16-2060

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LIVINGSTON CHRISTIAN SCHOOLS,

Plaintiff-Appellant,

-v-

GENOA CHARTER TOWNSHIP

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

No. 15-cv-12793 (Steeh, J., presiding)

DEFENDANT-APPELLEE'S BRIEF

*** * * Oral Argument Requested * * ***

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[1] Appellee is satisfied with Appellant's statement of jurisdiction and standard of review. See Fed. R. App. P. 28(b).

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellee requests that the Court entertain oral argument to enable counsel for the respective parties to address any outstanding issues regarding the facts or the applicable legal principles.

COUNTER-STATEMENT OF ISSUE FOR REVIEW

I. Did the District Court err in granting summary judgment of Appellant's claim under the Religious Land Use and Institutionalized Persons Act?

Appellant says "yes"

Appellee says "no"

District Court said "no"

INTRODUCTION

Livingston Christian Schools ("the School") claims that Genoa Charter Township ("the Township") violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA") by virtue of the denial of a special use permit for which the Brighton Church of the Nazarene ("the Church") applied.[2]

COUNTER-STATEMENT OF CASE

I. FACTUAL BACKGROUND

Over two decades ago, the Church purchased property in the Township's suburban residential zoning district. (***Complaint***, R. 1, Pg. ID 4). In 1991, the Church obtained a special use permit to conduct its worship services and ministries on the property. (***Id***.). Thereafter, the Church constructed a 27,620 square foot facility in various phases. (***Id***.). As the Church grew, so too did neighbors' problems. The Church's conduct and neglect led neighbors to express their need for privacy, for

[2] The School also claimed that the Township violated the First Amendment and the Fourteenth Amendment. As discussed in more detail below, the School abandoned these claims on appeal.

protection of their neighborhood, and ultimately for "protection from the [C]hurch." (***07-22-2013 Minutes***, R. 11-3, Pg. ID 377).

Around August 2000, the Church applied for a special use permit to add a 6,960 square foot pavilion-like building for use as a skate park. (***08-28-2000 Minutes***, R. 11-4, Pg. ID 380-384). The Church acknowledged that outdoor skating in its parking lot kept neighbors awake at night. (***Id***.). The Church viewed the skate park as a means to "keep things under control" and regulate the hours during which youth utilized the Church's facility. (***Id***.). The Church advised that youth would be permitted to use the skate park for skateboarding and in-line skating, perhaps volleyball games and picnics in the future, at no charge. (***Id***.). The Church denied any other planned activities for the skate park. (***Id***.). The Township Planning Commission recommended a special use permit subject to conditions, one of which required the Church to close the skate park by 10:00 p.m. (***Id***.). The Township Board approved a special use permit with the recommended conditions.

Neighbors voiced complaints about the skate park. They complained that the Church used the skate park for a commercial purpose. (***04-14-2003 Minutes***, R. 11-5, Pg. ID 398-401). They also

complained that the skate park created problems—including noise, loitering, and littering—"at all times of the day and night." (***Id***.). They stressed the need for additional supervision, as well as enforcement of curfews and existing rules, and inquired whether the Church developed guidelines for ensuring the privacy of neighbors. (***Id***.). The Church acknowledged that it closed the skate park at 12:00 a.m., rather than 10:00 p.m. (***Id***.). Although the Church previously informed the Township Planning Commission that it would not charge a fee, the Church admitted that it charged a fee—youth paid a fee to use the skate park unless they attended Saturday service, and others paid a fee to rent the skate park. (***Id***.; ***05-12-2003 Minutes***, R. 11-6, Pg. ID 413-416).

The Church met with neighbors to discuss "how the [C]hurch can be a better neighbor." (***Id***.). The Church agreed to plant a tree barrier to protect the privacy of neighbors, hire a security guard and install a security camera to monitor the activity in the parking lot, outline rules for the skate park in the liability waiver form, erect signs to inform youth that outdoor skating is prohibited, and turn off the outdoor lighting at 11:00 p.m. (***Id***.). Following the meeting, neighbors continued to voice complaints regarding the skate park. They complained that the Church

expanded the hours of operation without approval and failed to resolve the noise issue or enforce the prohibition against outdoor skating. (***Id***.).

Around April 2003, the Church applied for another special use permit to add a 17,600 square foot building for use as a sanctuary. (***04-14-2003 Minutes***, R. 11-5, Pg. ID 398-401). The Church advised that it planned to convert the existing sanctuary into Sunday school classrooms. (***Id***.). A neighbor expressed his belief that since the Church failed to meet the conditions of the special use permit approved in 2000, it should not be granted an additional special use permit. (***05-12-2003 Minutes***, R. 11-6, Pg. ID 415). The Township Planning Commission recommended a special use permit subject to conditions regarding the skate park. (***Id***.). The recommended conditions required the Church to improve and maintain the landscape near the east property line, set forth rules for the skate park in the liability waiver form, turn off the outdoor lighting at 11:00 p.m., erect at least two signs to inform youth that outdoor skating is prohibited, cease commercial activity, and provide a security guard to patrol the parking lot during the evening. (***Id***.). The Township Board approved a special use permit with the recommended conditions.

In September 2007, the Township received a letter from the homeowners of a neighboring subdivision, which documented continued problems with the skate park:

> It is with much frustration that we must report that not only has the Church failed to adhere to the guidelines . . . with respect to the [skate park], but [has] created other problems as well. On most occasions there is no supervision at all and the skating/biking goes on well past the 10 p.m. curfew. The activities are not confined to [the] indoor facility as mandated in the approval minutes, and in fact, have created a situation in which there is under-age drinking, loud and disturbing music, loud cars and motorcycles often driving recklessly and the attendees spend much of their time loitering on the [subdivision] property, resulting in littering and most recently, attempts at breaking into vehicles parked on Aljoann Road.
>
> As stated previously, the [subdivision] homeowners are concerned, and furthermore worried about the safety of our families and property due to the lack of supervision and care from the [Church].

(***Letter***, R. 11-7, Pg. ID 419-420).

* * *

For nine years preceding the commencement of this litigation, the School operated its educational institution in a 26,247 square foot facility situated on 1.6 acres in Pinckney. (***Complaint***, R. 1, Pg. ID 4; ***Agreement***, R. 35-2, Pg. ID 994-1007). The School purchased the Pinckney facility from the Roman Catholic Diocese of Lansing ("the

Diocese") for $1,400,000.00 in 2007. (***Id***.). The land contract executed by the School and the Diocese fully matured in August 2012, at which time the balance of the purchase price ($1,365,750.00) became due and payable. (***01-08-2013 Correspondence***, R. 35-3, Pg. ID 1008-1009). The School failed to make the required payment. (***Id***.).

During a meeting in November 2012, the School reached a consensus that remaining in the Pinckney facility on a long-term basis would result in dissolution of the School due to a lack of enrollment and income. (***Panning Declaration***, R. 43-2, Pg. ID 1246, 1249; ***11-19-2012 Minutes***, R. 35-4, Pg. ID 1010-1011). While the School acknowledged the need to be candid and forthright with students' families about the School's "financial difficulties," the School wanted to "present a positive spin" on a melancholic situation—perhaps announcement of a new location for the School. (***Id***.).

In January 2013, the Diocese sought to enforce the terms of the land contract. (***01-08-2013 Correspondence***, R. 35-3, Pg. ID 1008-1009). Five months later, the Diocese and the School met to discuss options. (***05-23-2013 and 06-04-2013 Correspondence***, R. 35-5, Pg. ID 1012-1013). In order to give the School an opportunity to consider whether to refinance

or negotiate a buyout, the Diocese proposed to forbear pursuit of a default under the land contract if the School paid $5,000.00 per month in the interim. (***06-10-2013 Correspondence***, R. 35-5, Pg. ID 1021-1022). The School accepted the Diocese's proposal, after which the School and the Diocese negotiated and executed a forbearance agreement. (***Agreement***, R. 35-6, Pg. ID 1034-1038).

* * *

As of July 2013, the Church parking lot remained "a nuisance." (***07-22-2013 Minutes***, R. 11-8, Pg. ID 421-425). Neighbors complained that the Church failed to resolve the noise issue. During the day, the Church allowed the parking lot to be used as a testing site for various licenses—driver licenses, commercial licenses, and motorcycle licenses—without approval. (***Id***.; ***09-09-2013 Minutes***, R. 11-9, Pg. ID 426-429). At night, youth blared music and drag raced in the parking lot. (***07-22-2013 Minutes***, R. 11-8, Pg. ID 421-425). Neighbors also complained that the Church failed to honor its obligation to improve and maintain the landscape. (***Id***.).

