
APPENDIX A

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Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 17a0117p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LIVINGSTON CHRISTIAN SCHOOLS,

Plaintiff-Appellant,

v.

GENOA CHAPTER TOWNSHIP,

Defendant-Appellee.

No. 16-2060

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit
No. 2:15-cv-12793—George C. Steeh, District Judge.

Argued: April 26, 2017

Decided and Filed: June 2, 2017

Before: MERRITT, GILMAN, and DONALD,
Circuit Judges.

COUNSEL

ARGUED: Robert K. Kelner, COVINGTON & BURLING, LLP, Washington, D.C., for Appellant. T. Joseph Seward, SEWARD PECK & HENDERSON, Royal Oak, Michigan, for Appellee. ON BRIEF: Robert K. Kelner, COVINGTON & BURLING, LLP, Washington, D.C., Hiram S. Sasser III, Stephanie N. Taub, FIRST LIBERTY INSTITUTE, Plano, Texas, for Appellant. T. Joseph Seward, Lindsey A. Peck, SEWARD PECK & HENDERSON, Royal Oak, Michigan, Carol A. Rosati, Anne McClorey McLaughlin, JOHNSON ROSATI SCHULTZ & JOPPICH, Farmington Hills, Michigan, for Appellee.

OPINION

RONALD LEE GILMAN, Circuit Judge. Livingston Christian Schools (LCS) is a private, nondenominational Christian school with a mission of providing a religiously oriented education to students in Livingston County, Michigan. After operating for several years in the town of Pinckney, LCS sought to relocate. LCS entered into a lease agreement with Brighton Nazarene Church (the Church), located in Genoa Charter Township (the Township), so that LCS could operate its school on the Church's property. Shortly thereafter, the Township informed LCS that an amended special-use permit would be required before the Church property could be used for the school. The Church then applied for such a permit (hereinafter referred to as the "special-use permit") on LCS's behalf. In a four-to-three vote, the Township Board denied the application.

The Board's action prompted LCS to file a complaint against the Township in the United States District Court

for the Eastern District of Michigan. LCS alleged that the denial of the application for a special-use permit violated the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc et seq. The Township moved for summary judgment in its favor, which the district court granted. For the reasons set forth below, we AFFIRM the judgment of the district court.

I. BACKGROUND

A. Factual background

1. LCS's attempt to relocate its operations to the Church

LCS describes its mission as providing a Christian education “for the Livingston County Community.” From 2006 to 2015, LCS carried out this mission at a building in Pinckney (the Pinckney property). Pinckney is located in the southernmost portion of Livingston County, which is outside of the Township.

A declaration by LCS’s treasurer, Scott Panning, notes that Pinckney is “without easy access to the interstate or major commuter roads,” that the Pinckney area is less populated than the central area of Livingston County, and that Pinckney’s population is declining. In addition, Panning explained that the building on the Pinckney property needed extensive, costly maintenance.

LCS asserts that these problems have led to financial difficulties. At a meeting in November 2012, the LCS Board decided that remaining at the Pinckney property on a long-term basis “will end in the dissolution of the school due to lack of enrollment and income.” So LCS resolved to search

for another location. LCS wanted to relocate to either “the Brighton or Howell area,” both of which are within Livingston County. There are both cities and townships by the names of Brighton and Howell; LCS did not specify whether the “area” that it had in mind refers to the city, the township, or both. See Municipalities, Livingston County, Michigan, <https://www.livgov.com/Pages/Municipalities.aspx> (last visited May 31, 2017). Several options within these areas were explored, but LCS asserts that only the Church property was suitable.

LCS then entered into an agreement to lease the Church’s building for use as a school. According to Panning, LCS was unaware when signing the lease agreement that the Church would need to amend its special-use permit to allow LCS to so operate. After entering into the lease agreement, LCS prepaid the Church \$70,000 in rent and began advertising its new location to prospective students.

The Township eventually heard about LCS’s plans to operate at the Church and informed the Church that the existing special-use permit would have to be amended in order for LCS to use the Church’s building as a school. In March 2015, the Church applied for the permit. Two public hearings were held, where several neighbors of the Church expressed concerns about the application. The primary complaints were that (1) LCS’s operations would worsen already heavy traffic, and (2) the Church had a history of failing to comply with its previous special-use permits by using its property in ways that neighboring residents found disruptive.

After the second meeting, the Township's Planning Commission reviewed the application and a traffic study submitted by the Church. The Planning Commission then recommended that the Township Board approve the Church's application with several conditions attached.

Despite the Planning Commission's recommendation, the Township Board voted to deny the special-use permit in a four-to-three decision at the July 2015 Board meeting. The July meeting minutes did not explain the reasons for the denial, but the August 3, 2015 meeting minutes did. These reasons included traffic concerns, inconsistency with the single-family residential zoning of the surrounding area, the failure of the Planning Commission's proposed conditional approval to mitigate these problems, and the Church's history of noncompliance with the zoning ordinance and with the conditions on the Church's prior special-use permits.

2. LCS's use of other properties

After the denial of the special-use permit, LCS entered into a short-term lease with the Whitmore Lake School District in August 2015, which allowed LCS to use the District's former public middle-school building located in neighboring Washtenaw County for LCS's school. Counsel for LCS explained at oral argument that LCS is currently using the Whitmore Lake property under what is essentially a year-to-year lease. But the Whitmore Lake School District has informed LCS that the School District might reoccupy the school building at some point in the future. LCS asserts that the Whitmore Lake property is therefore not a viable long-term option for its school. According to LCS, the Whitmore Lake property is also inadequate for several additional reasons. One is that the

property is inconveniently located for LCS's students. The conditions of the lease, moreover, inhibit LCS's efforts to recruit prospective students, to effectively run sports programs, to keep the property secure, and to serve lunch to its students.

In addition to leasing the Whitmore Lake property, LCS is the owner of the Pinckney property from which it sought to relocate in 2015. Even though LCS owns the Pinckney property, it decided not to continue its operations there when the special-use permit for the Church property was denied. LCS has instead leased the Pinckney property to the Light of the World Academy (LOTWA), a publicly funded charter school, for a term of seven years. The lease was executed on August 20, 2015, after the Township officially denied the Church's application for a special-use permit on August 3, 2015 and after LCS filed its original complaint on August 7, 2015.

B. Procedural background

In its original complaint, LCS alleged that the Township's denial of the special-use permit violated RLUIPA's substantial-burden provision, 42 U.S.C. § 2000cc(a)(1). LCS later amended its complaint to add alleged violations of the First and Fourteenth Amendments. But neither of these constitutional claims are before us on appeal because LCS has not raised these issues in its brief.

LCS filed an emergency motion for a temporary restraining order and a preliminary injunction, which the district court denied. The Township then moved for summary judgment. LCS did not file a cross-motion for summary judgment but, in its response to the Township's

motion, LCS informally asked the district court to grant summary judgment in its favor pursuant to Rule 56(f)(1) of the Federal Rules of Civil Procedure. Rule 56(f)(1) allows the district court to grant summary judgment in favor of a nonmoving party “[a]fter giving notice and a reasonable time to respond.”

