregation's website: "Currently the front of the house (facing Mumford) is used for davening. After renovations, most of the house on the northern side (facing Frankford) will be converted into a space for tefillah. Eventually, the women's section will occupy the northwestern part of the house (about where the master bedroom is currently located). With the completion of the renovations, the total tefillah space will be about 1200 sq. ft." As of September 2013, there were over 100 calendar entries listed on same website for events at 7103 Mumford Ct. during the remainder of 2013.

12. On August 18, 2013, the Rabbi of the Congregation, Rabbi Yaakov Rich, attended on Homeowners Association board meeting (also attended by Schneider). At that meeting, he stated that he was in the process of requesting a Certificate of Occupancy from the City of Dallas for Church usage by the Congregation at 7103 Mumford. He also assured meeting attendees that the Congregation wanted to be a "good neighbor". He indicated that he was personally involved in changes being made at the Congregation's location, including obtaining dirt to fill a swimming pool at the site. He

stated that he did not feel it was safe to have Congregation members' children near the swimming pool in the backyard; and that he planned to have it filled in as soon as funds could be raised from the congregation. Such dirt has been sitting in full view of the street for over four months. Also, an unscreened air-conditioning unit was installed which is visible from the street.

13. Since the congregation commenced full operation from 7103 Mumford, and many neighbors have complained about these activities as being disruptive, noxious or similar, including numerous complaints about excessive parking. Typically, Congregation services occur twice each day, every day of the week.

IV. Causes of Action

Count 1 – Violation of Deed Restrictions

14. All homes within the Highlands of McKamy share significant deed restrictions and covenants. These were properly filed and duly recorded on August 14, 1979 in Collin County in a document entitled "FIRST REVISED DECLARATION OF RESTRICTIONS FOR HIGHLANDS OF MCKAMY, PHASE IV AND V, DALLAS, TEXAS" (Volume 1189, Page 510, and amended September 9, 1980 per Volume 1300, Page 477). This document states in part:

a) Per Article VI, 1: "RESIDENTIAL USAGE: No structure shall be erected placed, altered, used for or be permitted to remain on any residential building lot

other than one detached single family private dwelling not to exceed three stories and one private garage for not more than four automobiles and servants' quarters if they are employed on the premises."

b) Per Article VI, 13: "No rubbish, trash, garbage or waste shall be placed, dumped or permitted to remain on any lot in this Addition".

c) Per Article VI, 15: "No noxious activity shall be carried on upon any lot which may be or become an annoyance or nuisance to the neighborhood".

d) Per Article VI, 9: "All air-conditioning equipment shall be installed in the rear or in the sideyard, screened from view from the street, by an opaque fence or masonry wall.".

15. Texas Property Code states in part:

a) Per Section 202.003(a): "A restrictive covenant shall be liberally construed to give effect to its purposes and intent."

b) Per Section 202.004(b): "A property owners' association or other representative designated by an owner of real property may initiate, defend, or intervene in litigation or an administrative proceeding affecting the enforcement of a restrictive covenant or the protection, preservation, or operation of the property covered by the dedicatory instrument."

c) Per Section 202.004(a): "An exercise of discretionary authority by a property owners' association or other representative designated by an owner of real property concerning a restrictive covenant is presumed reasonable unless the court determines by a preponderance of the evidence that the exercise of discretionary authority was arbitrary, capricious, or discriminatory."

d) Per Section 202.004(c): "A court may assess civil damages for the violation of a restrictive covenant in an amount not to exceed $200 for each day of the violation."

16. The intent of the deed covenants, as noted above, is clear. The Gothelfs and the Congregation are materially violating the restrictive deed covenants by operating a church out of a house. Inevitably, future activity will involve the breaking of further covenants. In accordance with Section 202 of Texas Property Law, Schneider seeks civil damages of $200 per day, calculated beginning from July 1, 2013.

Count 2 – Damage to Schneider's Property

17. Notwithstanding the above, Schneider has suffered a significant loss of value to his home. Clearly, each homeowner within the Highlands of McKamy purchased their property understanding the significance of the deed restrictions and their necessity in order to preserve the

unique and special nature of this valuable land. If Defendants can capriciously ignore the deed restrictions, then so can others within the Highlands of McKamy.

18. Schneider seeks from Defendants $50,000 in compensatory damages due to decline in the value of Schneider's home, as caused by Defendants.

Count 3 – Likelihood of Future Violations

19. Taken together, these statements indicate a wanton disregard for the deed restrictions covering his property. Schneider believes that further deed restriction violations and property torts are likely from the Gothelfs and the Congregation. Clearly, if they are willing to violate the above, the deed restrictions are meaningless to Defendants.

20. Schneider seeks a permanent injunction against the Defendants to prevent these and future violations of the deed covenants of the Highlands of McKamy.

V. Relief Requested

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully prays that that upon final hearing of this cause, Schneider be awarded judgment against the Defendants Gothelfs and the Congregation, for the following:

a) A permanent injunction against usage of the property as a location for the Congregation or its affiliates to operate from;

b) A permanent injunction against usage of the any other property within the Highlands of McKamy as a

location for the Congregation or its affiliates to operate from;

c) the maximum statutory civil damages, as alleged above;

d) amount of at least $50,000 in compensatory damages, as alleged above;

e) any other damages proved and to which he is entitled;

f) all reasonable costs of court and legal fees;

g) post-judgment interest on same at the highest lawful rate;

h) and for such other and further relief, both general and special, legal and equitable, to which Schneider may be justly entitled.

Respectfully submitted,

/s/ David R. Schneider
David R. Schneider, Pro Se
7035 Mumford
Dallas, TX 75252
Cell: (214) 315-5531
Email: DavidRaySchneider@Gmail.com

EXHIBIT B

CAUSE NO. 429-04998-2013

IN THE MATTER OF	§	**IN THE DISTRICT COURT**
	§	
DAVID R. SCHNEIDER,	§	
	§	
Plaintiff,	§	**OF COLLIN COUNTY, TEXAS**
	§	
vs.	§	
	§	
JUDITH D. GOTHELF, MARK B. GOTHELF, AND CONGREGATION TORAS CHAIM, INC.	§	**429th JUDICIAL DISTRICT**
	§	
Defendants,	§	
	§	
and	§	
	§	
HIGHLANDS OF McKAMY IV and V COMMUNITY IMPROVEMENT ASSOCIATION,	§	
	§	
Intervening Plaintiff,	§	
	§	
vs.	§	
	§	
JUDITH D. GOTHELF and MARK B. GOTHELF,	§	
	§	
Defendants.	§	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION AND SUMMARY

This suit is about Plaintiff David Schneider's and Intervening Plaintiff Highlands of McKamy IV and V Community Improvement Association's (the "HOA") (collectively, "Plaintiffs") attempt to obtain an injunction that would end community religious practice for approximately thirty families of Orthodox Jews in far North Dallas based only on minor irritations such as having to stop vehicles to permit blind people and mothers with children to cross the street. The members and other attendees of the Congregation Toras Chaim, Inc. (the "Congregation")[1] are homeowners who want to practice their religious beliefs in their homes, an issue that lies at the core of individual liberty. Plaintiffs—a single neighbor and the HOA—unfortunately are attempting to bully minority members of their community with this suit.

Since February 2011, with the HOA's full knowledge, the Congregation's prayer and study activities have taken place primarily at two homes in the housing development over which the HOA has authority: the Highlands of McKamy IV and V (the "Highlands of McKamy"). From February 2011 until August 2013, the Congregation's activities took place primarily at the home of Rabbi Yaakov Rich at 7119 Bremerton Court, and since August 2013, the same activities have taken place primarily at 7103 Mumford Court,[2] the home owned by Defendants Judith D. Gothelf and Mark B. Gothelf. The HOA has known about these activities since early 2011, but took no steps to try to stop them until sending a letter on October 14, 2013. The HOA

[1] The Congregation is not a proper Defendant in this case because it is not, nor ever has been, a homeowner in the Highlands of McKamy. The Congregation therefore cannot be bound by the restrictive covenants at issue in this case. *See Jim Walter Homes, Inc. v. Youngtown, Inc.*, 786 S.W.2d 10, 11 (Tex. App.—Beaumont 1990, no writ) (holding that non-property owners have no duty to comply with restrictive covenants). Indeed, the HOA has intervened only against the Gothelfs. The Congregation has filed a no-evidence motion for summary judgment that is pending before the Court. *See* Defendant Congregation Toras Chaim's No-Evidence Motion for Summary Judgment, filed March 7, 2014; Defendant Congregation Toras Chaim's Reply in Support of No-Evidence Motion for Summary Judgment, filed June 26, 2014. The Congregation hereby incorporates all of its briefing and evidence submitted in support of its No-Evidence Motion for Summary Judgment.

[2] Avrohom Rich's use of 7103 Mumford Court as his personal residence is the primary use of the property. Some of the Congregation's religious activities also take place there. *See* Defendants' Response to Plaintiff's and Intervening Plaintiff's Motions for Partial Summary Judgment, filed June 19, 2014.

sent this letter despite the conclusion of its counsel that the Highlands of McKamy's restrictive covenants lacked the "preferred language" for deeming the Congregation's presence in the neighborhood to be a violation.[3]

The Court has already denied two of Plaintiffs' attempts to shut down the Congregation's religious practice by (1) denying a request for a temporary injunction on April 10, 2014, and (2) denying the HOA's motion for summary judgment on August 20, 2014, on the issue of whether Defendants are in breach of the Highlands of McKamy's restrictive covenants. Discovery has since closed, and based on the application of Texas law to the undisputed facts (and in some instances the complete absence of facts) Defendants are entitled to summary judgment based on several independent grounds.

First, although Defendants are not at this time moving for summary judgment on the issue of whether their activities at 7103 Mumford Court violate the Highlands of McKamy's restrictive covenants,[4] Defendants are entitled to complete summary judgment on all of their affirmative defenses, each of which has been established as a matter of law and which independently foreclose Plaintiffs' claims:

- Interpreting the restrictive covenants to prevent the Congregation's religious activities would violate the Texas Religious Freedom Restoration Act ("Texas RFRA"), Tex. Civ. Prac. & Rem. Code §§ 110.001, *et seq.*, because it would place a substantial burden on the Congregation members' religious practice, would not further any compelling interest, and would not be the least restrictive means of furthering any interest that may exist.

- Interpreting the restrictive covenants to prevent the Congregation's religious activities would violate the federal Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc, *et seq.*, because it would

[3] Exhibit V at 4.