The Church applied for a special use permit to add a 16,120 square foot building for use as classrooms and a gymnasium. (***Id***.). The Church

advised of its intent to use the classrooms for Sunday school. (***Id***.). When asked by the Township Planning Commission, the Church expressly disclaimed any intent to use the classrooms for a private school. (***Id***.). The Township Planning Commission stressed the need for the Church to mitigate "annoyances to the neighbors." (***Id***.). The Township Planning Commission directed the Church to submit a revised site plan that addressed the landscape issues, as well as a revised environmental impact assessment that reflected resolution of the problems regarding noise and misuse of the property in the evening. (***Id***.).

After the public hearing, the Township Planning Commission received a letter from a neighbor that detailed serious problems with the Church's operations:

> It is very common for people, especially teenagers to be doing things in the parking lot at any time during the day, evening, and most annoying, the night.
>
> When I first moved in, it worried me, especially at night, because I would see the shadowed figures of two or three or more sitting or standing in the row of trees directly across from my house, looking straight at me (usually but not always teens). Believe me, it was strange, as if I was being watched. It was common for them to be smoking (don't know if it was cigarettes, pot, or what, though I have found injection needles that at least might be for harder drugs discarded on the bank and even on my lawn through the years, so someone is shooting up something).

It is also not at all uncommon to experience loud noises from the parking lot. Sometimes it's the result of an activity going on at the church, something I can live with on occasion, though I wish they would not hold outdoor events there, as happens, usually on a Saturday or Sunday. What is more bothersome is the noise during the middle of the night when young adults are racing their car engines (why I have no idea, though I suppose that's what teens do), turning up their radios or doing other things that literally wake me up from my sleep.

A more serious concern is that children of various ages (and some are very young) occasionally come running down the small bank, emerging suddenly from the trees and out onto the street. Sometimes they come down on bicycles and even occasionally on skateboards. This is a serious danger. If something is not done to prevent this, there will be a child run over by an automobile. I'm not saying maybe here. I'm saying it will happen. The only question is when. I am not looking forward to the day I have to say I told you so.

Others in the association have mentioned problems with trespassing, but I have not knowingly had those, though I do get annoyed when members of the church park on the street and leave behind one kind of garbage or another. . . .

So now, after years of problems with the church as it is, it wants to push the envelope even more. This most certainly increases the friction and dangers. I am not at all against whatever good-hearted intentions the church has for all of its youth activities, but it is not being good-hearted if it assumes those of us living near it should be willing to suffer because it already has outgrown its location and now wants to outgrow it even more. If something isn't put in place to placate those living near the church property, we're heading for a mess. And, by the way, I'm an easy-going person not at all prone to complaining, so imagine what others are thinking.

(***Letter***, R. 11-10, Pg. ID 431-432).

The Township Planning Commission later recommended a special use permit subject to the conditions of the special use permit issued in 2003, among others. (***09-09-2013 Minutes***, R. 11-9, Pg. ID 426-429). The Township Board approved a special use permit with the recommended conditions. Thereafter, the Church "totally reworked" the site plan without notifying—let alone obtaining approval from—the Township. (***08-04-2015 Article***, R. 11-11, Pg. ID 433-434). The Church delayed completion of the landscape plan because it "wanted to get [its] building done first." (***Id***.).

* * *

Around November 2013, the School met with the Church to discuss the prospect of creating a partnership. (***11-25-2013 Minutes***, R. 35-7, Pg. ID 1039-1040). According to the School, the Church expressed a willingness to lease portions of the Church's facility to the School. (***12-12-2013 Minutes***, R. 35-8, Pg. ID 1041).

In January 2014, the School failed to make the $5,000.00 monthly payment required by the forbearance agreement. (***01-08-2014 Correspondence***, R. 35-9, Pg. ID 1053).

In May 2014, the School met to discuss financing for the purchase of the Pinckney facility. (***05-19-2014 Minutes***, R. 35-12, Pg. ID 1059-1060).

In September 2014, the School met to discuss the anticipated relocation to the Church's facility. (***09-17-2014 Minutes***, R. 35-15, Pg. ID 1066-1067). The School agreed that it could not disclose the relocation to the Church's facility until it completed the process of attempting to purchase the Pinckney facility. (***Id***.).

In October 2014, the School and the Diocese amended their forbearance agreement to give the School time to arrange for financing to purchase the Pinckney facility. (***Amendment***, R. 35-18, Pg. ID 1070-1071).

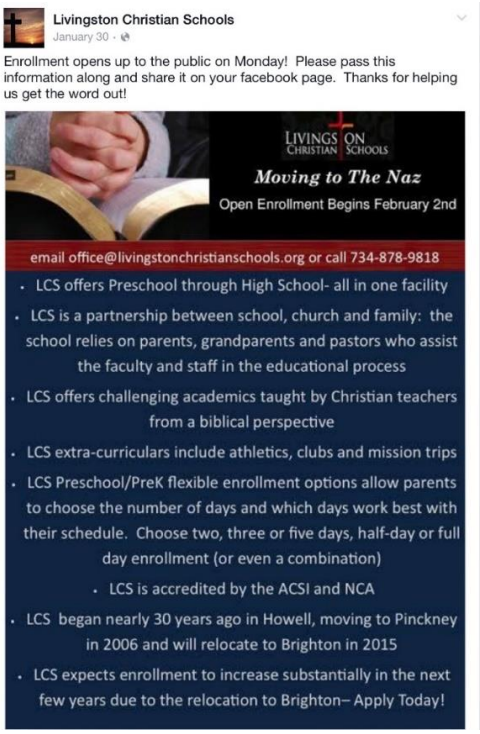
In October 2014, the School voted to sign a lease agreement with the Church. (***10-21-2014 Minutes***, R. 35-17, Pg. ID 1069). In November 2014, the School held a meeting to inform students and parents of the anticipated relocation to the Church's facility. The School advised that it decided to relocate due to "three consecutive years of decreasing enrollment . . . ." (***Meeting Recap***, R. 13-4, Pg. ID 539). The School noted that even if the relocation to the Church's facility did not immediately

increase enrollment, the School "would still be in a better financial position . . . ." (***Id***.). The School assured students and parents that the School would remain "totally independent of [C]hurch governance." (***Id***.).

Several weeks later, the Church and the School entered into a lease agreement. (***Agreement***, R. 1-3, Pg. ID 27-36). The Church agreed to lease a portion of its facility to the School for a five-year period to commence in June 2015. (***Id***.). The School pre-paid the Church $70,000.00 in rent, announced and advertised relocation to the Church's facility, and opened enrollment for students despite the absence of a special use permit. (***Panning Declaration***, R. 4-2, Pg. ID 140-141; ***Burwell Declaration***, R. 4-15, Pg. ID 239; ***04-27-2015 Minutes***, R. 12, Pg. ID 447; ***03-06-2015 Article***, R. 12-1, Pg. ID 451). Four months before the Church even applied for a special use permit, the School posted the following photograph on its social media page:

Three months before the Church applied for a special use permit, the School posted the following photograph on its social media page:

Two months before the Church applied for a special use permit, the School posted the following enrollment brochure on its social media page:



The Township learned about the School's anticipated relocation to the Church's facility "through the grapevine." (***VanMarter Deposition***, R. 43-7, Pg. ID 1315-1316). The Township advised the Church of the need to apply for a special use permit. (***Id***.).

In January 2015, the School offered the Diocese $300,000.00 for the Pinckney facility. (***01-06-2015 Correspondence***, R. 35-21, Pg. ID 1076-1077). The Diocese characterized the School's offer as "disingenuous," as the Diocese learned of the School's plans to vacate the Pinckney facility after the 2014-2015 academic year and relocate to the Church's facility before the 2015-2016 academic year. (***02-20-2015 Correspondence***, R. 35-21, Pg. ID 1078). The Diocese asked the School to advise of its intentions regarding vacation of the Pinckney facility and satisfaction of the debt to the Diocese. (***Id***.). The School characterized the plan to relocate to the Church's facility as a "back-up plan" even though the School had already entered into a lease agreement with the Church, pre-paid the Church $70,000.00 in rent, announced and advertised relocation to the Church's facility, and opened enrollment for students. (***02-16-2015 Correspondence***, R. 35-21, Pg. ID 1083; ***Agreement***, R. 1-3, Pg. ID 27-36; ***Panning Declaration***, R. 4-2, Pg. ID 140-141; ***Burwell***

Declaration, R. 4-15, Pg. ID 239; ***04-27-15 Minutes***, R. 12, Pg. ID 447; ***03-06-2015 Article***, R. 12-1, Pg. ID 451). The School advised the Diocese of its commitment to its $300,000.00 offer. (***02-16-2015 Correspondence***, R. 35-21, Pg. ID 1083).