The district court did not act on LCS’s request. It instead granted summary judgment in favor of the Township, concluding that the Township’s denial of the application did not impose a substantial burden on LCS because LCS had both the Pinckney and Whitmore Lake properties as adequate alternatives to the Church property. Noting that the parties made essentially the same arguments in the summary-judgment proceedings as in the emergency-motion proceedings, the court “incorporate[d] by reference” its ruling denying LCS’s motion for a temporary restraining order and a preliminary injunction.

II. ANALYSIS

A. Standard of review

We review de novo the district court’s grant of summary judgment. *Williams v. AT&T Mobility Servs.*, 847 F.3d 384, 391 (6th Cir. 2017). Summary judgment is proper when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “We must view all evidence in the light most favorable to the nonmoving party in making this determination.” *Williams*, 847 F.3d at 391.

As for the substantial-burden inquiry, the ultimate decision on whether the Township's actions imposed a substantial burden on LCS under RLUIPA is a question of law for us to decide. *See Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 93 (1st Cir. 2013) (explaining that the existence of a substantial burden is a question of law because "the corollary question of whether the government's interest is compelling is generally treated as a question of law," and because of the importance of appellate courts conducting de novo reviews of the legal aspects of First Amendment claims, which are "corollaries" of RLUIPA claims). *But see World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 539 (7th Cir. 2009) (assuming with little reasoning that the substantial-burden inquiry is a factual question, and noting that no other court at that point in time had specified whether this was a question of law or of fact).

B. LCS's leasehold interest is protected under RLUIPA.

RLUIPA explicitly protects "leasehold" interests in property. *See* 42 U.S.C. § 2000cc- 5(5). "Leasehold" and "ownership" interests are listed in the same provision and are therefore presumably entitled to the same level of protection. LCS clearly possessed a leasehold interest in the Church property by way of the lease agreement. The Township does not dispute that LCS had such an interest. Rather, the Township argues that the district court correctly concluded that the denial of the special-use permit did not violate RLUIPA because the denial did not effectively bar all religious exercise on the Church's property.

But the religious institution at issue here is LCS, not the Church, and the land interest at issue is LCS's leasehold interest, not the Church's ownership interest. In addition, LCS persuasively argues that taking into account the Church's ability to use the property for its own purposes as a factor against LCS's RLUIPA claim would result in treating LCS differently from a religious institution that leased property from a secular landlord. We will therefore consider only LCS's ability to exercise its religious mission (and not the Church's) in evaluating whether there was a substantial burden on LCS.

C. The test for whether a substantial burden exists

RLUIPA does not define the term "substantial burden." Its only reference to the term is contained in the following provision:

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 the imposition of the burden . . . (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. Nor has the Supreme Court had occasion to focus on the substantial-burden inquiry under RLUIPA in the land-use context, although it has done so in the institutionalized- persons context. *See Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (holding that a prison's policy

forbidding a prisoner to grow a beard of a certain length, which the prisoner sincerely believed was required by his religion, substantially burdened the prisoner even though the prison permitted him to engage in other religious practices, such as following a specified diet and keeping a prayer rug in his cell). Even in *Holt*, the Supreme Court did not articulate a definition of “substantial burden,” but rather explained that the ability to engage in other religious practices did not prevent a prisoner from making a substantial-burden claim as to the rule against growing a half-inch beard. We will therefore turn to caselaw from this court and other circuits regarding the substantial-burden inquiry.

1. *Sixth Circuit cases*

There are only two cases in this circuit, both of which are unpublished, that address the question of whether a land-use regulation imposed a substantial burden under RLUIPA. The first is *DiLaura v. Township of Ann Arbor*, 112 F. App’x 445 (6th Cir. 2004), where this court affirmed the district court’s conclusion that a substantial burden existed based on a zoning ordinance that required the plaintiffs, who wanted to establish an overnight religious retreat, to operate as a bed-and-breakfast establishment. *Id.* at 446. In *DiLaura*, the court noted that restrictions on such establishments prevented the plaintiffs from serving Communion wine and meals other than breakfast. The plaintiffs would also have been required to charge their guests a fee for lodging. Because the plaintiffs’ plan was to operate a prayer retreat that would provide free lodging, and to serve lunch, dinner, and Communion wine, the court found that the plaintiffs would be “effectively barred . . . from using the property in the exercise of their religion” if their property were designated as a bed and breakfast. *Id.*

The court did not provide any other explanation for its holding or articulate a test for whether a substantial burden existed.

The other Sixth Circuit case is *Living Water Church of God v. Charter Township of Meridian*, 258 F. App'x 729 (6th Cir. 2007), where this court reversed the district court's conclusion that a substantial burden existed. 258 F. App'x at 742. In *Living Water*, the plaintiff was a church that wanted to construct an additional building on its property for use both as a religious school and as extra space for the church. *Id.* at 731. A special-use permit that was needed for the building was granted insofar as it allowed a school on the residentially zoned property. *Id.* at 732. But the permit restricted the church to a total of 25,000 square feet of floor space amongst all of its buildings, thwarting the church's efforts to construct a single building of almost 35,000 square feet. *Id.* at 731–32.

The court in *Living Water* explicitly “decline[d] to set a bright line test” to determine whether a substantial burden exists, but announced “a framework to apply to the facts before us.” *Id.* at 737. That framework asks: “[D]oes 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.* The court also stated that a land-use regulation “may make religious exercise more expensive or difficult” without necessarily imposing a substantial burden. *Id.* Applying this framework, the court concluded that the church had not been substantially burdened because the church remained free to construct a school building. *Id.* at 738–39. The court concluded that there was no evidence in the record that a new building of the permitted size would be so inadequate

as to constitute a substantial burden. *Id.* at 739. Although the court acknowledged testimony that the church would be burdened by incurring additional expenses to develop plans for a smaller building, and by not having space for a gymnasium, the court concluded that these were “mere inconvenience[s].” *Id.*

In a concurring opinion, Judge Moore cautioned that *Living Water*’s framework was “inadvisable” because the effective-bar prong was “so broad as to swallow the substantial-burden inquiry.” *Id.* at 742 (Moore, J., concurring). We agree. The language of the effective-bar prong would mean that, any time that a land-use regulation completely barred the religious use of a property, a substantial burden would automatically exist. *See, e.g., Andon, LLC v. City of Newport News*, 813 F.3d 510, 516 (4th Cir. 2016) (explaining that any framework that would essentially create an “automatic exemption” from land-use regulations for religious plaintiffs would contravene RLUIPA’s intent).

Moreover, the effective-bar prong of *Living Water* fails to take into account circumstances that other circuits have considered in the substantial-burden inquiry, such as whether a religious institution has ready alternatives to carry out its mission, or whether the religious institution’s inability to use available land was self-imposed. *See* Part II.C.3. below. Judge Moore also noted that no other circuit had adopted the effective-bar language. *Living Water*, 258 F. App’x at 742 (Moore, J., concurring). Nor are we aware of any other circuit that has done so since *Living Water* was decided.