[4] Defendants are not in violation of the restrictive covenants. *See* Defendants' Response to Plaintiff's and Intervening Plaintiff's Motions for Partial Summary Judgment, filed June 19, 2014. If this case proceeds to trial, the evidence will show, among other things, that Avrohom Rich's use of 7103 Mumford Court as his personal residence is the primary use of the property.

place a substantial burden on the Congregation members' religious practice, would not further any compelling interest, and would not be the least restrictive means of furthering any interest that may exist. Interpreting the restrictive covenants to prevent the Congregation's religious activities would also violate RLUIPA because it would treat the Congregation's religious activities on unequal terms with other non-residential uses that are or have taken place in the Highlands of McKamy.

- The HOA may not enforce the Highlands of McKamy's restrictive covenants against Defendants because the HOA's decisions to intervene in this suit and to attempt to enforce the restrictive covenants were arbitrary, capricious, or discriminatory under § 202.004 of the Texas Property Code.

- Plaintiffs have waived and/or abandoned their right to enforce the residential use restriction because the HOA has never attempted to prevent other non-residential uses of homes within the Highlands of McKamy.

- The doctrine of laches bars the HOA's claims because the HOA unreasonably delayed in challenging the Congregation's activities, and the Gothelfs and the Congregation relied on the HOA's non-opposition to their detriment.

- The doctrine of unclean hands bars Schneider from asserting claims to enforce the restrictive covenants in the Highlands of McKamy because he is himself in violation of the restrictive covenants he seeks to enforce. In direct contravention of the residential-only provision of the restrictive covenants, Schneider maintains a shed in his yard. *See* Exhibit B at Article VI.1.[5]

Second, independent of Defendants' affirmative defenses, summary judgment is also proper as to certain of Plaintiffs' claims for additional reasons:

- Defendants are entitled to summary judgment on Plaintiffs' claim for a permanent injunction to the extent an injunction would prohibit the Congregation's religious activities at 7103 Mumford Court. The Court must balance the equities before issuing a permanent injunction, and the undisputed facts reflect that no balancing of the equities could reasonably be resolved in favor of Plaintiffs. An injunction prohibiting the Congregation from meeting at 7103 Mumford Court would end community religious life for approximately thirty families. By contrast, Plaintiffs complain of alleged harms such as parking and dogs barking. Even if Plaintiffs were to prevail at trial, any injunction should be narrowly tailored to address specific alleged harms (such as parking), rather than shutting down the synagogue entirely.

[5] Exhibit A identifies the evidence attached to this Motion. Defendants hereby incorporate all Exhibits attached to this Motion.

- Defendants are entitled to a no-evidence summary judgment on Schneider's claim for statutory damages under Tex. Prop. Code § 202.004(c). The statute does not permit individual homeowners to recover damages.

- Defendants are entitled to a no-evidence summary judgment on Schneider's claim for $50,000 due to an alleged decline in value of his home. Schneider has no evidence that his home has lost value.

This case should be put to rest now. Defendants should not have to incur the burden and expense of going to trial in a case that never should have been filed. Defendants respectfully request that the Court grant Defendants' Motion for Summary Judgment.[6]

II. STATEMENT OF FACTS

A. The Congregation's Formation

The Congregation is a small community of Orthodox Jews in far North Dallas in existence since 2007. Exhibit C at 27:25-28:2; Exhibit D at 16:7-16:9, 41:15-42:7, 55:17-56:12. There is only one other congregation of Orthodox Jews in the entire Dallas-Fort Worth area that shares the Congregation's particular outlook on spiritual life: the Ohr HaTorah Shul, which is located approximately seven miles south of the Highlands of McKamy. Exhibit D at 41:15-42:7, 74:3-75:3. While a member of the Ohr HaTorah Shul, Rabbi Yaakov Rich discovered that several families living around the Highlands of McKamy wanted to join an Orthodox Jewish synagogue that shared the same focus as the Ohr HaTorah Shul. Exhibit D at 74:3-75:3. Orthodox Jews are prohibited from driving on the Sabbath; these families therefore must live within walking distance of a synagogue to attend prayer services on the Sabbath. Exhibit C at 28:20-29:2; Exhibit D at 30:20-31:4, 39:25-40:4, 74:16-75:3, 84:1-84:13; Exhibit F at 72:9-73:4.

[6] If this Motion is granted in its entirety, it would dispose of all of Plaintiffs' claims. The Motion does not address Defendants' contention that they are entitled to attorneys' fees and expenses. *See* Defendants' First Amended Answer, filed October 1, 2014, at ¶¶ 8-10. Defendants intend to present evidence and argument regarding attorneys' fees and expenses at a later time.

When Rabbi Rich started the Congregation in 2007, locating it in and around the Highlands of McKamy was facilitated by the fact that the area had already been established as an eruv.[7] Exhibit D at 76:11-76:17. Creating an eruv is an extensive process that requires approval from and a leasing agreement with the city. Exhibit D at 74:21-76:10. The eruv that encompasses the Highlands of McKamy is called the Far North Dallas Eruv and is approximately two square miles. Exhibit E (map of Far North Dallas Eruv); Exhibit F at 72:9-73:4. The eruv had been created by the members of another Orthodox Jewish synagogue, Ohev Shalom, but that synagogue does not share the same particular outlook on the spiritual life as the Congregation. Exhibit D at 38:21-39:2, 41:15-42:7, 66:1-67:11, 74:3-74:15, 75:23-76:17.

B. Rabbi Rich Begins Hosting Congregation Activities

From 2007 until 2011, the Congregation met at a small home on Hillcrest Road (outside the Highlands of McKamy). Exhibit C at 27:25-28:4; Exhibit D at 42:23-43:3, 63:2-63:17. In February 2011, Rabbi Rich's home in the Highlands of McKamy became the primary location for the Congregation. Exhibit C at 28:3-28:10; Exhibit D at 63:2-63:5. By then, most of the members lived east of Hillcrest Road, so the Rabbi's home in the middle of the Highlands of McKamy was more centrally located with respect to where the Congregation's members lived than the Hillcrest home. Exhibit D at 66:1-67:22, 76:21-77:11. The main activities of the Congregation took place at 7119 Bremerton Court for two and a half years—from February 2011 to August 2013. Exhibit C at 28:3-28:14; Exhibit D at 63:2-63:5. During that time, members of the HOA board were fully aware of the Congregation's activities at 7119 Bremerton Court, yet the HOA never claimed that this activity was somehow not permitted under the restrictive

[7] An eruv is a ritual enclosure that allows Orthodox Jews to carry certain objects outside of their homes on the Sabbath. Exhibit D at 74:21-76:10, 91:5-91:23; Exhibit F at 72:9-73:4. The enclosure is formed by integrating a number of private and public properties into one larger private domain utilizing PVC piping and wires connected to telephone and electric poles. Exhibit D at 74:21-76:10.

covenants. Exhibit C at 33:20-34:14; Exhibit D at 77:12-78:11; Exhibit G (deposition notice to HOA); Exhibit H (HOA's designation of Carolyn Peadon as representative to testify for the HOA); Exhibit I at 6:3-6:9, 9:3-10:2, 22:1-13 (Ms. Peadon's testimony).

C. The Congregation Moves to 7103 Mumford Court

In the spring of 2013, a longtime friend of Rabbi Rich, Mark Gothelf (and his mother, Judith Gothelf), purchased a home in the Highlands of McKamy at 7103 Mumford Court, planning to have the home occupied by a resident and also permitting it to be used for the Congregation's activities. Exhibit D at 23:10-24:2; Exhibit F at 10:8-11:7, 73:17-74:7. Avrohom Moshe Rich moved into the home on September 16, 2013, and has since that time used the house as his personal residence. Exhibit D at 79:8-79:17. Avrohom Rich's use of 7103 Mumford Court is the primary use of the property.[8] The Congregation began meeting there in August 2013. Exhibit C at 28:11-28:14; Exhibit D at 79:18-79:23. No changes have been made to the exterior of the home, and no changes are planned. Exhibit J at 70:25-71:7, 75:1-75:17; Exhibit K.

Although the home's address is on Mumford Court and the front of the home faces that street, 7103 Mumford Court actually sits on the corner of Frankford Road and Meandering Way, both major streets that run for miles through North Dallas. Exhibit D at 67:12-67:22; Exhibit L (map reflecting location of 7103 Mumford Court); Exhibit M (map reflecting that Frankford Road stretches for over eleven miles across Dallas); Exhibit N (map reflecting that Meandering Way stretches for over five miles across Dallas).[9] Thus, attempts to characterize 7103 Mumford Court as being tucked away in the middle of a quiet neighborhood are simply inaccurate.

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[8] *See* Defendants' Response to Plaintiff's and Intervening Plaintiff's Motions for Partial Summary Judgment, filed June 19, 2014. Defendants hereby incorporate their June 19, 2014 filing, including all evidence cited therein, in its entirety.

[9] The Court can take judicial notice of Exhibits L, M, and N under Tex. R. Evid. 201.

D. Congregation Activities at 7103 Mumford Court

The activities that take place at Mumford Court are the same activities that took place at 7119 Bremerton Court for two and a half years. Exhibit C at 28:15-29:2; Exhibit D at 79:24-80:16. On non-Sabbath days, the Congregation has morning, afternoon, and evening prayer meetings, attended by no more than ten to twelve people on average. Exhibit C at 29:5-30:1; Exhibit D at 80:17-81:13. Usually, about five members drive to these prayer meetings. Exhibit D at 81:14-81:23. Three cars typically park in the backyard driveway, and three cars park in front of 7103 Mumford Court. Exhibit C at 30:2-31:3; Exhibit D at 81:24-82:10. It is most often the case that no cars are parked in front of other houses. Exhibit C at 30:18-31:3. Also, between two and six people study at the home during the day. Exhibit C at 29:15-29:23; Exhibit D at 80:17-81:13.

Once a week, on the evening before the Sabbath, approximately twenty people gather at the home to pray. Exhibit D at 83:16-83:25. On Saturday morning, approximately thirty people gather to pray. *Id.* Afternoon and evening prayer on the Sabbath usually attracts about twenty people. *Id.*[10] Because Orthodox Jews cannot drive on the Sabbath, all of the Congregation's members walk to 7103 Mumford Court for the events on Friday evening and Saturday. Exhibit C at 28:20-29:2; Exhibit D at 30:20-31:4, 39:25-40:4, 74:16-75:3, 84:1-84:13; Exhibit F at 72:9-73:4.

E. The Congregation Has Nowhere Else to Go

If the Gothelfs are enjoined from hosting Congregation activities at 7103 Mumford Court, multiple families in the Highlands of McKamy will be without a spiritual gathering place. Exhibit C at 31:4-33:19; Exhibit D at 41:15-42:7, 66:1-68:4. In the years before operating at

[10] Thus, although approximately thirty families identify with the Congregation, even the most highly attended prayer gatherings each week average no more than about twenty to thirty attendees.