The Diocese accepted the School's $300,000.00 offer for the Pinckney facility. In March 2015, the Diocese and the School executed a purchase agreement. (***Agreement***, R. 35-24, Pg. ID 1093-1099).

* * *

In March 2015, the Church applied for an amendment to the special use permit issued in 2013. (***Application***, R. 4-5, Pg. ID 163-164). The Church proposed that its special use permit be amended to allow the School's use of designated parts of its facility for the School's educational institution. (***Impact Assessment***, R. 12-3, Pg. ID 457-461). The site plan approved in 2013 accompanied the Church's application. (***04-27-2015 Minutes***, R. 12, Pg. ID 442).

Initial review of the Church's submittal raised concerns. The Brighton Area Fire Authority advised that the Church's site plan failed to meet the Township's fire prevention code for site and building accessibility. (***03-30-2015 Correspondence***, R. 12-4, Pg. ID 462-463).

LSL Planning, the Township's planning and zoning consultant, also detailed several concerns with the Church's application. (***03-31-2015 Correspondence***, R. 12-5, Pg. ID 464-468). Further, the Church submitted the site plan to the Livingston County Building Department for review. However, the Michigan Department of Licensing and Regulatory Affairs is generally responsible for such review under the Construction of School Buildings Act. See M.C.L. § 388.851b. Two weeks after the Church applied for an amendment to its special use permit, the architect for the Church's expansion project contacted a Livingston County Building Department official. (***04-01-2015 and 04-02-2015 Correspondence***, R. 18-2, Pg. ID 607-608). The architect stated that he met with the contractor and the Church representative "regarding the use of the addition," denied that "there will be [a] school going in this addition," and opined that the Livingston County Building Department had jurisdiction. (***Id***.). The official informed the architect that the Livingston County Building Department had heard three conflicting statements regarding the use of the addition (all within a matter of a week), contacted the Michigan Department of Licensing and Regulatory Affairs based on documentation that the addition would be used for a

school, and intended to withhold a Certificate of Occupancy pending resolution of the issue. (***Id***.). At some point thereafter, the Church submitted the site plan to the Michigan Department of Licensing and Regulatory Affairs for review. (***08-14-2015 Correspondence***, R. 18-3, Pg. ID 609).

The first public hearing regarding the Church's application to amend its special use permit took place in April 2015. The Church acknowledged that it failed to fully implement its landscape plan and advised that it expected to complete the landscape plan within ninety days. (***04-27-2015 Minutes***, R. 12, Pg. ID 442-450). The Township Planning Commission expressed concerns regarding traffic. (***Id***.). The Church acknowledged that it is a "traffic generator." (***Id***.). Although Brighton Road "is a major artery," the Church indicated that "there would be no busses." (***Id***.). Neighbors and residents also expressed concerns regarding traffic. Their concerns consisted of the following:

- Traffic on Brighton Road is "horrid." The intersection is "crazy" and "very dangerous." The traffic signal at the intersection is "difficult." On top of that, the intersection lacks a pedestrian signal.

- They fear for the safety of their children. The area had already been the scene of several accidents involving pedestrians and bicyclists.

- Three schools in the area—Hornung Elementary School with 400 students, Maltby Middle School with 900 students, and Brighton High School with 1200 students—use Brighton Road. A new school may open at the church next door, and another new school may open in a nearby facility. The new schools will also use Brighton Road. Many of the schools do not use busses to transport students. When Brighton Road is busy, traffic diverts onto residential streets. There will never be a dead zone during which they will be able to get out of their neighborhood. As it stands, they have to turn right in order to turn left.

- The likelihood of traffic jams and the impact of emissions on the environment are causes for concern. The wear and tear on Brighton Road is also a cause for concern.

(***Id***.). At least one neighbor expressed some of the above-referenced concerns before the public hearing in April 2015. (***07-22-2013 Minutes***, R. 11-8, Pg. ID 421-425). Neighbors also expressed concerns regarding the history of problems with the Church. Their concerns consisted of the following:

- They experienced problems "every day" for over a decade. As the Church grew, so did their problems.

- The Church's failure to satisfy conditions intended to address the problems became "a pattern."

- The Church failed to maintain and improve the landscape.

- The Church failed to implement measures to ensure their privacy and safety.
- The Church failed to control the noise and youth activity in the parking lot, which woke them up at night.
- The Church allowed illegal uses of the property.
- The activity on the Church's property, which "sometimes [persisted for] 24 hours a day," became "too much."
- They experienced difficulty selling their homes, as people "do not want to live near this activity."
- The Church offered "endless lies" and "contradictions" instead of concrete solutions.

(***04-27-2015 Minutes***, R. 12, Pg. ID 442-450). The Township Planning Commission tabled the Church's application for an amendment to its special use permit and directed the Church to submit a traffic study, along with a site circulation plan. (***Id.***; ***05-05-2015 Correspondence***, R. 12-7, Pg. ID 470-471). The Church retained Boss Engineering ("Boss") to perform a traffic study and develop a site circulation plan.

After the first public hearing, the Church submitted Boss's traffic study and site circulation plan. (***Id.***). At the recommendation of Tetra Tech, the Township Planning Commission requested a more detailed

traffic study and site circulation plan that accounted for the School's projected growth to 250 students and 35 staff members. (***Id***.).

The second public hearing regarding the Church's application to amend its special use permit took place in May 2015. Neighbors again addressed problems with the Church. One neighbor pointed out that the Church had yet to resolve the landscape issues or the noise issues. (***05-11-2015 Minutes***, R. 12-8, Pg. ID 474-475). Another neighbor stated that the Church had "not been honoring [its] promises and guarantees to [its] neighbors since 2000." (***Id***.). Neighbors also raised traffic concerns. (***Id***.). The Church admitted that it failed to submit the traffic study and site circulation plan requested after the first public hearing. (***Id***.). The Township Planning Commission again tabled the Church's application for an amendment to its special use permit. (***Id***.).

After the second public hearing, the Church submitted Boss's revised traffic study and site circulation plan. Tetra Tech commented that the revised traffic study and site circulation plan contained improper analysis, reflected inconsistency, and otherwise remained deficient in a number of material respects. (***06-03-2015 Correspondence***, R. 13, Pg. ID 481-482). The Township Planning Commission instructed the Church

to submit a revised traffic study and site circulation plan that addressed Tetra Tech's comments and concerns.

* * *

The School and KeyBank National Association, which approved the School's request for a $300,000.00 loan, executed a mortgage agreement in May 2015. (***Mortgage***, R. 35-25, Pg. ID 1100-1113). The School and the Diocese executed a memorandum of recapture of proceeds on sale of property, as well as a termination of land contract and mutual release. (***Memo***, R. 35-26, Pg. ID 1114-1116; ***Release***, R. 35-27, Pg. ID 1117-1119).

In May 2015, the School met to discuss a proposal from Light of the World Academy ("the Academy"), a formerly faith-based educational institution that decided to secularize and operate a publicly-funded charter school. (***05-10-2015 Minutes***, R. 35-28, Pg. ID 1120-1121). The Academy proposed to lease or buy the Pinckney facility from the School. (***Id***.).

* * *

The third public hearing regarding the Church's application to amend its special use permit took place in June 2015. A neighbor

expressed concern "with the increased traffic on Brighton Road and possible cut-through traffic in his subdivision." (***06-08-2015 Minutes***, R. 13-1, Pg. ID 483-485). He noted that if people are unable to turn left out of the Church parking lot, they will turn around at the entrance to his subdivision and cause congestion in the left turn lane. (***Id***.). Another neighbor expressed disbelief that the proposed amendment to the Church's special use permit made it "this far because the traffic in this area is so bad." (***Id***.). The Township Planning Commission tabled the Church's application for an amendment to its special use permit.

After the third public hearing, the Church submitted Boss's second revised traffic study and site circulation plan. (***Traffic Study***, R. 4-6, Pg. ID 168-200). Boss concluded that if the School held classes from 8:00 a.m. to 3:00 p.m. to avoid overlapping peaks with the nearby high school (which held classes from 7:25 a.m. to 2:25 p.m.) and the nearby middle school (which held classes from 8:30 a.m. to 3:30 p.m.), it would minimally impact traffic on Brighton Road. (***Id***., Pg. ID 170, 172). Boss concluded that the School would significantly impact traffic in the Church parking lot, which provided a single driveway for access to and from Brighton Road. (***Id***., Pg. ID 172). Boss recommended that the

Church (1) develop traffic control and pedestrian safety guidelines to which students and parents must "strictly" adhere; and (2) implement traffic control directors. (***Id***., Pg. ID 197, 199).