Finally, the court in *Living Water* was apparently trying to avoid creating a precedent, specifically crafting “a

framework to apply to the facts before us.” 258 F. App’x at 737. The factual context in the present case is materially different from that in *Living Water*. We therefore decline to follow the *Living Water* framework and will instead focus directly on RLUIPA’s test of whether the “land-use regulation . . . imposes a substantial burden on the religious exercise of [the] institution.” 42 U.S.C. § 2000cc.

2. *The meaning of “substantial burden” under RLUIPA*

One principle that clearly emerges from both *Living Water* and our sister circuits’ decisions is that not just any imposition on religious exercise will constitute a violation of RLUIPA. Instead, a burden must have some degree of severity to be considered “substantial.” *See, e.g., Int’l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1067 (9th Cir. 2011) (explaining that a substantial burden “must impose a significantly great restriction or onus upon [religious] exercise” (quoting *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004))); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (concluding that a substantial burden is “more than an inconvenience”). As this court recognized in *Living Water*, taking seriously the requirement that a burden be “substantial” is necessary in order to avoid an interpretation of RLUIPA that would exempt religious institutions from all land-use regulations. 258 F. App’x at 729, 736 (“If the term ‘substantial burden’ is not to be read out of the statute, RLUIPA cannot stand for the proposition that a construction plan is immune from a town’s zoning ordinance simply because the institution undertaking the construction pursues a religious mission.”).

Other circuits have persuasively explained that land-use regulations do not typically compel plaintiffs to “violate their beliefs” in the way that, for example, prison rules might require an inmate to engage in conduct that goes against his or her religious tenets. *See, e.g., Bethel World Outreach Ministries v. Montgomery Cty. Council*, 706 F.3d 548, 555–57 (4th Cir. 2013) (explaining that the government does not have “absolute control” over religious institutions in the land-use context in the same way that a prison has control over inmates, so that land-use decisions will “rarely” force a religious institution to violate its beliefs). But land-use regulations can prohibit a plaintiff from engaging in desired religious behaviors, causing some courts to define a substantial burden as something that places significant pressure on an institutional plaintiff to modify its behavior. *See id.* at 555.

3. *Several factors from our sister circuits’ caselaw are helpful in determining whether LCS was substantially burdened by the Township’s action.*

Our sister circuits have identified several factors that are helpful in determining whether a land-use regulation has imposed a substantial burden on a religious institution. One factor, which the district court properly considered here, is whether the religious institution has a feasible alternative location from which it can carry on its mission. *See Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 352 (2d Cir. 2007). Whether the religious institution will suffer “substantial ‘delay, uncertainty, and expense’” due to the imposition of the regulation is another factor. *Id.* at 349 (quoting *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005)).

The plaintiff's own actions have also been found relevant in determining whether a burden is considered substantial. Several circuits have held that, when a plaintiff has imposed a burden upon itself, the government cannot be liable for a RLUIPA substantial-burden violation. For example, when an institutional plaintiff has obtained an interest in land without a reasonable expectation of being able to use that land for religious purposes, the hardship that it suffered when the land-use regulations were enforced against it has been deemed an insubstantial burden. *See, e.g., Andon*, 813 F.3d at 515 (concluding that a burden was not substantial because it was self-imposed when the plaintiff entered into a contingent lease agreement for a property despite knowing that the property failed to meet applicable setback requirements and having been informed that the application for a zoning variance would be denied); *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007) (concluding that the plaintiff was not substantially burdened when it had imposed the burden upon itself by purchasing property in an industrial zone for use as a church after having been informed that its special-use application would be denied because the relevant zoning ordinance banned churches in that zone).

Whether LCS had a feasible alternative location, whether LCS faced substantial delay, uncertainty, and expense, and whether LCS's burden was self-imposed are helpful factors for us to consider in determining whether the Township's action placed a substantial burden on LCS in this case. We therefore discuss in Part III.D. below how these factors apply to the case before us.

As a final matter to consider, we note one often-cited factor: whether there is evidence that the municipality's decisionmaking process was arbitrary, capricious, or

discriminatory. *See, e.g., Westchester*, 504 F.3d at 350–51; *Guru Nanak Sikh Soc’y v. Cty. of Sutter*, 456 F.3d 978, 989–91 (9th Cir. 2006); *Saints Constantine*, 396 F.3d at 900–01. We deem this factor irrelevant in the present case because LCS has not argued that it faced a substantial burden as a result of any discriminatory decisionmaking by the Township. LCS instead alleges that the Township’s decision was discriminatory only with regard to the Township’s purported lack of a compelling interest for denying the special-use permit application.

In any event, although several other circuits have taken evidence of alleged discrimination into account in considering whether there was a substantial burden on religious exercise, we decline to adopt this approach. Evidence of improper decisionmaking is more appropriately considered when evaluating whether a governmental action was narrowly tailored to serve a compelling state interest—an inquiry that the court should undertake only after finding that a substantial burden exists. *See Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App’x 29, 741 (6th Cir. 2007) (declining to consider evidence of arbitrary decisionmaking by the municipality where the church had failed to first show that a substantial burden existed, noting that proof of the municipality’s motive is not relevant to the substantial-burden inquiry).

RLUIPA, moreover, contains a separate prohibition on discrimination in the implementation of land-use regulations, which does not require that the regulation impose a substantial burden. *See* 42 U.S.C. § 2000cc(b)(1)–(2) (prohibiting governmental entities from “impos[ing] or implement[ing] a land use regulation in a manner that” either “treats a religious assembly or institution on less

than equal terms with a nonreligious assembly or institution” or “discriminates against any assembly or institution on the basis of religion or religious denomination”). Finding a substantial burden due to evidence of discrimination would obviate the need for § 2000cc(b)(1)–(2). *See Bethel World Outreach Ministries*, 706 F.3d at 557 (concluding that requiring proof of religious discrimination in order to make out a substantial-burden claim “would render the nondiscrimination provision superfluous”).

D. The district court’s grant of summary judgment to the Township was proper because, as a matter of law, LCS failed to put forth sufficient evidence to establish that the Pinckney property was an inadequate location for its religious mission.

LCS argues that the district court erred in granting summary judgment to the Township on the basis that the Pinckney and Whitmore Lake properties were “ready alternatives” for LCS. Several of our sister circuits have addressed the issue of when the availability of other properties defeats a substantial-burden claim. Where plaintiffs have had access to other properties close to the property affected by the challenged land-use regulation, the courts have generally found that no substantial burden exists. *See World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 539 (7th Cir. 2009) (concluding that there was no substantial burden when the plaintiff was denied permission to demolish a historic building on its property and construct a new building, given that the plaintiff owned other empty space on its campus where it could construct the building); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 100 F. App’x 70,

73, 77 (3d Cir. 2004) (concluding that the plaintiff had not demonstrated a likelihood of success on a substantial-burden claim when the plaintiff was denied a variance for property that it had purchased, reasoning that the plaintiff was able to fully operate at a rented location just across the street from the property at issue); *see also Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227–28 (11th Cir. 2004) (concluding that walking a few additional blocks was not a substantial burden where the zoning ordinance required the plaintiff, an Orthodox Jewish synagogue whose members’ beliefs forbade them from using motorized vehicles on the Sabbath, to be located a few blocks away from its desired location).