7103 Mumford Court, the Congregation explored a move to another location. *Id.* It discovered that all of the commercially zoned properties within walking distance of its members were unavailable. *Id.* Other areas within walking distance of the Congregation's members were also ruled out as unsuitable for various reasons.[11] *Id.* Thus, the Congregation has nowhere else to go if it is prevented from conducting activities in the Highlands of McKamy. *Id.* Indeed, as Rabbi Rich testified regarding the effect of an injunction on the Congregation and its members:

> Asking the activities to stop would be similar to asking a person to stop eating. Let me explain what I mean.
>
> You see, we believe that there are physical needs and there are spiritual needs. And just like our bodies need nourishment every day, our souls need nourishment every day. That's our prayer and that is our Torah study.
>
> And if our members were asked . . . that they could not participate actively in Torah study or prayer, it would individually be a terrible disaster for those individuals, force people to have to relocate and immediately shut down the Congregation, without question.

Exhibit C at 31:12-32:1.

F. The Alleged Harms Due to the Congregation's Presence in the Neighborhood are Trivial

In contrast to the harm that would result from prohibiting the Congregation's activities in the Highlands of McKamy—ending community religious life for thirty families—the alleged harms from the Congregation's presence in the community are trivial. At the temporary injunction hearing on April 10, 2014, and in depositions since that time, Plaintiffs have repeatedly had the opportunity to testify at to what they perceive as the negative effects of the Congregation's presence in the Highlands of McKamy. *See* Exhibit C at 8:10-9:3, 13:12-16:5, 17:2-18:6, 20:13-21:19, 22:7-23:5 (temporary injunction hearing testimony of witnesses called

[11] For example, it would have been very disrespectful to Ohev Shalom and its rabbi and a violation of the Congregation's religious beliefs for the Congregation to center its activities in close proximity to another Orthodox Jewish synagogue. Exhibit C at 31:4-33:19; Exhibit D at 41:15-42:7, 66:1-68:4.

by Plaintiffs); Exhibit J at 65:18-69:18, 82:6-82:23 (Schneider's deposition testimony); Exhibit O at 46:8-48:17 (HOA board member Ted Day's deposition testimony); Exhibit P at 16:9-18:5 (HOA board member Michael Donohue's testimony). Setting aside speculative alleged harms regarding what Plaintiffs fear *could* happen in the future, the only specific evidence of actual alleged harms is:

- A pile of dirt that has since been removed was on the property at 7103 Mumford Court at one time. Exhibit C at 8:10-9:3; Exhibit K.

- Neighbors were forced to look at a window air-conditioning unit. Exhibit C at 8:10-9:3.

- People and cars come and go from the home at 7103 Mumford Court. Exhibit C at 8:10-9:3, 14:21-15:6, 20:16-21:6; Exhibit J at 66:2-66:12, 82:6-82:23; Exhibit O at 46:8-46:14, 48:6-48:17; Exhibit P at 16:23-17:15.

- It sometimes looks "unusual" and "odd" when Congregation members exit the home. Exhibit J at 82:6-82:23.

- When Jewish worshipers come to 7103 Mumford Court, it causes dogs to bark, which sometimes causes teenage children to wake up. Exhibit C at 14:3-14:13.

- A neighbor has had to stop his vehicle to allow a woman pushing a baby carriage to cross the street. Exhibit C at 14:14-14:17.

- A neighbor has had to stop his vehicle to allow a blind person to cross the street. Exhibit C at 14:21-15:3.

- The synagogue allegedly causes parking issues on Mumford Court, which the Congregation has taken steps to address. Exhibit C at 14:21-15:3, 15:19-16:5, 17:2-17:12, 20:16-21:6, 30:2-31:3; Exhibit O at 46:8-46:14, 48:6-48:17.

- There are speculative concerns—with no evidence—that the Congregation affects home values in the neighborhood. *E.g.*, First Amended Petition, filed April 2, 2014, at 18; Exhibit J at 67:13-67:18.

G. Plaintiff Schneider, His Relentless Pursuit of the Congregation, and Takeover of the HOA Board

Schneider and his wife Laura are the two owners of the home at 7035 Mumford.[12] Exhibit J. at 83:5-83:12. In December 2013, he sued Defendants for allegedly violating a residential-only restrictive covenant despite the fact that a shed he admits is in his yard blatantly violates the same residential-only restrictive covenant. Exhibit J at 23:21-25:13; Exhibit S.

Article VI.1 of the HOA's restrictive covenants provides:

> RESIDENTIAL USAGE: No structure shall be erected, placed, altered, used for or permitted to remain on any residential building lot other than one detached single family dwelling not to exceed three stories and one private garage for not more than four automobiles and servants' quarters if they are employed on the premises. No temporary structures may be placed on lot except during construction. Metal storage buildings, sheds or structures are not permitted. Only new structures shall be constructed on any lot and no house or structures shall be moved onto a lot.

Exhibit B at Article VI.1.

After suing, Schneider then attempted to get the HOA to join his suit, even stating that he could help keep the HOA's costs down by serving as "lead counsel" if the HOA were to intervene. Exhibit T at 1. The HOA's board at the time did not decide to intervene, having concluded that the HOA had no right to stop the Congregation from worshiping in homes in the neighborhood. Exhibit U at 3 (HOA minutes reflecting "Conclusions: The HOA cannot stop the building from being used for worship"). The HOA's counsel had also concluded that the restrictive covenants did not have the "preferred language" for deeming Defendants to be in violation. Exhibit V at 4 ("With the appropriate set of facts and the appropriate language in the deed restrictions, courts have ruled that use of a residence as a church did violate the deed

[12] Laura Schneider is not a plaintiff in this suit.

restrictions. Unfortunately, The Highlands Declaration and other governing documents do not contain the preferred language.").

Schneider then waged a proxy campaign to get himself and four likeminded neighbors (collectively, the "Schneider Board") elected as the new HOA board. Exhibit J at 39:8-40:1; Exhibit O at 17:18-19:6; Exhibit P at 19:17-20:17; Exhibit W (Schneider's promotional flier). Upon the takeover, one of the first acts of the Schneider Board was to cause the HOA to intervene in Schneider's lawsuit. Exhibit X at 4-5. The Schneider Board also adopted a "new policy" to enforce the residential-only restrictive covenant, implying that the HOA did not have such an enforcement policy prior to that time. Exhibit P at 21:4-21:20 (Schneider Board member Donohue answering "Correct" when asked if "a new policy was adopted to enforce deed-use restrictions" in February 2014); Exhibit Y (HOA minutes reflecting that the Schneider Board adopted a policy of enforcement on February 3, 2014).

The HOA membership was upset with the decision to intervene and demanded a special meeting for the neighborhood to discuss potential bylaw changes. Exhibit O at 35:23-37:1; Exhibit P at 24:14-25:21; Exhibit Z at 4. Schneider scheduled the meeting to occur on the Jewish Sabbath, and refused to move the date to accommodate members of the Congregation. *Id.* Regrettably, this decision is not the only instance of Schneider expressing hostility to the faith of Orthodox Jews:

- He has published a paper on his web site that criticizes Orthodox Jewish views of the Torah. Exhibit J at 32:16-35:9 (Schneider testifying that he views the Torah as the "word of man" and as a compilation of writings by multiple human authors).

- He recently filed a pro se lawsuit against another one of his neighbors for building a temporary structure (called a "Sukkah") in celebration of a Jewish holiday. Exhibit AA.

- He has referred to a Sukkah as a "strange-looking thing," "unusual structure," and "eyesore" and stated that he was "disturbed and dismayed" by its presence. Exhibit AA.

- He has stated that Jewish residents of the Highlands of McKamy should "[g]o outside the neighborhood to celebrate." Exhibit BB.

H. The HOA's Conflicted and Delayed Involvement in this Suit

Although it was forced into this suit by the Schneider Board, the HOA's own corporate representative deponent testified that she would have preferred that the HOA not done so. Exhibit G (deposition notice to HOA); Exhibit H (HOA's designation of Carolyn Peadon as representative to testify for the HOA); Exhibit I at 16:23-17:8 ("I would have preferred not to resort to litigation."), 29:2-29:6 (expressing concern about the appropriateness of expending HOA funds on this litigation), 25:14-26:8. This testimony is attributable to the HOA as an entity, thus putting the HOA in the awkward position of having testified under oath that it should not have intervened in a suit in which it remains a party. *Id.* Furthermore, despite being aware of the Congregation's activities in the Highlands of McKamy since early 2011, the HOA did not take any action to oppose those activities until October 14, 2013, in a letter sent to the Gothelfs. Exhibit F at 55:7-55:22; Exhibit CC (October 14, 2013 letter). The HOA sent this letter despite concluding that it had no right to stop the Congregation from worshiping in homes in the neighborhood. Exhibit U at 3. Moreover, its counsel had concluded that (1) the restrictive covenants lacked "preferred language," and (2) the HOA may be barred from opposing the Congregation's activities for failing to object for approximately three years. Exhibit V at 4, 6.

As a result of sentiments within the neighborhood that the HOA should not be involved in this suit, the homeowners voted to remove Schneider from the board on July 20, 2014, and the remaining members of the Schneider Board were only narrowly retained. Exhibit J at 51:10-53:12; Exhibit O at 21:23-25:17; Exhibit P at 30:25-33:6.

I. The HOA's History of Non-Enforcement of the Restrictive Covenants and Singling Out of the Congregation

When the HOA suddenly decided to oppose the religious activities of its own members, it was the first time that the HOA had brought an enforcement action in court in the HOA's 35-year history since 1979. Exhibit I at 14:12-15:5, 17:17-17:20; Exhibit J at 58:1-61:16; Exhibit O at 55:10-55:13. Indeed, the HOA was required to implement a "new policy" to enforce the residential-only restrictive covenant in February 2014. Exhibit P at 21:4-21:20; Exhibit Y. This is true notwithstanding the fact that there are currently numerous non-residential uses of property in the Highlands of McKamy, and there have been others over the years. For example:

- There is an eldercare facility at 7038 Lattimore Dr. known as the Weismer House. Exhibit C at 39:18-40:9; Exhibit D at 88:15-89:16; Exhibit J at 56:9-57:9; Exhibit O at 51:3-51:12; Exhibit DD (HOA minutes reflecting HOA knew of use in 2006); Exhibit EE (letter reflecting HOA knew of use in 2001); business web site at http://www.weismerhouse.com.

- There is a residential care facility at 6806 Rocky Top Circle known as Wellington Residential Care. Exhibit C at 39:18-40:9; Exhibit D at 88:15-89:16; Exhibit J at 56:9-57:9; Exhibit O at 51:3-51:12; Exhibit FF (letter reflecting HOA knew of use in 2011); business web site at http://www.wellingtonresidentialcaredallas.com.