A memorandum from Fleis & VandenBrink Engineering ("F & V") accompanied the second revised traffic study and site circulation plan. (***Memo***, R. 4-6, Pg. ID 181-186). F & V advised that "[w]ithout proper on-site facilities, off-site traffic operations may be interrupted." (***Id***., Pg. ID 181). F & V recommended that the Church (1) create a one-way, counter-clockwise circulation with 325 feet of sidewalk for a student loading zone; (2) physically separate the student loading zone from the parking lot; (3) add signage and pavement markings to designate the student loading zone; (4) allocate staff to direct traffic into the student loading zone and to restrict access to the parking lot; (5) require students to enter their parents' vehicles on the passenger side; (6) hold an informational meeting and distribute a pamphlet to notify parents and staff members of the student loading zone, the circulation pattern, and the proposed traffic operation plan; and (7) instruct parents and staff members that students must be accompanied by an adult between the parking lot and the building used for the School's educational institution. (***Id***., Pg. ID 183).

Tetra Tech reviewed the second revised traffic study and site circulation plan. (***07-07-2015 Correspondence***, R. 4-8, Pg. ID 208-209). Tetra Tech commented on the need for additional traffic management provisions and temporary measures to separate students awaiting pick-up from parking lot traffic. (***Id***.). Tetra Tech also stressed the importance of providing traffic control directors with proper instructions. (***Id***.).

LSL Planning, the Township's planning and zoning consultant, reviewed the Church's application for an amendment to its special use permit. (***07-08-2015 Correspondence***, R. 4-7, Pg. ID 202-206). LSL Planning concluded that because the proposed amendment is a "major amendment," a new application for a special use permit would be required. (***Id***.; see also ***Ordinance***, R. 11-2, Pg. ID 372-373).

Before the fourth and final public hearing regarding the Church's application to amend its special use permit, the Township Planning Commission received a number of letter from neighbors. (***Letters***, R. 13-2, Pg. ID 488-532). They expressed concerns regarding traffic and public safety, adverse impacts on Brighton Road, landscape, noise, loitering and littering, illegal activity around their neighborhood, lack of privacy, and negative impacts on property values due to increased traffic and use of

the Church's facility. (***Id***.). They opposed the School's use of the Church's facility. (***Id***.).

The fourth public hearing regarding the Church's application took place in July 2015. The Township Planning Commission recommended that the Township Board approve a special use permit to include the School as an accessory use, subject to conditions. (***07-13-2015 Minutes***, R. 13-3, Pg. ID 533-535). At the Township Board's next meeting, however, a motion to approve a special use permit failed by a 4-3 vote. (***07-20-2015 Minutes***, R. 1-9, Pg. ID 90-91).

The School met and decided that it would keep its educational institution open, even if doing so meant that it would need to return to the Pinckney facility. (***07-27-2015 Minutes***, R. 35-30, Pg. ID 1125). The School also discussed three other potential properties in the Brighton area. (***Id***.).

In August 2015, the Township Board formally denied a special use permit in a 4-3 vote. The Township Board identified the following grounds for its denial:

> 1) The expanded use of the [C]hurch to include [the School] will exacerbate the existing and historical negative impacts of the [C]hurch on the adjacent neighborhood. The need for active traffic management and restricted

egress from the facility provides that the site cannot accommodate the use properly and it increases the potential for negative off-site traffic impacts.

2) The proposed use is not consistent with the following goals of the Master Plan:

   a) "Achieve well-planned, safe, balanced, and pleasant residential neighborhoods."

   b) "Promote harmonious and organized development consistent with adjacent land uses."

3) The [proposed use] is contrary to the statement of purpose for the Single Family Residential Zoning in regard to [Sections] 3.01.02(e) and (g) and (i) as follows:

   a) 3.01.02(e) – "Discourage any use of land which may overburden public infrastructure and services and the areas natural resources."

   b) 3.01.02(g) – "Discourage land use which would generate excessive traffic on residential streets."

   c) 3.01.02(i) – "Prohibit any land use that would substantially interfere with the development, utilization or continuation of single family dwellings in the District."

5) The proposed use significantly alters the existing or intended character of the general vicinity.

6) The need for traffic management personnel and the potential off-site impacts created by forced right-turn only exiting will be detrimental to the natural environment, public health, safety or welfare by reason of excessive production of traffic. The proposed "D" condition on exit from Church grounds during pick-up

and drop-off provides a detriment to the existing walking path, other neighborhoods/buildings for turn-around, in addition to an impact on neighborhood travel including traffic from Worden Lake, Pine Creek, and travelers from the west towards Brighton. In addition, current conditions of this area also include the primary hub for the Brighton Area Schools, [including Hornung Elementary School, Maltby Intermediate School, Scranton Middle School, and Brighton High School]. While not all students attending Scranton will flow through Brighton Road, Scranton was not taken into consideration. It is reasonable to suggest parents with students at both schools drop off at the High School and then proceed to Scranton which starts school at 7:50 a.m.

7) The potential negative impacts to be created by the use will not be sufficiently mitigated by the conditions of the proposal.

8) The . . . Church has a history of non-compliance with past site plan and ordinance requirements resulting in a negative impact on surrounding neighborhoods, notably found in Planning Commission minutes from August 28, 2000, May 12, 2003, July 22, 2013 and April 2015 through current. Historical and consistent behavior suggests further non-compliance from [the Church]. Specific issues include the following:

   a) The [Church] has not yet fully implemented the project approved by the Township in 2013. Of particular note are the installation of additional landscaping and parking lot islands;

   b) The [Church] has continued to allow a driver's testing operation, despite being informed that it is an illegal nonconforming use of the property; and

> c) The [Church] has demonstrated disregard for existing approvals by making significant changes to [its] building design contrary to the approved 2013 plans and without necessary permits or approvals to do so.

(***08-03-2015 Minutes***, R. 43-18, Pg. ID 1410-1413).

Following the Township Board's formal denial of a special use permit, the Church sent the School an apology. (***08-05-2015 e-Mail***, R. 35-31, Pg. ID 1126). The Church acknowledged that it made a lot of mistakes in an effort to move things along in a quick fashion, "which probably caused [it] to get sloppy." (***Id***.). As to the lease agreement, the Church offered to refund the School's money because the Church did not want to take advantage of the situation. (***Id***.).

More than two weeks *after* the Township Board denied a special use permit, the School entered into an agreement to lease the Pinckney facility to the Academy. (***Lease***, R. 35-33, Pg. ID 1129-1137). The School decided to relocate to Whitmore Lake Middle School. (***08-12-2015 Minutes***, R. 35-32, Pg. ID 1127-1128).

Around the same time, the Church withdrew its application to the State for site plan review. (***08-14-2015 Correspondence***, R. 18-3, Pg. ID 609). The Church's withdrawal of its application for site plan review

prompted additional discussions between the Church's architect and the Livingston County Building Department official, who raised a number of concerns and advised that a certificate of occupancy could not be issued absent State approval. (***08-25-2015 and 08-26-2015 Correspondence***, R. 18-4, Pg. ID 610-612).

II. BASIS FOR DECISION TO RELOCATE

The School gave inconsistent reasons why it desired to relocate to the Church's facility, none of which involved the School's above-discussed financial difficulties. The School's reasons depended on the audience.

In its original complaint, the School told the Court that the "size constraints of its current facility" necessitated relocation to a larger facility. (***Complaint***, R. 1, Pg. ID 4). In its motion for temporary restraining order and preliminary injunction, the School told the Court that its "growing enrollment" necessitated relocation to a larger facility. (***Motion***, R. 4, Pg. ID 112). In its *sworn* affidavit, the School again told the Court that its "growing enrollment" necessitated relocation to a larger facility. (***Panning Declaration***, R. 4-2, Pg. ID 139). Further, the School told the Court that its ability to maintain even its current

enrollment is "entirely dependent" on relocation to a larger facility. (***Id***. at 140).

Statements made by both the Church and the School belied the School's claim that its "growing enrollment" necessitated relocation to a larger facility. When the Church applied for an amendment to its special use permit, it informed the Township Planning Commission that the School "*wants*" or "*hope[s]*" to grow. (***04-27-2015 Minutes***, R. 12, Pg. ID 442, 444). The School informed students and parents that it decided to relocate due to "*decreasing enrollment*." (***Meeting Recap***, R. 13-4, Pg. ID 539).