On the other hand, RLUIPA plaintiffs have survived a motion for summary judgment where they have raised a genuine dispute as to whether their current location was adequate for their religious mission. *See, e.g., Bethel World Outreach Ministries*, 706 F.3d at 558 (holding that the plaintiff church had put forth sufficient evidence to survive summary judgment where the already-existing facilities were so overcrowded that the church had to hold four services each Sunday, to shorten each one, to change its Communion and “Altar Call” practices, and to turn people away); *Int’l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1068–69 (9th Cir. 2011) (holding that the plaintiff church had demonstrated that its current facility was inadequate because the church’s “core beliefs” required it to assemble in one worship service, yet it had to hold three Sunday services in its existing facility); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 352 (2d Cir. 2007) (holding that there was a substantial burden on the plaintiff school, in part because the school had demonstrated that it was expanding and that its existing buildings did not have sufficient space).

In each of the cases ruling in the plaintiffs' favor, the plaintiffs had demonstrated that they were unable to carry out some core function of their religious activities due to the inadequacy of their current facilities. The school in *Westchester Day School*, for example, presented evidence from architects and other experts that existing buildings did not have enough space to incorporate planned expansions for new classrooms, labs, art and music rooms, and other facilities, all of which would be used for educational purposes that integrated religious teachings. 504 F.3d at 346, 352. In *Bethel*, the church likewise put forth evidence that Communion and Altar Call practices had to be modified, and that worshippers had to be turned away, due to the fact that the services were overcrowded. 706 F.3d at 558. The church in *Foursquare* also demonstrated that its current facilities did not provide sufficient space for the congregation to worship in one service, preventing the unity of worship that was central to its beliefs. 673 F.3d at 1069. When such central religious beliefs are in question, courts must be especially deferential to testimony from the religious institution about the truth of that belief. *Id.* (explaining that the plaintiff had clearly alleged that its "core beliefs" were at stake, and that the Supreme Court has cautioned that "while a court can arbiter the sincerity of an individual's religious beliefs, courts should not inquire into the truth or falsity of stated religious beliefs").

Unlike the plaintiffs in the aforementioned cases, LCS put forth only conclusory evidence that the Pinckney property is inadequate, and LCS did not allege that any of its core religious functions cannot be carried out at Pinckney. LCS submitted declarations from its principal and its treasurer as evidence of dwindling enrollment. These declarations state that "the fulfillment of [LCS's]

religious mission of operating a Christian school to serve the entire Livingston County community necessitated a move from the Pinckney Property . . . to a facility more centrally located in Livingston County”; that LCS’s enrollment increased due to the anticipated move to the Church and decreased upon denial of the permit; that the Pinckney property is “without easy access to the interstate or major commuter roads,” making attracting students difficult; that Pinckney is “much less populated than the central area of Livingston County”; that Pinckney’s population has recently declined; that the Pinckney property “required extensive maintenance and was in need of expensive repairs”; and that the Church was a superior alternative to the Pinckney property because LCS would be able to attract families affiliated with the Church.

LCS also submitted its Board’s meeting minutes stating the Board’s fear that remaining at the Pinckney property would eventually cause LCS to go out of business. In addition, LCS argues that the Pinckney property is inadequate because LOTWA had to switch its model from being a private religious school to being a publicly funded charter school in order to operate there. Excerpts of a deposition of LOTWA’s president, Laura Burwell, are offered in support of this claim.

Although the above evidence provides a modicum of support for the proposition that the Pinckney property’s location is inadequate, it is not sufficient to meet LCS’s burden of surviving the Township’s motion for summary judgment. The meeting minutes and other statements fearing that LCS will eventually be forced to close are little more than speculation because they are not substantiated by facts in the record. *See Alexander v. CareSource*, 576 F.3d 551, 560 (6th Cir. 2009) (“Conclusory statements

unadorned with supporting facts are insufficient to establish a factual dispute that will defeat summary judgment.”). As this court stated in *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App’x 729, 738 (6th Cir. 2007).

When faced with the burden of producing sufficient evidence to demonstrate that a genuine dispute of material fact existed, LCS had the obligation to provide evidence to substantiate its claims. LCS conceded at oral argument that it failed to provide its financial records to document the extent of its present loss of funds. Likewise, LCS acknowledged that it had not provided enrollment statistics to demonstrate the alleged drop in student enrollment that prompted LCS to relocate. The declarations provided by LCS did establish that 139 students were enrolled during LCS’s last year at Pinckney, that 59 new students had enrolled after the announcement of LCS’s move to the Church, and that 18 new students and 15 returning students unenrolled after the special-use permit was denied. But the declarations provide no historical enrollment data to indicate how LCS performed before its last year at Pinckney.

Moreover, LCS failed to produce evidence that would be admissible at trial about why the alleged drop in enrollment occurred. To make out a substantial-burden claim under RLUIPA, LCS must demonstrate that the land-use regulation implemented by the Township—the denial of the Church’s special-use permit application—imposed a substantial burden on LCS. *See* 42 U.S.C. § 2000cc. LCS cannot prevail if the burden of declining

enrollment was caused by something other than its inability to relocate to the Church. *See Andon, LLC v. City of Newport News*, 813 F.3d 510, 515 (4th Cir. 2016) (explaining that burdens are not substantial if they are self-imposed).

Although LCS could have introduced evidence regarding the reasons for its drop in enrollment by providing declarations or depositions from the families of students who unenrolled after the Church's special-use permit was denied, LCS did not do so. Panning's declaration states that Pinckney's remote location was the reason for the declining enrollment. But this explanation of the students' alleged reasons for unenrolling is based on hearsay. The statement would therefore be inadmissible at trial if offered to prove that the actual cause of the declining enrollment was Pinckney's remote location. *See Fed. R. Civ. P. 56(c)* (providing that an affidavit or declaration may be used as evidence at the summary-judgment stage only if it is "made on personal knowledge" and "set[s] out facts that would be admissible in evidence"); *Alpert v. United States*, 481 F.3d 404, 408–09 (6th Cir. 2007) (explaining that statements in an affidavit that amounted to hearsay cannot be considered at the summary-judgment stage).

Similarly, the evidence about LOTWA's decision to become a publicly funded charter school instead of remaining a religious school is insufficient because it does not explain the reason for LCS's financial difficulties. Even the testimony of LOTWA's president Burwell, on which LCS heavily relies for its argument that the Pinckney property is unsuitable, indicates that LOTWA's experience cannot be compared to LCS's. Burwell stated in her deposition that LOTWA became a charter school because it

was “having a difficult time keeping our enrollment numbers up at a tuition-based school” after relocating to Pinckney. When asked whether she knew why the Pinckney property did not fit LCS’s needs, however, Burwell stated that “I don’t know if Livingston Christian had the same experience.” The record contains only five nonconsecutive pages of Burwell’s deposition and provides no other context about LOTWA’s finances, enrollment statistics, or student demographics that might allow for a persuasive comparison of LOTWA to LCS.