- A home on Bremerton Court regularly conducts swimming lesson camps. Exhibit C at 39:18-40:9; Exhibit D at 88:15-89:16; Exhibit I at 18:5-19:1; Exhibit O at 51:13-51:19; Exhibit GG at 2 (minutes reflecting HOA knew of use in 2013).

- A used car business with a revolving inventory of cars operates on Judi Street. Exhibit HH.

- A seven-day per week music school that has hosted a recital operates on Judi Street. Exhibit HH.

- The wife of the HOA's secretary ran a court reporting business from her home. Exhibit P at 38:13-38:19; 40:9-40:24; Exhibit II (reflecting business address on Mumford Street); business web site at http://www.bradfordcourtreporting.com.

- An HOA board member has mentioned a garage rental apartment near his home. Exhibit JJ (2013 email from Ted Day mentioning "a garage near my home has been converted to a rental apartment").

- Schneider testified that an attorney in the neighborhood runs his law practice from his home. Exhibit J at 60:19-61:8.

- A former neighborhood resident operated a sales business from her home. Exhibit P at 38:2-38:12.

- A business training center was formerly operated at 7031 Bremerton Drive. Exhibit KK (HOA board minutes reflecting knowledge of existence of business training center in 2007 and 2008).

- Schneider maintains a shed in his yard in direct violation of the residential-only restrictive covenant. Exhibit J at 23:21-25:13; Exhibit S.

Under its "new policy" or otherwise, the HOA has never brought an enforcement action regarding any of these other non-residential uses, arbitrarily singling out the Congregation's activities. Exhibit I at 14:12-15:5, 17:17-17:20; Exhibit J at 58:1-61:16; Exhibit O at 55:10-55:13.

J. Plaintiffs' Claims

In the two operative Petitions in this case, Plaintiffs assert the following claims:

- The HOA brings a claim against Mark and Judith Gothelf for breach of the restrictive covenants. *See* Petition in Intervention, filed March 13, 2014, at 9-10. The HOA does not seek monetary damages in connection with the claim, but rather asks the Court to enter a declaratory judgment. *Id.* The Court has denied the HOA's motion for summary judgment on this claim. Schneider brings the same claim against the Gothelfs and the Congregation. *See* First Amended Petition, filed April 2, 2014, at 12.

- The HOA brings a claim for a temporary and permanent injunction to prohibit the Gothelfs from permitting the Congregation and its members to practice their religion at 7103 Mumford Court. *See* Petition in Intervention, filed March 13, 2014, at 10-12. The Court has denied the HOA's request for a temporary injunction, leaving only the request for permanent injunctive relief to be adjudicated. Schneider brings the same claim against the Gothelfs and the Congregation. *See* First Amended Petition, filed April 2, 2014, at 13-16.[13]

- The HOA brings a claim against the Gothelfs for a discretionary statutory penalty of up to $200 per day for alleged violations of the restrictive covenants. *See*

[13] Schneider also brings a second, duplicative claim seeking a permanent injunction. *See* First Amended Petition, filed April 2, 2014, at 18-19 ("Count 5 – Likelihood of Future Violations").

Petition in Intervention, filed March 13, 2014, at 12-13. Schneider brings the same claim against the Gothelfs and the Congregation, although the relevant statute does not authorize individual homeowners to pursue damages. *See* First Amended Petition, filed April 2, 2014, at 16-18.

- The HOA brings a claim against the Gothelfs to recover its attorneys' fees and costs. *See* Petition in Intervention, filed March 13, 2014, at 13.

- Schneider brings a purported claim against Defendants for $50,000 in compensatory damages for allegedly causing his home to decline in value. *See* First Amended Petition, filed April 2, 2014, at 18. It is unclear what legal cause of action (if any) Schneider sues under, as the title of the claim is simply "Count 4 – Damage to Schneider's Property," and nothing within the text of the count identifies a specific cause of action. *Id.*

Each of these claims requires Plaintiffs to show that Defendants have breached the restrictive covenants. Thus, if there has been no breach and/or if Defendants establish an affirmative defense on the issue of breach, all of Plaintiffs' claims necessarily fail.

III. SUMMARY JUDGMENT GROUNDS

Defendants are entitled to summary judgment on the following independent grounds:

- Defendants are entitled to summary judgment on all of Schneider's claims, and the Gothelfs are entitled summary judgment on all of the HOA's claims because Defendants have established their affirmative defense under the Texas Religious Freedom Restoration Act.

- Defendants are entitled to summary judgment on all of Schneider's claims, and the Gothelfs are entitled summary judgment on all of the HOA's claims because Defendants have established their affirmative defense under the Religious Land Use and Institutionalized Persons Act.

- The Gothelfs are entitled to summary judgment on all of the HOA's claims because Defendants have established their affirmative defense that the HOA's actions were arbitrary, capricious, or discriminatory under the Texas Property Code.

- Defendants are entitled to summary judgment on all of Schneider's claims, and the Gothelfs are entitled summary judgment on all of the HOA's claims because Defendants have established their affirmative defense that the Highlands of McKamy's residential use restriction has been waived and/or abandoned.

- The Gothelfs are entitled to summary judgment on all of the HOA's claims because Defendants have established the affirmative defense of laches.

- Defendants are entitled to summary judgment on all of Schneider's claims because Defendants have established the affirmative defense of unclean hands.

- Defendants are entitled to summary judgment on Schneider's claim for a permanent injunction, and the Gothelfs are entitled to summary judgment on the HOA's claim for a permanent injunction to the extent Plaintiffs seek injunctive relief that would prohibit the Congregation from meeting at 7103 Mumford Court. No balancing of the equities could possibly support the issuance of such an injunction.

- Defendants are entitled to summary judgment on Schneider's claim for statutory damages under the Texas Property Code because the law does not permit individual homeowners to recover such damages. Therefore, no evidence supports the claim.

- Defendants are entitled to summary judgment on Schneider's claim for an alleged decline in value of his home because there is no evidence that supports the claim.

IV. ARGUMENT AND AUTHORITIES

A. Summary Judgment Standards

Texas Rule of Civil Procedure 166a governs the propriety of summary judgments. Entry of summary judgment is appropriate where the summary judgment record establishes that there are no genuine issues of material fact, and that movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). A defendant moving for summary judgment must conclusively negate at least one essential element of each of the plaintiff's causes of action, or conclusively establish an affirmative defense. *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). When moving for summary judgment on a plaintiff's claim, once a defendant presents evidence entitling it to summary judgment by negating an element of the claim, the burden shifts to the plaintiff to present evidence raising a fact issue on the negated element. *Lection v. Dyll*, 65 S.W.3d 696, 701 (Tex. App.—Dallas 2001, pet. denied). When moving for summary judgment

on an affirmative defense, the defendant has the burden to conclusively establish that defense. *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999).

Under Texas Rule of Civil Procedure 166a(i), a party may also move for summary judgment on the ground that there is no evidence of one of the essential elements of a claim on which an adverse party would have the burden of proof at trial. A no-evidence motion for summary judgment "is essentially a motion for a pretrial directed verdict. Once such a motion is filed, the burden shifts to the nonmoving party to present evidence raising an issue of material fact as to the elements specified in the motion." *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). "The Court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact." Tex. R. Civ. P. 166a(i).

B. Defendants are Entitled to Summary Judgment on Each of Their Affirmative Defenses.

Defendants have asserted six independent affirmative defenses, each of which independently entitles Defendants to summary judgment. *See* Defendants' First Amended Answer, filed October 1, 2014, at ¶¶ 2-7. Each defense is entirely dispositive as to all claims of one or both Plaintiffs. *See supra* Section III. Thus, although Defendants contend that each defense has been established as a matter of law, Defendants need only win summary judgment on a single defense as to each Plaintiff in order for Plaintiffs' claims to be dismissed in their entirety.

1. Interpreting the restrictive covenants to prevent the Congregation's religious activities would violate the Texas Religious Freedom Restoration Act.

Texas RFRA prohibits the government from "substantially burden[ing] a person's free exercise of religion" unless the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that interest." Tex. Civ. Prac. & Rem. Code § 110.003. This prohibition against governmental burden of the free exercise of religion applies

whether or not the government itself is a party to the action. Tex. Civ. Prac. & Rem. Code § 110.004 ("A person whose free exercise of religion has been substantially burdened . . . may assert that violation as a defense in a judicial or administrative proceeding without regard to whether the proceeding is brought in the name of the state or by any other person.").

a. Texas RFRA applies to this litigation.

Texas RFRA applies to this litigation in three independent ways: (i) Plaintiffs are seeking to enforce state statutes that are subject to Texas RFRA, (ii) judicial enforcement of restrictive covenants is itself state action subject to Texas RFRA, and (iii) homeowners' associations are quasi-governmental entities that are themselves subject to Texas RFRA.

i. Plaintiffs are seeking to enforce state statutes that are subject to Texas RFRA.

Texas RFRA "applies to each law of this state unless the law is expressly made exempt from the application of this chapter by reference to this chapter." Tex. Civ. Prac. & Rem. Code § 110.002(c). Each of Plaintiffs' claims is based in state law that has not been exempted from Texas RFRA. Fundamentally, Plaintiffs are seeking to enforce restrictive covenants, both the creation and the enforcement of which are authorized by Tex. Prop. Code §§ 5.001 *et seq.* and 202.001 *et seq.* None of these statutes, however, has been exempted from Texas RFRA and are thus subject to the limitations imposed by Texas RFRA. This is true even though the state is not a party to this litigation. Tex. Civ. Prac. & Rem. Code § 110.004.

ii. Judicial enforcement of restrictive covenants is itself state action subject to Texas RFRA.

Not only are the underlying statutes themselves subject to Texas RFRA, but any judicial enforcement of Plaintiffs' claims is itself state action subject to Texas RFRA. The principle that judicial enforcement of restrictive covenants is state action subject to constitutional protections

was first applied by the United States Supreme Court in *Shelley v. Kraemer*, 334 U.S. 1 (1943). In that case, the Court refused to enforce restrictive covenants that limited the use or occupancy of a building on the basis of race because judicial action enforcing them would be state action that would violate the Fourteenth Amendment to the United States Constitution. The Court noted that judicial enforcement had long been considered state action in other contexts as well. *Shelley*, 334 U.S. at 16-18 (*see, e.g.*, *American Federation of Labor v. Swing*, 312 U.S. 321 (1941) (refusing to enforce a common-law policy that would restrain peaceful picketing because judicial enforcement of the policy would offend the Constitution)); *see also Shaver v. Hunter*, 626 S.W.2d 574, 578-79 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.) (subjecting the state's action in enforcing a restrictive covenant to constitutional scrutiny); *Gerber v. Long Boat Harbour*, 757 F. Supp. 1339, 1341 (M.D. Fla. 1991) ("[J]udicial enforcement of private agreements contained in a declaration of condominium constitutes state action and brings the heretofore private conduct within the scope of the Fourteenth Amendment, through which the First Amendment guarantee of free speech is made applicable to the state.").