The School's enrollment statistics also belied the School's claim that its "growing enrollment" necessitated relocation to a larger facility. According to the School's treasurer, the School enrolled 139 students for the 2014-2015 academic year. (***Panning Declaration***, R. 4-2, Pg. ID 140). Data collected by the Center for Educational Performance and Information ("CEPI"), a division of the Michigan Department of Education, indicates that the School enrolled 138 students for the 2014-

2015 academic year.[3] The CEPI data further indicates that the School enrolled 154 students in the 2013-2014 academic year,[4] 158 students in the 2012-2013 academic year,[5] 189 students in the 2011-2012 academic year,[6] 166 students in the 2010-2011 academic year,[7] and 160 students in the 2009-2010 academic year.[8] CEPI's data is relatively close to the

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[3] Center for Educational Performance and Information, *2014-2015 Nonpublic School Data*, http://www.michigan.gov/documents/cepi/15-CEPI-06_NonPublics_496243_7.xlsx (last accessed February 22, 2016). The School's data is recorded in No. 137.

[4] Center for Educational Performance and Information, *2013-2014 Nonpublic School Data*, https://www.michigan.gov/documents/cepi/2013-14_nonpublic_students_468824_7.xls (last accessed February 22, 2016). The School's data is recorded in No. 143.

[5] Center for Educational Performance and Information, *2012-2013 Nonpublic School Data*, https://www.michigan.gov/documents/cepi/2012-13_nonpublic_students_434558_7.xls (last accessed February 22, 2016). The School's data is record in No. 57.

[6] Center for Educational Performance and Information, *2011-2012 Nonpublic School Data*, https://www.michigan.gov/documents/cepi/2011-12_nonpublic_students_396636_7.xls (last accessed February 22, 2016). The School's data is recorded in No. 354.

[7] Center for Educational Performance and Information, *2010-2011 Nonpublic School Data*, https://www.michigan.gov/documents/cepi/2010-11_nonpublic_students_380514_7.xls (last accessed February 22, 2016). The School's data is recorded in No. 152.

[8] Center for Educational Performance and Information, *2009-2010 Nonpublic School Data*, https://www.michigan.gov/documents/cepi/2009-

data collected by the National Center for Education Statistics ("NCES"), a division of the United States Department of Education. NCES's available data indicates that the School enrolled 158 students in the 2013-2014 academic year, 193 students in the 2011-2012 academic year, and 160 students in the 2009-2010 academic year. (***NCES Data***, R. 13-5, Pg. ID 540-541). The School's own data also reveals a steadily declining enrollment from the 2010-2011 academic year to the 2015-2016 academic year. (***Student Enrollment History***, R. 35-34, Pg. ID 1138).

Contrary to the School's claim that the Pinckney facility could not accommodate its "current enrollment of less than 160 students" (***Motion***, R. 4, Pg. ID 127), the enrollment statistics show that the School operated in the Pinckney facility with upwards of 190 students during the 2011-2012 academic year. The Academy planned to move into the Pinckney facility with 200 students. See Light of the World Academy, http://www.lightoftheworldacademy.org/Our%20School (last accessed November 10, 2016). And after the July 2015 meeting of the Township Board, the School acknowledged that it had the ability to return to the

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10_nonpublic_students_334602_7.xls (last accessed February 22, 2016). The School's data is recorded in No. 703.

Pinckney facility. (***07-27-2015 Minutes***, R. 35-30, Pg. ID 1125). Indeed, the School's own administrator stated:

> The [S]chool is going to open. I can definitively tell you that. It will open on time. . . . ***We still have the Pinckney building available because we own it***.

(***07-29-2015 Article***, R. 13-8, Pg. ID 546).

Confronted with its enrollment statistics and contradictory statements, the School backpedaled and reversed course. The School acknowledged "enrollment decreases, including double digit enrollment [decreases]" between the 2013-2014 academic year and the 2014-2015 academic year, and came up with yet another reason why it needed to relocate to the Church's facility. (***Nast Declaration***, R. 16-1, Pg. ID 577). This time, the School hung its hat on the perceived appeal of the "centralized" and "populous" location of the Church's facility. (***Reply***, R. 16, Pg. ID 561; ***Nast Declaration***, R. 16-1, Pg. ID 577).[9] Shortly

[9] The Church's facility (7669 Brighton Road in Brighton) is really no more centralized than the Pinckney facility (550 East Hamburg Street in Pinckney), and central Livingston County is really no more accessible from the Church's facility than from the Pinckney facility. Perhaps the most centralized location in Livingston County is Howell City Hall (611 East Grand River Avenue in Howell). Livingston County, *Municipalities*, available at https://www.livgov.com/pages/municipalities.aspx (last accessed May 13, 2016). According to Google Maps, the Church's facility is approximately 10 miles from Howell City Hall (18-minute drive) and

thereafter, the School filed an amended complaint in which it removed its previous allegation that the "size constraints" of the Pinckney facility necessitated relocation to a larger facility. (***Complaint***, R. 1, Pg. ID 4; compare with ***Amended Complaint***, R. 23, Pg. ID 668). The School alleged that its inability to relocate to the Church's facility frustrated its mission to serve the "Livingston County community." (***Amended Complaint***, R. 23, Pg. ID 668). Yet the School's official website indicates that the School serves communities *all over southeast Michigan*—including communities in Washtenaw County, Oakland County, Ingham County, and Jackson County. Livingston Christian Schools, available at http://www.livingstonchristianschools.org/ (last accessed December 14, 2016). According to Google Maps, some of the above-referenced communities are quite a distance from Brighton. Jackson, as but one example, is approximately 54 miles from Brighton (a travel time of 53 minutes). Manchester, as another example, is approximately 43 miles from Brighton (a travel time of 44 minutes).

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the School's former facility is approximately 11 miles from Howell City Hall (17-minute drive). The Court may take judicial notice of the distances and travel times. *Nw. Airlines, Inc. v. Kent Cnty.*, 955 F.2d 1054, 1060 (6th Cir. 1992); *Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 288 F.3d 910, 915 (6th Cir. 2002).

III. PROCEDURAL HISTORY

The School filed a complaint against the Township on August 8, 2015. (***Complaint***, R. 1, Pg. ID 1-96). The School raised a RLUIPA claim.

The School filed a motion for temporary restraining order or preliminary injunction on August 12, 2015. (***Motion***, R. 4, Pg. ID 100-243; ***Response***, R. 11-13, Pg. ID 267-548; ***Reply***, R. 16, Pg. ID 557-579; ***Surreply and Supplement***, R. 18, Pg. ID 583-612). The District Court denied the School's motion for temporary restraining order or preliminary injunction on September 15, 2015. (***Order***, R. 22, Pg. ID 635-663).

The School filed an amended complaint against the Township on September 15, 2015. (***Amended Complaint***, R. 23, Pg. ID 664-688). The School revised the RLUIPA claim and added a First Amendment claim and a Fourteenth Amendment claim.

The Township filed a motion for summary judgment on March 7, 2016. (***Motion***, R. 35, Pg. ID 904-1138; ***Response***, R. 43, Pg. ID 1159-1457; ***Reply***, R. 45, Pg. ID 1459-1495). The District Court granted the Township's motion for summary judgment on June 30, 2016. (***Order***, R.

47, Pg. ID 1498-1521; ***Judgment***, R. 48, Pg. ID 1522). The School filed a notice of appeal on July 21, 2016. (***Notice***, R. 49, Pg. ID 1523-1552).

SUMMARY OF COUNTER-ARGUMENT

The School waives the First Amendment claim and the Fourteenth Amendment claim. As to the RLUIPA claim, the School fails to establish that the Township's denial of a special use permit placed a substantial burden on its religious exercise. The Township did not place substantial pressure on the School to violate its religious beliefs. Nor did the Township effectively bar use of the Church's facility for religious exercise. And at the time of the Township's denial of a special use permit, the School admittedly had a ready alternative. The District Court's judgment should be affirmed.

COUNTER-ARGUMENT

I. THE SCHOOL WAIVED THE FIRST AMENDMENT AND THE FOURTEENTH AMENDMENT CLAIMS.

In addition to a RLUIPA claim, the School raised a First Amendment claim and a Fourteenth Amendment claim. The parties briefed all of the claims at the summary judgment stage. On appeal, however, the School addresses only the RLUIPA claim. As such, the First

Amendment claim and the Fourteenth Amendment claim are waived. *Ahlers v. Schebil*, 188 F.3d 365, 374 (6th Cir. 1999); *Ewolski v. City of Brunswick*, 287 F.3d 492, 516-17 (6th Cir. 2002); *Dillery v. City of Sandusky*, 398 F.3d 562, 569 (6th Cir. 2005).