And even if we were to assume that LCS’s characterization of Pinckney as a remote, inaccessible area is supported by record evidence that would be admissible at trial, we conclude as a matter of law that remaining at the Pinckney property would not have imposed a substantial burden on LCS. The Pinckney property, located at 550 E. Hamburg St., Pinckney, Michigan, is a 12.1-mile drive from the Church, located at 7669 Brighton Road, Brighton, Michigan. See maps.google.com. Because LCS insists that the Church would have been a more convenient location for many students, the Pinckney property’s distance from the Church is relevant. In addition, the Pinckney property is 11.1 miles from what the Township pinpoints as the geographic center of Livingston County, whereas the Church is 9.9 miles from that geographic center. We may take judicial notice of maps showing the distances between these locations. See *Carpenter v. Norfolk & W. Ry. Co.*, 145 F.3d 1330 (Table), 1998 WL 199723, at *4 (6th Cir. 1998) (explaining that the trial court can “take judicial notice of general time/distance calculations”); Fed. R. Evid. 201, Advisory Comm. Notes (f) (noting that judicial notice “may be taken at any stage of the proceedings, whether in the trial court or on appeal”). Treating the center of Livingston County as

the area from which LCS hopes to attract more students, locating its school at the Pinckney property instead of the Church property would increase travel distance by a mere 1.2 miles.

And even if the proper distance to consider is the distance between the Church and the Pinckney property, the additional travel distance is only 12.1 miles. Requiring students to travel an additional 12.1 miles is somewhat of a burden, but we conclude as a matter of law that this is not so significant as to “impose[] a substantial burden on the religious exercise of [LCS].” See RLUIPA, 42 U.S.C. § 2000cc. As discussed above, the Eleventh Circuit has held that walking an additional several blocks would not impose a substantial burden on religious adherents whose beliefs bar motor-vehicle travel on the *Sabbath*. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227–28 (11th Cir. 2004). The *Midrash Sephardi* court even took into account the mobility difficulties that some members of the synagogue might have and the fact that walking in the Florida summer heat might pose additional problems—but not enough to impose a substantial burden. *Id.*

Likewise, families with especially tight budgets or busy schedules might find burdensome the additional expenses and time constraints of approximately 12.1 more miles of car travel each way, but this does not mean that such additional expense and time is so great as to constitute a substantial burden on LCS’s religious mission. This is more analogous to a “mere inconvenience” that would not be deemed a substantial burden under *Living Water*. See 258 F. App’x 729, 739 (6th Cir. 2007).

We also note that LCS has not alleged that any functions of its religious school were unable to be carried out on the

Pinckney property. LCS focuses on increasing enrollment and raising revenue, but has not identified any religious activity—or even any traditionally secular one—that could not be performed at the Pinckney property. The present case is therefore distinguishable from *Bethel* and *Westchester Day School*, both of which are discussed in more detail above. Even though the expansion in *Westchester* was designed to serve an existing school population that, like LCS, was not growing, the school in *Westchester* established that the renovations would serve a religious-education mission that could not be performed using its existing space. See *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.2d 338, 345–46 (2d Cir. 2007) (explaining how the school’s philosophy tied Orthodox Jewish teachings into each and every aspect of the school curriculum, and how the expansion would further this mission). There is no such evidence in the present case.

Finally, we note that no credence should be given to any argument that LCS faces a substantial burden because LOTWA now occupies the Pinckney property, thus preventing LCS from returning there. Any such argument would have no merit because LCS leased the Pinckney property to LOTWA only after the special-use permit application by the Church was denied and after this litigation commenced. The fact that LCS cannot now use the Pinckney property due to the seven-year lease is therefore due to LCS’s own actions. As discussed above, a burden is not substantial when the plaintiff imposes that burden upon itself. See, e.g., *Andon, LLC v. City of Newport News*, 813 F.3d 510, 515 (4th Cir. 2016); *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007).

E. As a matter of law, LCS was not substantially burdened even if we assume that LCS could establish that no alternative properties were available within Genoa Township.

LCS alternatively argues that it is substantially burdened because there are allegedly no alternative facilities within Genoa Township where LCS can operate its school. If LCS were correct that a substantial burden results whenever a religious institution cannot find a suitable location within a particular local jurisdiction, then LCS's present inability to use the Pinckney property and its concern about the long-term use of the Whitmore Lake property would be irrelevant because both of those properties are located outside the Township.

We will assume, solely for the purpose of resolving this issue, that there are no alternative facilities available to LCS within the Township's borders. Nevertheless, we conclude as a matter of law that LCS is not substantially burdened by the absence of such other properties because LCS has the Pinckney property as an adequate alternative.

LCS cites *Islamic Center of Mississippi, Inc. v. City of Starkville*, 840 F.2d 293, 300 (5th Cir. 1988), for its argument that being unable to locate anywhere within the Township is itself a substantial burden. But that case involved a free-exercise challenge to a zoning ordinance that prohibited all churches within the city limits unless an exception was obtained. Under the zoning ordinance, the city had allowed exceptions to 25 Christian churches, but denied an exception to an Islamic Center. The court stated that "the availability of other sites outside city limits does not permit a city to forbid the exercise of a constitutionally protected right within its limits." *Id.* at 300

(citing *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76–77 (1981) (holding that a local government could not constitutionally ban all live entertainment from its borders by relying on the argument that live entertainment was available in neighboring jurisdictions)). In so ruling, the court focused on the extensive evidence of religious discrimination against the Islamic Center and the fact that the city’s denial of the exception was not narrowly tailored to an important governmental interest. *Id.* at 300–03.

The language that LCS relies on in *Islamic Center* and *Schad* is from a different context than the present case—a First Amendment challenge to laws that categorically prohibited religious assemblies or certain types of speech within a jurisdiction’s borders. In the present case, unlike in *Islamic Center*, there is no evidence that the Township’s zoning ordinance has completely banned religiously oriented schools from its borders (or banned them unless they can obtain zoning exceptions).

And even if the Township’s denial of the special-use permit has effectively barred LCS from the Township’s borders, such a consequence does not automatically establish a RLUIPA violation. Our research has revealed only a few circuit cases that address this issue in the RLUIPA context. And most such cases involve challenges to land-use regulations that prohibit plaintiffs from using land in a certain area of a jurisdiction, not in the entire jurisdiction.

The most analogous case is *Andon, LLC v. City of Newport News*, 813 F.3d 510, 515–16 (4th Cir. 2016), in which the Fourth Circuit concluded that there was no substantial burden even though the plaintiff could not find another suitable location within the particular jurisdiction

in question. *Andon's* holding relied primarily on the fact that the plaintiff's burden was self-imposed, as discussed above. But the Fourth Circuit also stated that the unavailability of other land in the particular jurisdiction "will not by itself support a substantial burden claim." *Id.* at 516.