That judicial enforcement is state action subject to Texas RFRA is an even easier case. Texas RFRA itself includes a definition of state action that is very broad, applying to "any ordinance, rule, order, decision, practice, or other exercise of governmental authority," which encompasses judicial action. Accordingly, at least one Texas court has suggested that judicial enforcement of restrictive covenants would be subject to Texas RFRA. *See Voice of the Cornerstone Church Corp. v. Pizza Prop. Partners*, 160 S.W.3d 657, 672 n.10 (Tex. App.—Austin 2005, no pet.) ("Cornerstone did not raise the Texas Religious Freedom [Restoration] Act below in its pleadings, summary-judgment response, or briefing. *See* Tex. Civ. Prac. & Rem. Code § 110.004 (person whose free exercise of religion has been violated under act may assert

violation as defense in judicial or administrative proceeding). . . . Thus, we have no occasion here to consider the potential implication of the Act or the merit of ExxonMobil's contention that it does not apply to courts. *See id.* § 110.001(a)(2) (defining 'Government agency' to include 'any agency of this state . . . including a department'), .002(a) (Act 'applies to any . . . order, decision, practice or other exercise of governmental authority.')" (second and third ellipses in original)).

iii. Homeowners' associations are quasi-governmental entities that are themselves subject to Texas RFRA.

Finally, homeowners' associations themselves are subject to Texas RFRA because of their quasi-governmental nature. *See Mayad v. Cummins Lane Owners Ass'n*, 1988 Tex. App. LEXIS 1973, at *4 (Tex. App.—Houston [1st Dist.] Aug. 11, 1988, no writ) ("[A]n owners association is a 'quasi-governmental' entity with the power to charge individual owners assessments to fund common expenses."); *Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Cos.*, 617 N.E.2d 1075, 1080 (Ohio 1993) ("An owners' association acts as a 'quasi-governmental entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government.'") (quoting Hyatt & Rhoads, Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations, 12 Wake Forest L. Rev. 915, 918 (1976)); *Colo. Homes v. Loerch-Wilson*, 43 P.3d 718, 722 (Colo. Ct. App. 2001) (homeowners associations serve "quasi-governmental functions").

In *Marsh v. Alabama*, 326 U.S. 501 (1946), the Supreme Court struck down a privately-owned town's restrictions on distributing flyers and recognized that Constitutional protections can limit even private property rights when the property is taking on the nature of a governmental entity. The *Marsh* Court stated,

> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment "lies at the foundation of free government by free men" and we must in all cases "weigh the circumstances and . . . appraise the . . . reasons . . . in support of the regulation . . . of the rights." *Schneider v. State*, 308 U.S. 147, 161. In our view, the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute.

Marsh, 326 U.S. at 509 (ellipses in original).

Here, the HOA is "govern[ing] a community of citizens" in just such a way that it is violating their most fundamental rights—rights that Texas RFRA was intended to protect. *See Barr v. City of Sinton*, 295 S.W.3d 287, 305-06 (Tex. 2009) (noting that Texas RFRA protects "fundamental, constitutional rights" that are superior to the interests protected by zoning ordinances); *see also E. Tex. Baptist Univ. v. Sebelius*, 2013 U.S. Dist. LEXIS 180727 at *77-78 (S.D. Tex. Dec. 27, 2013) (holding, in interpreting the Federal Religious Freedom Restoration Act, upon which Texas RFRA is based, that "[p]rotecting constitutional rights and the rights under RFRA are in the public's interest"). If fully private property, as in *Marsh*, is limited in its ability to restrict fundamental liberties, how much more should a quasi-governmental entity such as the HOA be limited in its ability to restrict fundamental liberties.

b. Preventing the Congregation from meeting at 7103 Mumford Court would completely prevent thirty families from being able to worship, which is a substantial burden on their religious exercise.

There is no bright-line rule for what constitutes a "substantial burden." The Texas Supreme Court has held that Texas RFRA, "like its federal cousins, 'requires a case-by-case, fact-specific inquiry.'" *Barr*, 295 S.W.3d at 302 (quoting *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004)).

Barr, however, provides an example of a situation that the Texas Supreme Court held to be a substantial burden. In that case, Barr, on the basis of his religious convictions, operated a halfway house in two homes. The City of Sinton, Texas, wanted Barr to relocate, but finding a viable alternative location for the halfway house was unlikely. *Barr*, 295 S.W.3d at 302. The Texas Supreme Court held that prohibiting Barr from exercising his faith through operating the halfway house was a substantial burden. Furthermore, the Texas Supreme Court held that "evidence of *some* possible alternative, irrespective of the difficulties presented, does not, standing alone, disprove substantial burden." *Id.* The Court noted that "[i]n a related context, the [United States] Supreme Court has observed that 'one is not to have the exercise of his liberty of expression in appropriate places abridges on the plea that it may be exercised in some other place.'" *Id.* (quoting *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939)). The *Barr* Court also pointed to an example similar to the present case in *Islamic Ctr. of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 294 (5th Cir. 1988), in which Starkville, Mississippi, violated the Free Exercise Clause by attempting to use zoning restrictions to keep Muslim students from worshipping in a home in a residential area of Starkville. "'By making a mosque relatively inaccessible within the city limits to Muslims who lack automobile transportation, the City burdens their exercise of their religion.' . . . Although the zoning ordinance did not foreclose all locations, the court determined 'relatively impecunious Muslim students' were left with 'no practical alternatives for establishing a mosque in the city limits.'" *Id.* at 304 (quoting *Islamic Ctr.*, 840 F.2d at 299-300).

The Texas Supreme Court also rejected the idea that the size of the relevant location alleviates the substantial burden, stating, "The City argues that its zoning restrictions on locating Barr's ministry inside city limits could not have been a substantial burden because the City is so

small that excluding the ministry from inside the city limits was inconsequential. But size alone is not determinative. . . . [In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), t]he Supreme Court did not consider the small size of the municipality to be important and specifically rejected the argument that the adult entertainment business at issue could simply move elsewhere." *Id.* at 302-03.

The City of Sinton also argued that relocating Barr's halfway house was not a substantial burden because the parolees could be disbursed among other homes. The Texas Supreme Court rejected this argument, too, holding that "a burden on a person's religious exercise is not insubstantial simply because he could always choose to do something else." *Id.* at 303.

In the present case, the Congregation must meet within walking distance of its members and within the North Dallas Eruv. *See supra* Sections II.A., II.D., II.E.; Exhibit C at 28:20-29:2; Exhibit D at 30:20-31:4, 39:25-40:4, 74:16-75:3, 84:1-84:13; Exhibit F at 72:9-73:4. After searching for a suitable location to replace Rabbi Rich's home, which is within the HOA, 7103 Mumford Court was determined to be the only viable location that was available to the Congregation. Exhibit C at 31:4-33:19; Exhibit D at 41:15-42:7, 66:1-68:4. If the Congregation cannot meet at 7103 Mumford Court, then, because of the restrictions placed upon the Congregation by their Orthodox Jewish religious beliefs, they will be unable to have communal worship. *Id.*; *see supra* Section II.E. The practical abolition of the Congregation's members' religious worship is a much more significant burden than that in *Barr*, and is similar to the burden in *Islamic Ctr.*

c. Plaintiffs do not have a compelling interest in prohibiting the Congregation from meeting at 7103 Mumford Court.

Because Plaintiffs' action would substantially burden Defendants' religious freedoms, Plaintiffs have the burden of showing that their interests are compelling. The Texas Supreme

Court noted that, "[b]ecause religious exercise is a fundamental right, that justification can only be found in 'interests of the highest order', to quote the Supreme Court in [*Wisconsin v.*] *Yoder*[, 406 U.S. 205, 215 (1972)], and to quote *Sherbert* [*v. Verner*, 374 U.S. 398, 406 (1945)], only to avoid 'the gravest abuses, endangering paramount interest[s].'" *Barr*, 295 S.W.3d at 306.

Not only must a compelling interest be an interest "of the highest order," the Texas Supreme Court pointed to the United States Supreme Court's holding that:

> "RFRA requires the Government to demonstrate that the compelling interest is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." To satisfy this requirement, the Supreme Court stated, courts must "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemption to particular religious claimants."

Id. at 306 (quoting *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31, 439 (2006) (brackets in original)). "In this regard, there is no basis for distinguishing RFRA from [Texas] RFRA; the same requirement verbatim is in both." *Id.*

The Texas Supreme Court held that interests such as "preserv[ing] the public safety, morals, and general welfare" are "the kind of 'broadly formulated interest' that does not satisfy the scrutiny mandated by [Texas]RFRA." *Id.* The Court went on to note, particularly relevantly to the present litigation, "'[T]he compelling interest test must be taken seriously. Courts and litigants must focus on real and serious burdens to neighboring properties, and not assume that zoning codes inherently serve a compelling interest, or that every incremental gain to city revenue (in commercial zones), or incremental reduction of traffic (in residential zones), is compelling." *Id.* at 307 (quoting Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. Davis L. Rev. 755, 784 (1999)).

Plaintiffs have not shown any compelling interest in preventing the Congregation from meeting at 7103 Mumford Court. Their stated interests have included being forced to wait while a blind man and a woman pushing a stroller crossed the street and general concerns about parking. *See supra* Section II.F. None of these concerns are "real and serious burdens to neighboring properties" that would constitute "an interest of the highest order" and avoid "the gravest abuses, endangering paramount interests."

Any assertion by Plaintiffs that they have a compelling interest in prohibiting the Congregation from meeting at 7103 Mumford Court is further undercut by their refusal to stop other uses within the Highlands of McKamy IV and V that are non-residential. *See supra* Section II.I.; Exhibit I at 14:12-15:5, 17:17-17:20; Exhibit J at 58:1-61:16; Exhibit O at 55:10-55:13. As the Supreme Court noted, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal citations omitted). In this case, Plaintiffs have never sued to prohibit non-residential uses within the HOA, and thus the same claimed "harms" Plaintiffs allege here abound throughout the neighborhood without any attempt to curb them. *See supra* Section II.I.; Exhibit I at 14:12-15:5, 17:17-17:20; Exhibit J at 58:1-61:16; Exhibit O at 55:10-55:13. Their efforts to stop the Congregation and the Gothelfs are thus unique, demonstrating that the interests are manufactured and not compelling.

d. Prohibiting the Congregation from meeting at 7103 Mumford Court is not the least restrictive means of furthering any compelling interest.