II. THE SCHOOL FAILED TO MEET THE SUBSTANTIAL BURDEN REQUIREMENT FOR THE RLUIPA CLAIM.

Congress enacted RLUIPA, which is codified at 42 U.S.C. § 2000cc, after the Supreme Court invalidated RFRA as applied to state and local government. *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005). RLUIPA borrows elements from RFRA, but the former is "less sweeping in scope" than the latter. *Sossamon v. Texas*, 131 S. Ct. 1651, 1656 (2011). RLUIPA targets two areas, one of which is the regulation of land use. *Cutter*, 544 U.S. at 715; *Sossamon*, 131 S. Ct. at 1656. The general rule regarding the regulation of land use is set forth in § 2000cc(a)(1):

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

> (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1)(A)-(B). For purposes of the general rule, the term "religious exercise" encompasses "any exercise of religion" and includes the use or intended use of real property "for the purpose of religious exercise . . . ." 42 U.S.C. § 2000cc-5(7)(A); 42 U.S.C. § 2000cc-5(7)(B). The circumstances in which the general rule applies are enumerated in § 2000cc(a)(2). The general rule applies where, *inter alia*, "the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved." 42 U.S.C. § 2000cc(a)(2)(A)-(C). A "land use regulation" is a "a zoning or landmarking law, or the application of such a law, that limits or restricts [the School's] use or development of land . . . if the [School] has an ownership, leasehold, easement, servitude, or other property interest in the regulated land." 42 U.S.C. § 2000cc-5(5).

The School bears the burden of establishing that the Township's land use decision places a substantial burden on its exercise of religion. 42 U.S.C. § 2000cc-2(b). RLUIPA does not define "substantial burden."

Living Water Church of God v. Meridian Charter Twp., 258 Fed. Appx. 729, 733 (6th Cir. 2007). Congress has directed courts to interpret RLUIPA's substantial burden requirement in accordance with the Supreme Court's jurisprudence regarding the Free Exercise Clause of the First Amendment. *Id.* at 733, 736. In *Living Water*, this Court heeded Congress' directive and surveyed decisions in which the Supreme Court addressed the Free Exercise Clause's substantial burden requirement:

> [W]hile the Supreme Court generally has found that a government's action constituted a substantial burden on an individual's free exercise of religion when that action forced an individual to choose between following the precepts of her religion and forfeiting benefits or when the action in question placed substantial pressure on an adherent to modify his behavior and to violate his beliefs, it has found no substantial burden when, although the action encumbered the practice of religion, it did not pressure the individual to violate his or her religious beliefs.
>
> * * *
>
> We note . . . that [RLUIPA] requires . . . courts to walk a thin line. On one hand, RLUIPA's definition of religious exercise covers most any activity that is tied to a religious group's mission, and RLUIPA bars inquiry into whether a particular belief or practice is "central" to an individual's religion. . . . On the other hand, and in tension with this broader definition of religious exercise, Congress has cautioned that we are to interpret "substantial burden" in line with the Supreme Court's "free exercise" jurisprudence, which suggests that a "*substantial burden*" *is a difficult threshold to cross*. . . . Although RLUIPA assuredly protects religious institutions in their religious exercise, the statute's language indicates that

> it is not intended to operate as an outright exemption from land-use regulations.

Id. at 734, 736 (internal quotations, citations, and alterations omitted). This Court declined to "set a bright line test by which to 'measure' a substantial burden." *Id.* at 737. Instead, this Court adopted a framework in which it considered the following question:

> [T]hough the government action may make religious exercise more expensive or difficult, does the government action place substantial pressure on a religious institution to violate its religious beliefs or effectively bar a religious institution from using its property in the exercise of its religion?

Id. at 737, 739. This Court made several important observations. First, RLUIPA's substantial burden requirement is rendered meaningless if a proposed land use is immune from a land use regulation merely because it involves pursuit of a religious mission. *Id.* at 736. Second, the question is whether a land use regulation imposes a substantial burden "*now*—not five, ten or twenty years from now . . . ." *Id.* at 738 (emphasis in original). Third, inconvenience does not equate to a substantial burden. *Id.* at 739. Fourth, "additional expense and delay" does not equate to a substantial burden. *Id.* at 741. Fifth, consideration of matters outside a land use regulation does not establish that denial of a special use permit

substantially burdens the exercise of religion—even if consideration of such matters "could be said to be arbitrary." *Id.* at 741.

RLUIPA is designed to ensure that religious land uses are on "equal footing" with secular land uses. *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003). RLUIPA is not designed to "favor" religious land uses over secular land uses "in the form of an outright exemption" from zoning regulations. *Id.* "[N]o such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise." *Id.*; see also *Living Water*, 258 Fed. Appx. at 737. Suffice it to say that RLUIPA does not afford the School immunity from the Township's zoning ordinance "simply because the [School] . . . pursues a religious mission." *Id.* at 736; see also *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 96 (1st Cir. 2013).

A. The Township Board's Decision Did Not Effectively Bar Religious Exercise at the Church's Facility.

The School argues that the District Court addressed only half of the *Living Water* standard and failed to consider whether the Township effectively barred religious exercise at the Church's facility. However, the District Court incorporated by reference its analysis from its order

denying the School's motion for temporary restraining order and preliminary injunction (***Order***, R. 47, Pg. ID 1507), where the District Court stated:

> [The school] seeks to frame the issue in a limited fashion as it relates only to its leasehold interest in the property . . . . However, given that the *church* applied for the amended special use permit, the court cannot limit its inquiry to the [school's] leasehold interest. It is relevant that the township's decision does not bar the church from exercising its religious beliefs or using its property in furtherance of religious exercise. There has not been an absolute bar on religious exercise at the property.

(***Order***, R. 22, Pg. ID 656-57) (emphasis in original). That the Church, not the School, applied for the special use permit is a critical fact that appears to be lost on the School. Given the absence of any evidence that the Township effectively barred religious exercise at the Church's facility, the School must show that the Township coerced or placed substantial pressure on the School to violate or forego its religious beliefs. *Living Water*, 258 Fed. Appx. at 737, 739.

B. The Township Board's Decision Did Not Force the School to Violate or Forego Its Religious Beliefs.

When the Township denied a special use permit on August 3, 2015, the School still owned the Pinckney facility. When the School filed the original complaint on August 7, 2015, the School still owned the Pinckney

facility. Although the School claimed that its growing enrollment necessitated relocation to a larger facility, undisputed evidence proved otherwise and forced the School to acknowledge its declining enrollment. Given that the School previously operated in the Pinckney facility with a much larger enrollment than the expected enrollment for the 2015-2016 academic year, there is no question that the School had the ability to return to the Pinckney facility for the 2015-2016 academic year. Indeed, the School admitted that it had the ability to return to the Pinckney facility for the 2015-2016 academic year.

But then the School leased the Pinckney facility to the Academy, notwithstanding the Township's denial of a special use permit and the School's knowledge that it would not be able to operate in the Church's facility for the 2015-2016 academic year. After the School failed to convince the Court to grant injunctive relief and allow the School to relocate to the Church's facility, the School decided to temporarily relocate to Whitmore Lake Middle School.

The current unavailability of the Pinckney facility is immaterial to the School's RLUIPA claim. The Pinckney facility remained available when the School filed the original complaint on August 7, 2015.

Notwithstanding the filing of the *amended* complaint on September 15, 2015, the filing of the original complaint on August 7, 2015 "fixe[d] the controversy . . . ." *Rodgers v. Hawley*, 14 Fed. Appx. 403, 408 (6th Cir. 2001); see also *R.K. ex rel. J.K. v. Bd. of Educ. of Scott Cnty.*, 494 Fed. Appx. 589, 595-96 (6th Cir. 2012). Thus, the Court must evaluate the School's RLUIPA claim on the facts that existed as of August 7, 2015. *Id.* The facts that came to light after August 7, 2015 are immaterial. *Id.* As demonstrated below, the facts that existed as of August 7, 2015 lend no support to the School's claim that the Township's denial of a special use permit placed a substantial burden on the School's religious exercise.

Even if the Court is inclined to consider the facts that came to light after August 7, 2015—such as the School's decision to lease the Pinckney facility to the Academy notwithstanding the Township's denial of a special use permit—the School's RLUIPA claim fares no better. RLUIPA provides relief for *government-imposed* burdens, not *self-created* burdens. See *Andon, L.L.C. v. City of Newport News*, 813 F.3d 510, 515 (4th Cir. 2016) (the plaintiffs failed to satisfy the "substantial burden" requirement because "the alleged burdens they sustained were not imposed by the [defendant's] action denying the variance, but were self-

imposed hardships"); *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007) (because the plaintiff "decided to . . . purchase the property outright after it knew that the permit would be denied, [the plaintiff] assumed the risk of having to sell the property and find an alternative site for its church should the denial be upheld"). The unavailability of the Pinckney facility is the product of poor planning and decision-making on the part of the School, which cannot be imputed to the Township.