Similarly, the Seventh Circuit has held that a land-use regulation does not impose a substantial burden simply because of a "lack of affordable land" in Chicago or for other reasons "incidental to any high-density urban land use." *Civil Liberties for Urban Believers (CLUB) v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003). CLUB, however, involved a substantial-burden challenge to a zoning ordinance on its face, not a challenge to a specific land-use decision. *Id.* at 755–56, 763. And the court noted that the plaintiffs had in fact been able to locate in other parts of Chicago. *Id.* at 761.

Because RLUIPA has been held to allow the courts to consider the reasonableness of a plaintiff's expectations in being able to use the land in question for religious purposes, the courts should also be allowed to consider other factors relevant to the substantial-burden inquiry—such as whether the plaintiff had easy access to properties in a neighboring jurisdiction (as LCS had at the Pinckney property). Allowing a plaintiff to make out a substantial-burden claim where the plaintiff has burdened itself or in fact has easy access to suitable property in a neighboring jurisdiction is beyond the protection of RLUIPA. And as the Seventh Circuit has explained, the unavailability of land within a particular jurisdiction can result from the reality of competitive real-estate markets, not the municipality's actions. *See CLUB*, 342 F.3d at 762.

The circumstances of the present case indicate that LCS was not substantially burdened within the meaning of RLUIPA despite the alleged unavailability of other land within Genoa Township. LCS had the Pinckney property as a ready alternative, to which LCS could have returned with little or no expense if it had not leased that property to LOTWA after this litigation commenced. And LCS's stated mission is to serve Livingston County as a whole, not Genoa Township in particular.

Genoa Township is relatively small—it has a total area of 36.3 square miles out of Livingston County's total 565.25 square miles. See *Genoa Township Profile, Genoa Township*, <https://genoa.org/community/profile> (last visited May 31, 2017); *QuickFacts, Livingston County, Michigan*, U.S. Census Bureau, <https://www.census.gov/quickfacts/table/PST045216/26093> (last visited May 31, 2017). The Township is located between Brighton and Howell—two “areas” that LCS has stated would suffice for its school, but that are located at least in part outside of Genoa Township. See *Municipalities, Livingston County, Michigan*, <https://www.livgov.com/Pages/Municipalities.aspx> (last visited May 31, 2017). We take judicial notice of the geographic map of Livingston County and the corresponding square-mileage calculations.

Moreover, the boundaries of jurisdictions on the local-government level are often arbitrary in practice. Holding that a religious institution is substantially burdened any time that it cannot locate within such a small area—even if it could locate just across the border of the town limits—would be tantamount to giving religious institutions a free pass from zoning laws. See *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x at 729, 736–37 (6th

Cir. 2007) (explaining that RLUIPA cannot be construed so as to give religious institutions immunity from zoning laws); *see also, e.g., Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 96 (1st Cir. 2013) (noting that RLUIPA “does not provide religious institutions with immunity from land use regulation”) (quoting 146 Cong. Rec. S7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy)). In sum, RLUIPA does not automatically require every minor municipality to have at least one religious school within its borders.

We therefore conclude that the proper inquiry should be more functional and factually driven. When a religious institution has an available alternative outside of a desired jurisdiction, and where the distance from the desired location to the alternative property is reasonably close, the artificial boundaries of a particular jurisdiction become less important. The record here does not indicate that traveling the roughly dozen miles to Pinckney would be unduly burdensome to LCS’s students. Nor does the record demonstrate that LCS’s religious beliefs required it to locate within Genoa Township specifically. LCS instead seeks to serve Livingston County as a whole. Under these circumstances, we hold as a matter of law that LCS was not substantially burdened simply because it could not relocate within Genoa Township.

Our decision should not be taken to mean that a religious institution can never establish a RLUIPA claim based on the inability to locate within a particular jurisdiction. We simply hold that the determination of whether a substantial burden exists due to geographical limitations is factual in nature. A religious institution, for example, might have a mission of catering specifically to lower-income individuals located in an urban center, which

might be thwarted by relocating to a suburb that lacked public transportation. *See Islamic Center of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 299 (5th Cir. 1988) (noting that members of a mosque, many of whom were students living in an urban area located near a university campus, would be substantially burdened if they had to travel to the mosque using an automobile). But the circumstances in the present case simply do not constitute a substantial burden on LCS.

III. CONCLUSION

For all of the reasons set forth above, we AFFIRM the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-2060

Livingston Christian Schools,

Plaintiff-Appellant,

v.

Genoa Chapter Township,

Defendant-Appellee.

Before: MERRITT, GILMAN, and DONALD, Circuit
Judges.

JUDGMENT

On Appeal from the United States District Court for the
Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district
court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED
that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/

Deborah S. Hunt, Clerk

APPENDIX B

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

LIVINGSTON CHRISTIAN

SCHOOLS,

a Michigan non-profit
corporation,

Plaintiff,

v.

Honorable George
Caram Steeh

Magistrate Judge
David Grand

GENOA CHAPTER TOWNSHIP,
a Michigan municipal
corporation,

Case No. 15-12793

Defendant.

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT (DOC. 35)**

This matter is before the court on Defendant Genoa Charter Township's (Township) motion for summary judgment. Plaintiff Livingston Christian Schools (LCS) brought this action against the Township under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, the First Amendment to the United States Constitution, and the Fourteenth Amendment to the United States Constitution.

LCS also requested injunctive relief in its complaint, but the court denied that request. (Doc. 4 and Doc. 22).

LCS alleges that the Township violated RLUIPA by denying the Brighton Church of the Nazarene (Church)—a non-party to this case—a special use permit that would have allowed LCS to relocate to property owned by the Church. Specifically, LCS argues that the Township’s decision denying the Church’s amended special use permit imposes a substantial burden on LCS’s religious exercise and the religious exercise of its students. LCS additionally argues that the Township has not advanced a compelling governmental interest in denying the amended special use permit, and, even if it had, it has not implemented the denial in the least restrictive means possible. LCS further alleges that the denial of the permit application violated both its First Amendment right to free exercise of religion as well as its Fourteenth Amendment right to Substantive Due Process. The Township filed this summary judgment motion, and the court heard oral argument on June 15, 2016.

For the reasons stated in the court’s opinion, the Township’s motion for summary judgment is GRANTED.

I. STATEMENT OF FACTS¹

The Nazarene Church sits on approximately 16.5 acres (37,620 square feet) of property in Genoa Charter Township and includes a Christian education center, a sanctuary, Church offices, a recreational facility and a

¹ For a complete recitation of the facts, see the court’s Opinion and Order Denying Plaintiff’s Emergency Motion for Temporary Restraining Order (Doc. 22).

residential parsonage. (Doc. 4, Pg ID 113). The Church is bounded to the west by another church, to the east and south by public roads and to the north by neighborhoods. The Church conducts “its worship services and ministries . . . on weekends and select weeknights, and approximately 1,000 people typically attend weekend worship services.” (*Id.* at 114). The Church property is located in the Township’s “suburban residential zoning district.” (Doc. 11, Pg ID 274). As such, the Church has sought several special use permits between 1991 and 2013. All of these special use permit applications were approved by the Township. Over the years, homeowners in the surrounding neighborhoods complained about the Church’s existing activities, which created, among other things, noise, littering, and safety issues.