To avoid summary judgment, not only must Plaintiffs show that they have a compelling interest in prohibiting the Congregation from meeting at 7103 Mumford Court, Plaintiffs must also show that their actions in prohibiting the Congregation from meeting at 7103 Mumford

Court are the "least restrictive means" of achieving their compelling interest. Tex. Civ. Prac. & Rem. Code § 110.003. "The least-restrictive-means standard is exceptionally demanding. . . ." *Hobby Lobby Stores, Inc. v. Burwell*, 134 S. Ct. 2751, 2781 (2014). In order to satisfy the least-restrictive-means test, Plaintiffs must show that they lack any other means of achieving any compelling interest "without imposing a substantial burden on the exercise of religion by the objecting parties." *Id.* at 2782. Plaintiffs have been unwilling to even discuss alternatives to completely prohibiting the Congregation from meeting at 7103 Mumford Court, but even if Plaintiffs had an interest that qualified as compelling, a resolution short of stopping the religious exercise of the members of the Congregation could be found. For example, Plaintiffs could have sought to limit parking near 7103 Mumford Court, ensure that the home maintains its exterior character, etc. Instead, Plaintiffs seek the broadest possible relief—a complete shutdown of the Congregation that would prohibit any gathering at all.

2. Interpreting the restrictive covenants to prevent the Congregation's religious activities would violate the Religious Land Use and Institutionalized Persons Act.

There is a second, independent statute that forecloses Plaintiffs' claims—a statute that Congress enacted to prohibit the very actions taken by Plaintiffs here. RLUIPA "is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with [the Supreme] Court's precedents." *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). Following the Supreme Court's refusal to apply Federal RFRA against the states, Congress enacted a more measured attempt to ensure that state and local governments protect the rights of religious institutions and adherents in two particular contexts where Congress concluded that constitutional rights were most threatened by laws of general applicability: land use regulation and religious exercise by institutionalized persons. *Cutter*, 544 U.S. at 715; 42 U.S.C. §§ 2000cc, 2000cc-1. As Congress recognized, land use

regulations pose a particularly serious risk to religious freedom because "[t]he right to assemble for worship is at the very core of the free exercise of religion," and "[c]hurches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements." 146 Cong. Rec. 16698 (2000). Importantly, Congress specifically described "[t]he right to build, buy, or rent such a space [a]s an indispensable adjunct of the core First Amendment right to assemble for religious purposes." *Id*.

To protect this right, RLUIPA imposes several limitations, divided into two categories, on government land-use restrictions relevant here. *First*, the "Substantial Burden Clause" uses the same fundamental test that is employed by Texas RFRA. *Second*, under the category of "Discrimination and exclusion," the "Equal Terms Clause" provides that "No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." RLUIPA § 2000cc(b)(1). *Third*, the "Nondiscrimination Clause" prohibits any government from "impos[ing] or implement[ing] a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." RLUIPA § 2000cc(b)(2). *Finally*, the "Unreasonable Limitation Clause" prohibits governments from "impos[ing] or implement[ing] a land use regulation that . . . unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." RLUIPA § 2000cc(b)(3)(B). Congress specifically provided that RLUIPA "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution." RLUIPA § 2000cc-3(g). Plaintiffs violate all four of these restrictions.

a. RLUIPA applies to this litigation.

RLUIPA applies to this litigation for the same reasons that Texas RFRA applies to this litigation as discussed in Section IV.B.1.a. above. Furthermore, while the application of RLUIPA to restrictive covenants has yet to be litigated, the United States Court of Appeals for the Eleventh Circuit itself raised the issue that RLUIPA may apply to restrictive covenants. *Konikov v. Orange County*, 410 F.3d 1317, 1324 n.3 (11th Cir. 2005) (noting that a restrictive covenant "originating from" a neighborhood homeowners' association "might constitute a constitutional violation and substantial burden in violation of RLUIPA").

b. Plaintiffs have violated RLUIPA's Substantial Burden Clause.

RLUIPA's Substantial Burden Clause has the same basic test that Texas RFRA uses. This clause provides that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution – (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest." RLUIPA § 2000cc(a)(1). Because this test is the same as the test used by Texas RFRA, and because Plaintiffs have substantially burdened Defendants' religious exercise, do not have a compelling interest to do so, and have not used the least restrictive means, Defendants are entitled to prevail under the Substantial Burden Clause of RLUIPA.

c. Plaintiffs have violated RLUIPA's Equal Terms Clause.

RLUIPA's Equal Terms Clause prohibits the government from "treat[ing] the Church on terms that are less than equal to the terms on which it treats similarly situated nonreligious institutions." *The Elijah Grp. v. City of Leon Valley, Tex.*, 643 F.3d 419, 424 (5th Cir. 2011).

The test is one of strict liability: if a restrictive covenant treats a church on less than equal terms than a similarly situated nonreligious institution, Plaintiffs have no opportunity to offer a justification for the disparity. *See, e.g.*, *id.* (finding a violation of RLUIPA's Equal Terms Clause after determining that a church was treated on less than equal terms with a nonreligious institution, without any analysis of possible justification); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 269 (3d Cir. 2007) (same). The only concern of the Equal Terms Clause is whether "secular and religious institutions are treated equally." *Third Church of Christ, Scientist v. City of New York*, 626 F.3d 667, 671 (2d Cir. 2010); *see also Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1172 (9th Cir. 2011) ("Both because the language of the equal terms provision does not allow for it, and because it would violate the 'broad construction' provision, we cannot accept the notion that a 'compelling governmental interest' is an exception to the equal terms provision, or that the church has the burden of proving a 'substantial burden' under the equal terms provision.").

In the present case, Plaintiffs have acknowledged that while there are non-residential uses within the HOA, no enforcement action has been brought against any such uses. *See supra* Section II.I.; Exhibit I at 14:12-15:5, 17:17-17:20; Exhibit J at 58:1-61:16; Exhibit O at 55:10-55:13. The only enforcement action brought under the residential use provision of the restrictive covenants has been against Defendants in violation of RLUIPA's Equal Terms Clause.

d. Plaintiffs have violated RLUIPA's Nondiscrimination and Unreasonable Limitation Clauses.

Because of Plaintiffs' refusal to enforce their restrictive covenants against anyone except Defendants, their enforcement is both discriminatory against Defendants' religious exercise and unreasonable, in violation of RLUIPA.

3. The HOA's claims are barred because the HOA has arbitrarily singled out Defendants.

The Texas Property Code also independently forecloses the HOA's claims. Under that statute, a homeowners' association may not enforce a restrictive covenant if the decision to do so is arbitrary, capricious, or discriminatory. *See* Tex. Prop. Code § 202.004(a). The Property Code prevents homeowners' associations from enforcing a restrictive covenant against a property owner when the association has not enforced similar alleged violations against others in the neighborhood. *Leake v. Campbell*, 352 S.W.3d 180, 190 (Tex. App.—Fort Worth 2011, no pet.) (enforcement against one owner but not others committing similar alleged violations is evidence of arbitrariness); *Nolan v. Hunter*, 2013 Tex. App. LEXIS 11990, at *12-14 (Tex. App.—San Antonio Sept. 25, 2013, no pet.) (homeowners association's opposition to a fence was arbitrary, capricious, or discriminatory when there were other similar fences in the neighborhood).

Here, this lawsuit is the only enforcement action the HOA has ever brought since it was formed in 1979. *See supra* Section II.I.; Exhibit I at 14:12-15:5, 17:17-17:20; Exhibit J at 58:1-61:16; Exhibit O at 55:10-55:13. Yet, there are numerous non-residential uses of property in the neighborhood that the HOA has never attempted to stop. *See supra* Section II.I. As catalogued above, non-residential uses such as an eldercare facility, a residential care facility, swimming camps, a court reporting business, a music school, a used car business, and others have occurred freely in the neighborhood. *See supra* Section II.I. Only after Schneider took over the board and the Schneider Board implemented a "new policy" in early 2014 did the HOA decide to get involved in this suit. *See supra* Section II.G. The "new policy," however, has not been enforced against anyone other than Defendants. The HOA's action can only be described as arbitrary as a

matter of law, and thus the Gothelfs are entitled to granted summary judgment for this reason alone.

4. Plaintiffs have waived and/or abandoned their right to enforce the residential use restriction because the HOA has never attempted to prevent other non-residential uses of homes within the Highlands of McKamy.

The common law doctrine of waiver precludes both Plaintiffs' claims as a matter of law. Until this case, the HOA had never filed suit to enforce its residential-only restrictive covenant since its founding in 1979. *See supra* Section II.I.; Exhibit I at 14:12-15:5, 17:17-17:20; Exhibit J at 58:1-61:16; Exhibit O at 55:10-55:13. The HOA has had this hands-off approach for years despite the existence of numerous non-residential uses of property in the neighborhood. *See supra* Section II.I. As a result of the HOA's inaction, Article VI.1 of the restrictive covenants has therefore been waived and is no longer enforceable.

"A party asserting waiver of a restrictive covenant or deed restriction must prove . . . that the party seeking enforcement of the covenant or restriction has acquiesced in such substantial violations to amount to abandonment of the covenant or restriction." *Loch 'N' Green Vill. Section Two Homeowners Ass'n v. Murtaugh*, 2013 Tex. App. LEXIS 6613, at *14 (Tex. App.—Fort Worth May 30, 2013, no pet.). "Among the factors to be considered are the number, nature and severity of the existing violations, any prior acts of enforcement, and whether it is still possible to realize to a substantial degree the benefits sought to be obtained by way of the covenants." *Wildwood Civic Ass'n v. Martin*, 1995 Tex. App. LEXIS 1575, at *13 (Tex. App.—Houston [1st Dist.] July 13, 1995, no writ). "Evidence showing multiple violations of a restrictive covenant in a subdivision is more than sufficient to uphold a trial court's finding that the restrictive covenant has been abandoned." *Glenwood Acres Landowners Ass'n v. Alvis*, 2007

Tex. App. LEXIS 6060, at *7 (Tex. App.—Tyler July 31, 2007, no pet.).[14] "Waiver may be proved by a party's express renunciation of an actually or constructively known right or by silence or inaction for so long a period as to show an intention to yield the known right." *Loch 'N' Green*, 2013 Tex. App. LEXIS 6613, at *14 (citation omitted). "[L]ong-term acquiescence in violations of . . . restrictions" supports granting summary judgment on the issue of waiver. *Id.* at *20-22 (granting summary judgment on waiver based on failure to attempt to enforce restrictions over a period of years).