In light of the foregoing, the question before the Court is relatively straightforward. Did the Township's denial of a special use permit place a substantial burden on the School's religious exercise despite the existence of a ready alternative (*viz.*, the Pinckney facility)? The short answer is no. The long answer is borne out by the cases discussed below, which compel the conclusion that the Township's denial of a special use permit did not offend RLUIPA.

This Court's decision in *Living Water* is instructive. A "small but growing" Christian congregation applied for a special use permit to construct a 10,925 square foot building on its property (a six-acre parcel in a residential zoning district) for use as a sanctuary and a daycare for

40 children. *Living Water*, 258 Fed. Appx. at 730. The township granted a special use permit, at which time the congregation advised the township of its future plans for the property. The township understood that the sanctuary and the daycare represented the first phase of the congregation's multi-phase building plan.

The congregation constructed and ultimately occupied the sanctuary and daycare. Six years later, the congregation applied for a special use permit to increase daycare enrollment to 72 children and to construct a 28,500 square foot building for use as a school. The township granted a special use permit, subject to certain conditions. Although the congregation initially sought approval for enrollment of 360 students, it voluntarily limited enrollment to 280 students at the township's request. Thereafter, the congregation immediately began to promote and raise money for construction of the school.

The following year, the township informed the congregation that the special use permit would expire in two months unless the congregation obtained an extension or began substantial construction of the school. The congregation timely requested an extension. The township denied the request for an extension, which forced the

congregation to apply for a new special use permit and cost the congregation its initial investment of roughly $35,000.00 – $40,000.00 in planning documents. *Id.* at 730-31. Before it applied for a new special use permit, the congregation met with the township to address concerns regarding intensity of use. *Id.* at 731. The congregation agreed to adhere to the previously-discussed conditions and to further limit enrollment from 280 students to 125 students.

Two years later, the congregation applied for an amendment to its special use permit. The congregation sought to construct a 34,989 square foot building for use as a church and school facility. The size of the proposed church and school facility exceeded the size of the previously-approved school by 6,489 square feet. On the building footprint, however, the size of the previously-approved school actually exceeded the size of the church and school facility by 1,500 square feet.

The proposed church and school facility complied with all regulations concerning use (pending approval of a special use permit for operation of a school on the property), location, height, appearance, lot coverage, and setback. *Living Water Church of God v. Meridian Charter Twp.*, 384 F. Supp. 2d 1123, 1128-29 (W.D. Mich. 2005). Multiple

departments—community planning and development, EMS and fire, police, engineering, county drain commission, and county road commission—reviewed and approved the proposed church and school facility. *Id.* at 1127. After two public hearings, the township planning commission recommended that the township board grant a special use permit for use of the property as a school. *Living Water*, 258 Fed. Appx. At 731. Additionally, the township planning commission recommended that the township board grant a special use permit for construction of a church and school facility. The township planning commission provided the township board with a packet of documents for review. The packet included a table of land-to-building ratios for schools, developed solely for review of the congregation's application for a special use permit. The table of land-to-building ratios contained unreliable and incomplete data, and neither the zoning ordinance nor the comprehensive development plan provided a standard for determining appropriate land-to-building ratios for schools. *Living Water*, 384 F. Supp. 2d at 1127-28.

The township board granted a special use permit for use of the property as a school, subject to certain conditions. *Living Water*, 258 Fed. Appx. at 732. However, the township board denied a special use permit

for construction of a church and school facility. The township board reasoned that the size of the proposed church and school facility—relative to the size of the property—was out of proportion to similarly situated facilities in the township and inconsistent with the standards for issuance of a special use permit.

The congregation previously operated the school, a leadership academy for boys, in a building 25 miles away from the church. Due to the difficulties of transporting students, the congregation moved the school to a building 2.5 miles away from the church. However, the size of the building failed to meet the school's needs and detracted from the school's enrollment. Therefore, the congregation moved the school to a nearby office building in the professional/office zoning district. The office building posed problems, too. The congregation incurred additional expenses due to the need to rent gym facilities. The off-site location presented difficulties with coordination of staff, who operated both the church and the school. Moreover, operation of a school did not fall among the permitted uses in the professional/office zoning district. According to evidence presented by the congregation, the building for which it obtained a special use permit did not fare much better:

> [The congregation's] membership [has] doubled in recent years. The current facility does not meet the needs of the current members, let alone provide space to add services and seating for new members. The sanctuary in the current facility is a multi-purpose room that is also used for daycare and for teen activities. At least once a week the sanctuary had to be broken down for the day care and then re-set up as a sanctuary for use on Sunday morning. . . . Due to the challenges of sharing this space, the daycare center was recently closed after operating for eight years. Half of the church staff is occupying offices in a rented facility off site. The church needs additional room for the children's program on Sundays and weekday evenings, weekly men's group meeting, weekly women's group meeting, for evening seminars for adults, for wood shop programs and other special events. . . . The same staff operates the church and the school, so it is difficult to coordinate the staff when they are not on the same property. . . . [The congregation] seeks to bring the school onto the church property and to share the building for church and school related functions. *[The congregation] has been losing current and potential members due to the frustration and confusion caused by the space constraints. [The congregation] is also limited in its ability to recruit students for the school because of the uncertainty about the future space and the current lack of programming associated with the lack of space*.

Living Water, 384 F. Supp. 2d at 1128-29.

The District Court concluded that the township's denial of a special use permit substantially burdened the congregation's exercise of religion and thus violated RLUIPA. *Id.* at 1131-36. This Court disagreed that the township's denial of a special use permit *substantially* burdened the congregation's exercise of religion:

> Our decision . . . will certainly result in additional expense and delay for [the congregation] . . . . But while we might well prefer to reach the result reached by the district court, . . . [t]he right RLUIPA protects is the right not to have land use regulations implemented in a manner that imposes a *substantial* burden on an institution's religious exercise. . . . The [township's] action . . . will require [the congregation] to incur increased expense to accomplish its goal of building a significantly larger church and school, and to endure increased inconvenience if it is not able to build a facility of the desired size. But nothing the township has done requires [the congregation] to violate or modify or forego its religious beliefs or precepts, or to choose between those beliefs and a benefit to which the church is entitled. . . .
>
> While we do not hesitate to say that the township's denial of the [special use permit] burdens [the congregation] to some degree, we cannot conclude that the denial imposes a substantial burden on the church's religious exercise. . . . We find no substantial burden because [the congregation] has failed to demonstrate that, without the [special use permit] . . . , it cannot carry out its church missions and ministries. Instead, [the congregation] has demonstrated only that it cannot operate its church on the *scale* it desires.
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> * * *
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> If the facts were different, *i.e.*, if [the congregation] proffered evidence showing that it cannot carry out its church missions and ministries due to the township's denial, we might have a different outcome. . . . But we cannot and will not speculate as to what may happen in the future. The facts before us do not support a conclusion that the township's denial of [the congregation's application for a special use permit] substantially burdens its religious exercise.

Id. at 741-42.

This case parallels *Living Water* to the extent that the burdens alleged by the School—which relate to inconvenience, additional expense or loss of anticipated income, and loss of current and potential enrollment—are virtually identical to the burdens identified by the congregation in *Living Water*. But this case also differs from *Living Water* in several notable respects. Unlike the congregation in *Living Water*, the School's enrollment had not increased (much less doubled) in the past few years. Unlike the congregation in *Living Water*, the School had not outgrown the Pinckney facility. Unlike the congregation in *Living Water*, the School had not needed to share space or rent additional space. And unlike the congregation in *Living Water*, the School had not been required to eliminate programs for students. If the burdens identified by the congregation in *Living Water* are not substantial—as this Court held—then by a parity of reason, the burdens identified by the School are not substantial.

The School contends that Living Water "is about scale," whereas this case "is about survival." (***Appeal Brief***, D. 25, Pg. ID 29). The School

cites its treasurer's second declaration[10] for the proposition that returning to the Pinckney facility would have resulted in dissolution. However, the declaration qualifies that statement—the declaration states that remaining at the Pinckney facility "on a *long-term basis*" would frustrate its desire to grow and ultimately result in dissolution. (***Panning Declaration***, R. 43-2, Pg. ID 1246, 1249). There is no evidence that the School would have been forced to close its doors for the 2015-2016 academic year had it returned to the Pinckney facility. And whether the Pinckney facility could have accommodated the School's desired growth is immaterial, as the question is whether the Township placed a substantial burden on the School's religious exercise *at the time of the Township's denial of a special use permit*—"not five, ten or twenty years from now." *Living Water*, 258 Fed. Appx. at 738. Moreover, the School's inability to operate its educational institution "on the *scale* it desires" does not equate to an inability to pursue or carry out its religious mission. *Id.* at 741-42 (emphasis in original).