LCS is a non-profit organization that has been operating a pre-kindergarten through 12th grade Christian school since its formation in 2005. (Doc. 4-2, Pg ID 139). For the past nine years, LCS operated the school at a building it owns in Pinckney, Michigan. (*Id.*). LCS insists it must relocate to meet its growing enrollment, academic objectives, and mission to serve Livingston County (*Id.* at 140-41). The Township claims these are not LCS’s true reasons. Rather, according to the Township, LCS wants to relocate to reverse a recent trend of decreasing enrollment. (Doc. 35, Pg ID 939).

Recently, LCS sought to relocate from Pinckney, Michigan to the Church’s building to operate a Christian school. To facilitate the move to a new building, LCS entered into a five-year lease agreement with the Church beginning June 1, 2015. (Doc. 4-4). LCS prepaid rent to the Church in the amount of approximately \$70,000. (Doc. 4-2, Pg ID 140). After opening enrollment to the community,

with the help of LCS's social media campaign, LCS's enrollment increased by over 20% from 139 students during the 2014-2015 school year to 168 students for the upcoming 2015-2016 school year. (*Id.*). In anticipation of the move to the Nazarene Church, LCS agreed to lease the property it owns in Pinckney to a charter school, Light of the World Academy, for \$5,000 per month. (Doc. 4-2, Pg ID 141).

The Township heard "through the grapevine" about LCS's anticipated relocation to the Church property beginning in the 2015-2016 school year and advised the Church that it would need to apply for a special use permit to allow LCS to operate a school on the Church property. (Doc. 11 at 288). In March 2015, the Church applied for an amendment to the existing special use permit it was issued in 2013 and submitted an impact assessment in support of the amendment. (Doc. 4-5); (Doc. 12-3). The assessment noted that "the School will add an increase of approximately 50 cars using the exiting parking facilities on Monday thru [sic] Friday." (Doc. 12-3, Pg ID 459). In addition, the existing playground would be used by the school Monday through Friday during the mid-day, and the parking lot, on occasion, would be used for daytime activities. (*Id.*). The assessment also notes that the school would increase the number of employees by approximately 25 people and there would be 150-250 students. (*Id.* at 460). Finally, as it relates to traffic, the assessment states that LCS "is expected to generate 75 ingress/egress trips from the west and 50 ingress/egress trips from the east prior/after these start times. . . . Little of this traffic will occur during "peak" traffic hours." (*Id.* at 461). The assessment also noted that the Livingston County Road Commission defined the impact LCS will have on the

intersection of Brighton Road and the Church driveway as minor. (*Id.*).

Four Planning Commission meetings open to the public's comment took place between April and July 2015 to determine whether to recommend approval to the Township board of the Church's application to amend its existing special use permit. Over this four-month period, the Church worked with the Planning Commission and others to address all outstanding issues and arrange for the operation of LCS beginning in the 2015-2016 school year. At each Planning Commission meeting, nearby neighbors of the Church complained about multiple issues, the central theme being that allowing LCS to operate a school at the Church would be bad for traffic in the area. Neighbors also complained that the Church had never complied with conditions of its existing special use permit.

The Planning Commission's planning and zoning consultant, LSL Planning, stated that "[t]here are concerns of traffic generation and protection of the adjacent neighborhood to the east. We believe a traffic impact study is necessary to ensure there are no issues with the roadway[.]" (Doc. 12-5, Pg ID 464). The Township's engineering consultant, Tetra Tech, also recommended that the Township require the Church to submit a traffic study. (Doc. 12-6). Tetra Tech stated that the "biggest concern is the traffic generated by a school use and its coordination with the other public school traffic utilizing Brighton Road." (*Id.*).

Attempting to rectify the issues raised in the public hearings, LCS hired Boss Engineering to conduct a traffic impact study. Boss provided a report on May 1, 2015, which was amended on May 20 and again on June 23, 2015, after

receiving comments from Tetra Tech and the Planning Commission. (Doc. 4-6); (Doc. 12-7). The final conclusions and recommendations by Boss were as follows:

- The Livingston Christian School will have minimal impact on Brighton Road in the a.m. and p.m. peak traffic hours for the school. The Brighton Road Level of Service will remain at A.
- The Livingston Christian School will have no impact on the traffic signals located at Brighton High School based on the Livingston County Road Commission Synchro model and Bauer Road based on the distance from the Livingston Christian School to the intersection.
- There will be a significant impact on the Monday through Friday use of the Church parking lot during the September to June time period when the school is in session.
- Information shall be provided to students, parents and staff during orientation that recommends right turns out of the parking lot after drop off and pick up to limit delays within the parking lot. The Traffic Control Director will direct left turn drivers into the left turn lane of the driveway at their discretion. The Traffic Director Roles and Responsibilities are defined in Appendix D. The traffic pick up and drop off Parent and Student Orientation Material is presented in Appendix E.
- Due to potentially long delays within the parking lot and at the driveway exit to Brighton Road school staff must be posted at critical locations to monitor

the delays and to direct left turns out of the parking lot.

(Doc. 4-6, Pg ID 172). LSL Planning deferred to Tetra Tech for comment on the traffic study. (Doc. 4-7, Pg ID 204). Tetra Tech stated that it had “no further objections to approval of the site plan for approval contingent on [multiple] comments. . . .” (Doc. 4-8, Pg ID 209). Tetra Tech’s comments focused on the Church managing traffic in its parking lot. (*Id.* at 208).

At the final Planning Commission meeting on July, 13, 2015, the commission recommended the Township board approve the Church’s application for an amendment to its special use permit. (Doc. 13-3, Pg. ID 535). On July 16, 2015, the assistant Township manager, Kelly VanMarter, sent the Township board of trustees a letter informing them that the commission recommended granting the Church’s amended special use permit to allow LCS to operate its school from the Church property. (Doc. 4-9, Pg ID 211). The Township board of trustees had a regular meeting on July 20, 2015, where approval of the permit was discussed and voted on. (Doc. 4-10). The motion failed by a 4-3 vote. (*Id.* at 215). The meeting minutes do not reflect any formal reasons for denying the permit. At the board’s next regular meeting, which took place on August 3, 2015, the board clarified the reasons for its previous action of July 20. (Doc. 4-11, Pg ID 217-18). Again, by 4-3 vote, the board voted to deny the Church’s application to amend its special use permit. The following reasons were provided:

- 1) The expanded use of the church to include a K-12 school will exacerbate the existing and historical negative impacts of the church on

the adjacent neighborhood. The need for active traffic management and restricted egress from the facility provides that the site cannot accommodate the use property 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 project is contrary to the statement of purpose for the Single family Residential Zoning in regard to items 3.01.02(e.) and (g.) and (i)
- 4) 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 include the primary hub for the Brighton Area Schools, with Honung (elementary), Maltby (intermediate), Scranton (7/8th grade) 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 Nazarene 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 petitioners. Specific issues include the following:
 - a) The applicant 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 applicant 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 applicant has demonstrated disregard for existing approvals by making significant changes to their building design contrary to the approved 2013 plans and without necessary permits or approvals to do so.