Courts commonly find that a provision has been waived where, as here, there are multiple similar uses coupled with a history of non-enforcement. *See, e.g.*:

- *Loch 'N' Green*, 2013 Tex. App. LEXIS 6613, at *12-22 (granting summary judgment on waiver where association had not sought to enforce other alleged violations);

- *Glenwood Acres*, 2007 Tex. App. LEXIS 6060, at *5-7 (finding waiver where association had not enforced mobile home prohibition against others);

- *Lay v. Whelan*, 2004 Tex. App. LEXIS 5777, at *12-17 (Tex. App.—Austin July 1, 2004, pet. denied) (finding waiver where there were similar alleged violations and no evidence of prior enforcement actions);

- *Wildwood*, 1995 Tex. App. LEXIS 1575, at *11-15 (finding waiver where association had not enforced maintenance fee provision against another homeowner);

- *Foxwood Homeowners Ass'n v. Ricles*, 673 S.W.2d 376, 379-80 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) (affirming finding of waiver based on "similar violations" and where association was "inconsistent" in its enforcement efforts);

[14] When a provision of a restrictive covenant has been waived, the waiver also applies in suits by individual homeowners—such as Schneider—in addition to applying to suits by homeowners' associations. *See Cowling v. Colligan*, 312 S.W.2d 943, 945 (Tex. 1958) (holding in suit brought by individual homeowners that courts can refuse to enforce residential-only restrictive covenants based on "acquiescence of the lot owners . . . of substantial violations within the restricted area"); *Baker v. Brackeen*, 354 S.W.2d 660, 663 (Tex. Civ. App.—Amarillo 1962, no writ) (finding waiver in suit brought by individual homeowners). This makes sense, as the doctrine of waiver would be rendered a nullity if homeowners' associations could evade its application merely by having an individual property owner bring a suit in his own name.

- *Baker*, 354 S.W.2d at 663 (finding waiver of residential-only provision where homeowners had not sought to enforce provision in the past).

Here, the numerous instances of non-residential uses of property that the HOA has never brought enforcement actions to stop—both current and past—in the Highlands of McKamy are more than sufficient to find that the residential-only restrictive covenant has been waived. As catalogued above, non-residential uses such as an eldercare facility, a residential care facility, swimming camps, a court reporting business, a music school, a used car business, and others have occurred freely in the neighborhood. *See supra* Section II.I. The residential-only provision has been waived as a matter of law, and the Court should grant Defendants summary judgment, dismissing all claims by both Plaintiffs, for this additional reason.

5. The doctrine of laches bars the HOA's claims.

The HOA's claims further fail under the common law defense of laches. A defendant establishes the defense of laches by showing "(1) unreasonable delay in asserting one's legal or equitable rights and (2) a good faith change of position by another to his detriment because of the delay." *Houston Lighting & Power Co. v. City of Wharton*, 101 S.W.3d 633, 639 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

The HOA unreasonably delayed in asserting its legal rights in this case. As noted above, the same Congregation activities that the HOA now challenges have taken place with the HOA's knowledge at homes within the Highlands of McKamy since February 2011. Exhibit C at 33:20-34:14; Exhibit D at 77:12-78:11; Exhibit G (deposition notice to HOA); Exhibit H (HOA's designation of Carolyn Peadon as representative to testify for the HOA); Exhibit I at 6:3-6:9, 9:3-10:2, 22:1-13 (Ms. Peadon's testimony). The HOA did not take a position against these activities until October 14, 2013, well over two and half years after the Congregation's activities first started in the Highlands of McKamy. Exhibit F at 55:7-55:22; Exhibit CC (October 14,

2013 letter). And the HOA did not take legal steps against the Congregation until March 2014, over three years after the Congregation began having its prayer and study activities at homes within the Highlands of McKamy. *See* Petition in Intervention, filed March 13, 2014. This delay is unreasonable as a matter of law. *See Henke v. Fuller*, 2005 Tex. App. LEXIS 3141, at *8-12 (Tex. App.—San Antonio Apr. 27, 2005, no pet.).

In good faith reliance on the HOA's non-opposition, the Gothelfs purchased a home in the Highlands of McKamy, in part so that the Congregation and its members could use it to practice their religion. Exhibit D at 89:17-90:15. Moreover, in the months before the HOA first opposed the Congregation's activities, some of the Congregation's members purchased property in the area with the good faith belief that the Congregation would be able to have its activities in the neighborhood. Exhibit D at 90:16-90:24. The Gothelfs, the Congregation, and some of its members have thus all changed their position to their detriment in good faith reliance on the HOA's non-opposition. The defense of laches therefore precludes the HOA's claims as a matter of law. *See, e.g.*, *Huntington Park Condo. Ass'n v. Van Wayman*, 2008 Tex. App. LEXIS 1480, at *11-13 (Tex. App.—Corpus Christi Feb. 28, 2008, no pet.) (affirming trial court's application of laches where association did not sue until years after homeowner acted); *Henke*, 2005 Tex. App. LEXIS 3141, at *8-12 (suit barred by laches where plaintiffs had not objected to defendant's prior similar use of property within the neighborhood and defendant had spent money in good faith reliance on this non-opposition).

6. The doctrine of unclean hands bars Schneider's claims.

"Under the doctrine of unclean hands, a court may refuse to grant equitable relief to a plaintiff who has been guilty of unlawful or inequitable conduct regarding the issue in dispute." *Lazy M Ranch v. TXI Operations, LP*, 978 S.W.2d 678, 683 (Tex. App.—Austin 1998, pet. denied); *see also Jamison v. Allen*, 377 S.W.3d 819, 823-24 (Tex. App.—Dallas 2012, no pet.)

(holding that homeowners could not sue to enforce a restrictive covenant when they were in violation of the same covenant); *Foxwood Homeowners Ass'n v. Ricles*, 673 S.W.2d 376, 379 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) ("Injunctive relief is an equitable remedy and the complaining party must come into court with clean hands . . .").

Schneider is himself in violation of the residential-only restrictive covenant that forms the basis of his claims. He admits that he has a shed in his yard, and the residential-only restrictive covenant unambiguously prohibits sheds. Exhibit B at Article VI.1; Exhibit J at 23:21-25:13; Exhibit S. Schneider therefore comes to the Court with unclean hands. It is unconscionable to permit Schneider to sue on a covenant provision when he is indisputably in violation of that same covenant. *See Jamison*, 377 S.W.3d at 823-24. The Court should hold that the doctrine of unclean hands bars Schneider's claims as a matter of law.

C. Defendants are Entitled to Summary Judgment on Certain of Plaintiffs' Claims for Additional Independent Reasons

Independent of their affirmative defenses, Defendants are also entitled to summary judgment on certain of Plaintiffs' claims for other independent reasons.

1. Plaintiffs' claims for a permanent injunction fail as a matter of law to the extent Plaintiffs seek an injunction that would prohibit the Congregation from meeting at 7103 Mumford Court.

The HOA brings a claim for a permanent injunction to prohibit the Gothelfs from permitting the Congregation and its members to practice their religion at 7103 Mumford Court. *See* Petition in Intervention, filed March 13, 2014, at 10-12. Schneider brings the same claim against the Gothelfs and the Congregation. *See* First Amended Petition, filed April 2, 2014, at 13-16. These claims fail as a matter of law based upon an application of the proper factors to the undisputed facts here.

A permanent injunction is an equitable remedy that can only be issued by the Court, not a jury. *Priest v. Tex. Animal Health Comm'n.*, 780 S.W.2d 874, 876 (Tex. App.—Dallas 1989, no writ); *see also* Tex. R. Civ. P. 683. Among other requirements, in order to issue an injunction the Court must balance the equities to determine whether the harm from not issuing the injunction would exceed the harm from issuing the injunction. *Reliant Hosp. Partners, LLC v. Cornerstone Healthcare Grp. Holdings, Inc.*, 374 S.W.3d 488, 503 (Tex. App.—Dallas 2012, pet. denied). Even where a defendant has committed a primary violation of some kind, the Court should still refuse to enjoin the conduct if the balancing of the equities weighs against doing so. *See, e.g.*, *Storey v. Cent. Hide & Rendering Co.*, 226 S.W.2d 615, 617-19 (Tex. 1950) (balancing equities to conclude that operation of jury-found nuisance could not be enjoined where there was nowhere the defendant could have moved and an injunction would have put the defendant out of business); *Georg v. Animal Def. League*, 231 S.W.2d 807, 808-11 (Tex. Civ. App.—San Antonio 1950, writ ref'd n.r.e.) (affirming denial of injunctive relief even where jury had found for plaintiff as to some claims); *see also Cowling v. Colligan*, 312 S.W.2d 943, 946 (Tex. 1958) (holding that court can refuse to enforce a residential-only restriction by injunction if the decision arises from a "balancing of equities" or of "relative hardships" where the harm from the injunction would be significantly greater than the harm from declining to enjoin). Moreover, where—as here—a homeowners' association attempts to enforce a restrictive covenant only after a significant period of inaction, the prior inaction should factor into the Court's balancing of the equities analysis. *Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682, 691 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (balancing of equities weighed against injunction where homeowners' association delayed taking action).

Issuing the permanent injunction requested by Plaintiffs would effectively end community religious life for the approximately thirty families in the Congregation. *See supra* Section II.E.; Exhibit C at 31:4-33:19; Exhibit D at 41:15-42:7, 66:1-68:4. If the Gothelfs are enjoined from hosting the Congregation's prayer and study activities at 7103 Mumford Court, the Congregation's members would have nowhere else to go within walking distance of their homes and would therefore not be able to pray in community as their religious beliefs require. *Id.* Plus, Congregation members have purchased homes within walking distance of 7103 Mumford Court in reliance on the ability to practice their religious beliefs there. Exhibit D at 90:16-90:24. The ability to worship in community is of central importance to Orthodox Jews. Thus, the permanent injunction that Plaintiffs propose would bring about severe and irreparable harm to the religious liberty of the Congregation and its members.

In contrast to ending community religious life for thirty families, Plaintiffs complain of such "harms" as having to stop to let blind people and mothers cross the street, barking dogs, and street parking issues (which the Congregation has already taken steps to minimize). *See supra* Section II.F.; Exhibit C at 30:2-31:3. Also, as explained above, the HOA permits multiple non-residential uses of property in the neighborhood (including Schneider's own violation of the restrictive covenants) and delayed taking action regarding the Congregation for years. *See supra* Sections II.G., II.H., II.I., IV.B.

Accordingly, no balancing of the equities could possibly favor Plaintiffs to such a degree that would justify an injunction prohibiting the Congregation from meeting at 7103 Mumford Court. As the HOA's counsel has acknowledged,[15] even should the Court be of the opinion that some of the alleged harms from the Congregation's presence in the Highlands of McKamy are

[15] Exhibit V at 1-2 (HOA's counsel acknowledging that even if the use of 7103 Mumford Court were found to violate the restrictive covenants, an injunction from the Court could either "order[] the owner to stop using the residence as a synagogue ***or order[] the owner to limit/restrict certain aspects of the activities***" (emphasis added)).

significant, the Court could issue an injunction that is narrowly tailored towards those specific harms without taking the drastic and harsh step of enjoining the Congregation's religious practice altogether. Therefore, Defendants are entitled to summary judgment on Plaintiffs' claims for a permanent injunction to the extent Plaintiffs seek to prevent the Congregation from meeting at 7103 Mumford Court.