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[10] The School has never explained the treasurer's first declaration, which falsely states that the School's "growing enrollment" necessitated relocation to a larger facility. (***Panning Declaration***, R. 4-2, Pg. ID 139).

The School's reliance on the Second Circuit's decision in *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007) is misplaced. In *Westchester*, the Second Circuit recognized that the result would have been different if the denial of the application would have had minimal impact on the school's religious exercise. *Id.* at 349. If the school could have rearranged existing classrooms to meet its religious needs, for example, the Second Circuit would not have concluded that the denial of the application substantially burdened the school's religious exercise. *Id.* The Second Circuit also recognized that the result would have been different if a "ready alternative," including "an entirely different plan to meet the same needs," had existed. *Id.* at 352; see also *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004). And finally, the Second Circuit recognized that the result would have been different if the school had sought to expand its facilities merely to "enhance the overall experience of its students." *Westchester*, 504 F.3d at 347.

There is no dispute that at the time the Township denied a special use permit, the School had a ready alternative. The School acknowledged that it could have returned to the Pinckney facility. (***07-27-2015***

Minutes, R. 35-30, Pg. ID 1125; ***07-29-2015 Article***, R. 13-8, Pg. ID 546). See *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 705 (E.D. Mich. 2004) (citing *Lakewood Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 307 (6th Cir. 1983)) (that a ready alternative is more costly or less appealing does not qualify as a substantial burden, as neither RLUIPA nor the Constitution requires the government "to subsidize the real estate market"). The School had not outgrown the Pinckney facility. In fact, the School had operated in the Pinckney facility for many years with a much higher enrollment than the enrollment expected for the 2015-2016 academic year. See *Lighthouse Institute for Evangelism v. City of Long Branch*, 100 Fed. Appx. 70, 73-74, 77 (3d Cir. 2004).

The School points out that the Pinckney facility and the other alternative noted by the District Court—the Whitmore Lake facility—are located outside the Township's borders. From that premise, the School argues that the Township "effectively barred" the School from operating within the Township's borders. However, RLUIPA does not give the School special status or otherwise allow the School to relocate to wherever it pleases. *Civil Liberties for Urban Believers*, 342 F.3d at 762;

Living Water, 258 Fed. Appx. at 736, 737; *Roman Catholic Bishop*, 724 F.3d at 96. Moreover, the School's argument is a non sequitur. Just because the Township denied a special use permit that would have allowed the School to relocate to *the Church's facility* does not mean that the Township effectively barred the School from operating within *the Township's borders*. And just because the obvious alternatives happen to be outside of the Township's borders does not mean that the Township effectively barred the School from operating within the Township's borders. The School did not try to relocate to any other location within the Township's borders, and the Township thus did not consider any other location within the Township's borders. This is not a case where, for example, a local unit of government passed a zoning ordinance that specifically targeted a pastor and "effectively banned" his religious ministry from an entire city. See *Barr v. City of Sinton*, 295 S.W.3d 287, 289, 291 (Tex. 2009) (cited by the School).

The recent case on which the School relies, *Harbor Missionary Church Corporation v. City of San Buenaventura*, 642 Fed. Appx. 726 (9th Cir. 2016), lends no support to the School's arguments. In *Harbor*, the church began to provide religious services to the homeless on its property

as an integral part of its ministries. Four to five years later, the city told the church that it needed to obtain a conditional use permit to continue conducting its homeless ministries on its property. The church applied for a conditional use permit. The city denied the church's application for a conditional use permit. Based on certain Bible passages, the church insisted on conducting its homeless ministries at the same location as its other religious ministries. In order to continue conducting its homeless ministries at the same location as its other religious ministries, the church would have had to sell its property and raise $1.4 million to relocate. The Ninth Circuit found that the city placed a substantial burden on religious exercise because the city prevented the church from conducting its homeless ministries "without suffering substantial delay, uncertainty, and expense." *Id.* at 729.

The Township would be remiss if it did not point out the conflict between the Ninth Circuit's decision in *Harbor* and this Court's decision in *Living Water*. In *Living Water*, this Court found that *expense* and *delay* did not constitute substantial burdens. *Living Water*, 258 Fed. Appx. at 741. This Court also rejected the District Court's conclusion that *uncertainty* regarding space and programming, which severely hindered

the congregation's ability to recruit students for the school, constituted a substantial burden. *Id.* at 737-38.

In any event, the circumstances in *Harbor* are not comparable to the circumstances in this case. The Township did not condone the School's activities and then create obstacles for or prevent continued participation in such activities. And when the Township denied a special use permit, the School had a ready alternative—the Pinckney facility. The Township did not prevent the School from continuing to provide religious education at the Pinckney facility. Nor did the Township force the School to sell or lease the Pinckney facility and raise substantial funds in order to continue providing religious education elsewhere.

Since "substantial burden" under RLUIPA carries the same meaning as "substantial burden" under the First Amendment, this Court's decision in *Lakewood Congregation* is also instructive. A congregation decided to relocate and began to search for a site "more conducive to worship and capable of accommodating a larger building." *Lakewood Congregation*, 699 F.2d at 304. The congregation found and entered into an option contract for a half-acre corner lot in a district zoned for residential use. Before the congregation purchased the lot, it applied

for a permit to construct a church on the lot. *Id.* at 304-05. The city denied the church's application because "a church on the corner would create traffic hazards, increase noise levels, potentially decrease property values, and cause various other problems." *Id.* at 305. After the congregation purchased the lot, the city enacted a new zoning ordinance. The congregation again applied for a permit to construct a church on the lot. The city denied the congregation's application because the lot fell within a district zoned exclusively for residential use. This Court determined that the city's enforcement of the zoning ordinance and concomitant denial of the application for a permit did not impose a substantial burden on the congregation's religious exercise. This Court reasoned that the zoning ordinance did not prevent the congregation "from practicing its faith through worship whether the worship be in homes, schools, other churches, or meeting halls throughout the city." *Id.* at 307. This Court acknowledged that the zoning ordinance burdened the congregation's religious exercise to some extent, as it permitted the construction of a church in only two districts—districts in which land happened to be more expensive and less conducive to worship. However,

this Court determined that the zoning ordinance did not *substantially* burden the congregation's religious exercise:

> [T]his is not a case where the Congregation must choose between exercising its religious beliefs and forfeiting government benefits or incurring criminal penalties. No pressure is placed on the Congregation to abandon its beliefs and observances. While it is true that the Congregation would face penalties if it began building on the proposed site, the penalties would not have the purpose or the effect of dissuading the Congregation from practicing its faith.
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>
> The Congregation argues that the [zoning] ordinance effectively eliminates religious worship from the city because it limits the location of new churches to ten percent of the City. We disagree. The effect of the [zoning] ordinance is not to prohibit the Congregation or any other faith from worshipping in the City. Although the Congregation may construct a new church in only ten percent of the City, the record does not indicate that the Congregation may not purchase an existing church or worship in any building in the remaining ninety percent of the City. Furthermore, unlimited numbers of churches may be constructed in the appropriately zoned areas, confined only by the number of lots. The lots available to the Congregation may not meet its budget or satisfy its tastes but the First Amendment does not require the City to make all land or even the cheapest or most beautiful land available to churches. . . . [T]he [zoning] ordinance does not exclude the exercise of . . . religious worship . . . from the City.
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> * * *
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> The [zoning] ordinance . . . does not pressure the Congregation to abandon its religious beliefs through financial or criminal penalties. Neither does the ordinance tax the Congregation's exercise of its religion.

Id.

Suffice it to say that the Township's denial of a special use permit did not require the School to transgress its religious beliefs, force the School to choose between its religious convictions and government benefits, or prevent the School from carrying out its religious missions. Since the School cannot establish that the Township substantially burdened the School's religious exercise, the Court need not address whether the Township's denial of a special use permit is the least restrictive means of furthering compelling government interests. *Living Water*, 258 Fed. Appx. at 742.

RELIEF SOUGHT

For the foregoing reasons, the Township respectfully requests that this Honorable Court AFFIRM the District Court's judgment.

Respectfully submitted,

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Dated: December 21, 2016

CERIFICATE OF COMPLIANCE

I certify that Appellee's brief complies with the type-volume limitation in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. The brief contains 12,652 words, excluding the contents exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

I further certify that Appellee's brief complies with the typeface requirement in Rule 32(a)(5) of the Federal Rules of Appellate Procedure. I prepared the brief in Microsoft® Word 2013 and used Century Schoolbook, a proportionally-spaced font, at 14 point.

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2016, I electronically filed the foregoing brief with the Clerk of the Court, which will send notification to the following: *All Attorneys of Record*.

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