2. No evidence supports Schneider's claim for statutory damages under Tex. Prop. Code § 202.004(c).

Schneider purports to seek damages under § 202.004(c) of the Texas Property Code, even though he is an individual homeowner, not a homeowners' association. *See* First Amended Petition, filed April 2, 2014, at ¶¶ 1, 7-8, 42-43 & page 19. Under both the plain language of the statute and the unanimous case law interpreting the statute, however, individual homeowners may not recover damages.

Section 202.004 of the Texas Property Code applies only to associations or their designated representatives, not to individual homeowners:

> ENFORCEMENT OF RESTRICTIVE COVENANTS. (a) An exercise of discretionary authority by a property owners' association or other representative designated by an owner of real property concerning a restrictive covenant is presumed reasonable unless the court determines by a preponderance of the evidence that the exercise of discretionary authority was arbitrary, capricious, or discriminatory.
> (b) A property owners' association or other representative designated by an owner of real property may initiate, defend, or intervene in litigation or an administrative proceeding affecting the enforcement of a restrictive covenant or the protection, preservation, or operation of the property covered by the dedicatory instrument.
> (c) A court may assess civil damages for the violation of a restrictive covenant in an amount not to exceed $200 for each day of the violation.

Tex. Prop. Code § 202.004.

Thus, courts unanimously hold that § 202.004 does not permit individual homeowners to recover damages:

- *Quinn v. Harris*, 1999 WL 125470 (Tex. App.—Austin Mar. 11, 1999, pet. denied). The court in *Quinn* held that the plain language of the statute precludes individual homeowners from recovery and therefore reversed the trial court's award of statutory damages. *Id.* at *7-8. The court also observed that permitting individual homeowners to recover under § 202.004 would lead to absurd results that the legislature could not have intended: "If appellees' interpretation of section 202.004(c) were followed, each individual homeowner in a subdivision could recover up to $200 per day from the time she filed suit until the judgment was signed. We do not believe the legislature intended this result." *Id.* at *8.

- *Hawkins v. Walker*, 233 S.W.3d 380 (Tex. App.—Fort Worth 2007, no pet.). In *Hawkins*, the court reversed the trial court's judgment for homeowners under § 202.004, and held that the statute unambiguously precludes homeowners from seeking recovery. *Id.* at 388-90, 403. The court held that the "exclusive language [of the statute] evidences a legislative intent that only property owners' associations or the designated representative of a property owner may sue for civil damages under the statute. Individual property owners are not identified in the statute as persons or entities who are authorized to bring suit under the statute." *Id.* at 389.

- *Jacks v. Bobo*, 2009 WL 2356277 (Tex. App.—Tyler July 31, 2009, pet. denied). Relying on *Hawkins* and *Quinn*, the court held that "[b]oth courts that have addressed the question have held that an individual owner bringing suit on his own behalf and not as a representative designated by the other owners may not recover civil damages under subsection 202.004(c)." *Id.* at *7. Accordingly, the court held that the trial judge erred in concluding that an individual homeowner can bring suit to recover civil damages under § 202.004(c). *Id.* at *7-8.

- *Tanglewood Homes Ass'n, Inc. v. Feldman*, 436 S.W.3d 48 (Tex. App.—Houston [14th Dist.] 2014, pet. filed). The court in *Tanglewood* affirmed the trial court's rejection of plaintiffs' request for damages under § 202.004, holding that individual homeowners may not recover damages under the statute. *Id.* at 75-76.

In fact, Defendants are not aware of a single case that permitted individual homeowners to recover damages under § 202.004(c). Defendants are thus entitled to summary judgment on this claim by Schneider as a matter of law.

3. No evidence supports Schneider's claim based on his home's alleged loss of value.

Without identifying any particular cause of action under which he sues, Schneider asserts that he is entitled to $50,000 because Defendants have allegedly caused his home to decline in

value. *See* First Amended Petition, filed April 2, 2014, at 18. This claim is meritless and should be summarily dismissed because Schneider has no evidence that his home has lost value.

The only record "evidence" that facially relates to the value of Schneider's home is Schneider's response to Defendants' Request for Disclosure and his own deposition testimony. Exhibit D at 20:13-23:20 (Schneider's deposition testimony); Exhibit LL (response to Request for Disclosure). Those sources reflect that the alleged reduction in value to Schneider's home is based solely on his own conjecture without regard to market conditions and that he has no training and no expertise in real estate valuation. *Id.* The Texas Supreme Court prohibits this kind of testimony as to a home's value, requiring instead that a property owner's testimony be based on market data rather than another speculative measure. *Natural Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 155 (Tex. 2012). "An owner's conclusory or speculative testimony will not support a judgment." *Id.* at 158. Schneider makes no effort to base his claim on market conditions. Thus, there is no evidence that Schneider could present at trial in support of his claim, and Defendants are entitled to summary judgment on this claim as a matter of law.

V. PRAYER

WHEREFORE, Defendants respectfully request that the Court:

(1) grant their Motion for Summary Judgment in its entirety;

(2) enter an order dismissing all of Plaintiffs' claims with prejudice;

(3) enter an order directing that Plaintiffs take nothing by way of their claims against Defendants;

(4) grant Defendants all other and further relief to which they may be entitled; and

(5) Defendants further request that, upon dismissing Plaintiffs' claims, the Court receive evidence and argument regarding Defendants' entitlement to recover attorneys' fees and expenses at a later time.

Dated: January 9, 2015

Respectfully Submitted,

HAYNES AND BOONE, LLP

By: /s/ Matthew A. McGee

2323 Victory Avenue, Suite 700
Dallas, TX 75219
JEREMY D. KERNODLE
Tex. Bar No.: 24032618
T: (214) 651-5159
F: (214) 200-0693
jeremy.kernodle@haynesboone.com
MATTHEW A. MCGEE
Tex. Bar No.: 24062527
T: (214) 651-5103
F: (214) 200-0585
matt.mcgee@haynesboone.com
PHONG T. TRAN
Tex. Bar No.: 24093273
T: (214) 651-5126
F: (214) 200-0588
phong.tran@haynesboone.com

ATTORNEYS FOR CONGREGATION TORAS CHAIM, INC.

THE LIBERTY INSTITUTE

By: /s/ Justin Butterfield

2001 West Plano Parkway, Suite 1600
Plano, TX 75075
KELLY J. SHACKELFORD
Tex. Bar No. 18070950
kshackelford@libertyinstitute.org
JEFFREY C. MATEER
Tex. Bar No. 13185320
jmateer@libertyinstitute.org
JUSTIN BUTTERFIELD
Tex. Bar No. 24062642
jbutterfield@libertyinstitute.org
T: (972) 941-4444
F: (972) 941-4457

ATTORNEYS FOR CONGREGATION TORAS CHAIM, INC., JUDITH D. GOTHELF, AND MARK B. GOTHELF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served in accordance with the Texas Rules of Civil Procedure, on this 9th day of January 2015, upon the following:

David R. Schneider, Pro Se
7035 Mumford
Dallas, TX 75252
T: (214) 315-5531
Email:DavidRaySchneider@gmail.com

David A. Surratt
Riddle & Williams, P.C.
3710 Rawlins Street, Suite 1400
Dallas, TX 75219
T: (214) 760-6766
Email:dsurratt@riddleandwilliams.com
Attorney for Intervenor Highlands of McKamy IV and V Community Improvement Association

/s/ Matthew A. McGee
Matthew A. McGee

EXHIBIT C

CAUSE NO. DC-15-02336

CITY OF DALLAS	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
v.	§	DALLAS COUNTY, TEXAS
	§	
MARK B. GOTHELF, JUDITH D. GOTHELF, and CONGREGATION TORAS CHAIM, INC. DBA CONGREGATION TORAS CHAIM,	§	116th JUDICIAL DISTRICT COURT
	§	
Defendants.	§	

DECLARATION OF RABBI JORDAN YAAKOV RICH

1. My name is Rabbi Jordan Yaakov Rich. I am more than twenty-one years of age, under no legal disability, and am capable of making this declaration. I have personal knowledge of the facts stated herein, except to the extent I have noted otherwise, and such facts are true and correct to the best of my knowledge.

2. Congregation Toras Chaim ("CTC") is a small, Orthodox Jewish congregation that meets at 7103 Mumford Court in Collin County, Texas. This address serves as CTC's principal office in Texas.

3. Most meetings of CTC have been between ten and fifteen attendees. Sabbath services may have approximately twenty-five attendees.

4. Because of the CTC members' sincerely-held religious beliefs (1) they must walk on the Sabbath; and (2) they cannot carry anything on the Sabbath, including their children, outside a designated area known as an eruv. Thus, only locations within walking distance and inside the North Dallas Eruv are suitable sites for CTC to meet.

5. CTC had, for several years, met at my home about two blocks away from the present meeting place of CTC. Last year, Mark Gothelf bought a house at 7103 Mumford Court in Dallas, Texas (the "Mumford Home").

6. My son, Avrohom Moshe Rich, lives in the Mumford Home full-time. CTC uses the Mumford Home as a place of worship part of the time.

7. All of the members of CTC live in close proximity to the Mumford Home in Collin County.

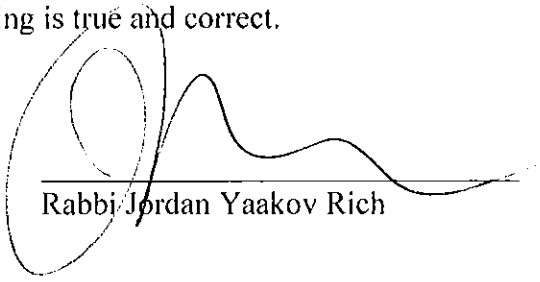
8. It is my understanding based on the previous lawsuit, *In re David R. Schneider*, Cause No. 429-04998-2013 (429th Judicial District Court of Collin County, Texas), that the neighbors that have complained about CTC to the City of Dallas, including David R. Schneider, also live in close proximity to the Mumford Home in Collin County.

9. While we have tried to avoid litigation, the City of Dallas has required us to meet a number of unnecessary requirements that would cost us approximately $200,000 to implement. If we are required to make these changes, CTC will no longer be able to meet at 7103 Mumford Court. Therefore, a substantial part of the events at issue in these claims occurred in Collin County.

10. While the City of Dallas has requested that we install thirteen parking spaces at the Mumford Home, even if the money were available, there would be no space to add thirteen parking spaces.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 6th day of April, 2015.



Rabbi Jordan Yaakov Rich