(*Id.* at 218–19).

After the Township's denial of the special use permit application, LCS filed this lawsuit. On August 20, 2015, seventeen days after the Township's denial, LCS finalized its contract to lease the Pinckney facility to Light of the World Academy. After filing this suit, LCS also entered into a short term agreement to lease a building from Whitmore Lake Public Schools for the 2015-2016 academic year.

II. SUMMARY JUDGMENT LEGAL STANDARD

Federal Rule of Civil Procedure 56(c) empowers the court to render summary judgment “forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *See Redding v. St. Edward*, 241 F.3d 530, 532 (6th Cir. 2001). The Supreme Court has affirmed the court's use of summary judgment as an integral part of the fair and efficient administration of justice. The procedure is not a disfavored procedural shortcut. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *see also Cox v. Kentucky Dept. of Transp.*, 53 F.3d 146, 149 (6th Cir. 1995).

The standard for determining whether summary judgment is appropriate is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Amway Distributors Benefits Ass'n v. Northfield Ins. Co.*, 323 F.3d 386, 390 (6th Cir. 2003) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). The evidence and all reasonable inferences must be construed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith*

Radio Corp., 475 U.S. 574, 587 (1986); *Redding*, 241 F.3d at 532 (6th Cir. 2001). “[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original); *see also National Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 907 (6th Cir. 2001).

If the movant establishes by use of the material specified in Rule 56(c) that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law, the opposing party must come forward with “specific facts showing that there is a genuine issue for trial.” *First Nat’l Bank v. Cities Serv. Co.*, 391 U.S. 253, 270 (1968); *see also McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000). Mere allegations or denials in the non-movant’s pleadings will not meet this burden, nor will a mere scintilla of evidence supporting the non-moving party. *Anderson*, 477 U.S. at 248, 252. Rather, there must be evidence on which a jury could reasonably find for the non-movant. *McLean*, 224 F.3d at 800 (citing *Anderson*, 477 U.S. at 252).

III. ANALYSIS

A. Religious Land Use and Institutionalized Persons Act (RLUIPA)

1. Overview

LCS and the Township primarily rely on the same arguments supporting claimed RLUIPA violations here as they did in their briefs in support and opposition to LCS’s

motion for a temporary restraining order. Accordingly, the court incorporates by reference the lengthy analysis explaining its ruling denying that motion and only briefly addresses those arguments previously advanced by the parties.

LCS's complaint alleges that the Township's denial of the Church's amended special use permit is a violation of the RLUIPA. The RLUIPA provides:

(a) Substantial burdens

(1) General rule

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.

The statute further provides:

(2) Scope of application

This subsection applies in any case in which—

* * * *

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

Id. § 2000cc(a)(2).

The primary point of contention between the parties is whether the Township’s denial of the special use permit constitutes a substantial burden under RLUIPA. LCS also contends that the Township does not have a compelling governmental interest in denying the amended special use permit and that, even if the Township has a compelling governmental interest, it has not accomplished its interest through the least restrictive means necessary. The Township, however, does not address whether the Township had a compelling interest or employed the least restrictive means available, instead arguing exclusively that the Township’s denial did not constitute a substantial burden.

2. *The Township did not Impose a Substantial Burden on LCS*

The term “substantial burden” is not defined in the RLUIPA. The Sixth Circuit in *Living Water Church of God v. Charter Twp. of Meridian* articulated a standard which requires LCS to show that, “though the government action may make religious exercise more expensive or difficult, . .

. the government action place[s] substantial pressure on [it] to violate its religious beliefs or effectively bar[s] [it] from using its property in the exercise of its religion[.]” 258 F. App’x 729, 737. When the Township denied the Church’s permit application, LCS had not yet leased its Pinckney property. So, it could have used that location as an alternate to the Church property. Additionally, LCS has operated for 2015-16 school year at the Whitmore Lake location. Thus, “nothing the Township has done requires [LCS] to violate or modify or forego its religious beliefs or precepts, or to choose between those beliefs and a benefit to which [LCS] is entitled[.]” *Id.* at 741 (citations omitted). While it may be less convenient or more expensive for LCS to operate its school from a different location, the circumstances present here do not constitute a substantial burden under the *Living Water* analysis. Because LCS has not “proffered evidence showing that it cannot carry out its church missions and ministries due to the Township’s denial,” it has not established a substantial burden on its free exercise of religion. *Id.* (citing *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007)).

LCS also relies on *Harbor Missionary Church Corp. v. City of San Buenaventura*, No. 14-56137, 2016 WL 946537 (9th Cir. Mar. 14, 2016). In that case, a church operated a homeless ministry on its property. *Id.* at *1. The church considered ministering to the homeless a sacred duty. *Id.* After a few years of operation, the city told the church that it needed a conditional use permit to continue operating the homeless ministry. *Id.* The church applied and was denied a permit. *Id.* The church would have had to pay \$1.4 million in order to relocate. *Id.* at *3. The church filed suit against the city, asking the district court for injunctive relief. *Id.* at *2. The district court held that the church was not likely to succeed on the merits because

there was no substantial burden under RLUIPA. *Id.* The district court, therefore, denied injunctive relief. *Id.* The church appealed, and the Ninth Circuit reversed the district court's decision finding that there was, in fact, a substantial burden. *Id.* at *3.

Harbor Missionary is distinguishable from the matter at hand. As this court noted in its order denying LCS's motion for temporary restraining order, where there is a ready alternative, there is no substantial burden. (Doc. 22, Pg. ID 659-60). *Westchester Day School v. Vill. of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007). The church in *Harbor Missionary* had no ready alternative. They would either have to pay \$1.4 million or forfeit their "sacred duty" of ministering to the homeless. LCS, on the other hand, had ready alternatives in the form of both the Pinckney and Whitmore Lake locations. There is nothing standing in the way of LCS exercising its religious beliefs.

During oral argument, LCS also noted that there are currently no religious schools in Livingston county. LCS claimed this was indicative of the Township's discriminatory intent and violation of the purpose of RLUIPA. The Pinckney facility, however, is in Livingston County and was available to LCS when the Township denied its special use permit application. LCS did not lease that space to Light of the World Academy until after the Township's denial. Second, as demonstrated above, RLUIPA analysis begins with determining whether there was a substantial burden, not whether similarly situated religious institutions exist within a given area. Because there is no indication that LCS is being prevented from

exercising its religious beliefs, there is no substantial burden here.²

B. First Amendment - Free Exercise of Religion

LCS next alleges that the Township violated its constitutional right under the First Amendment to freely exercise its religious beliefs. The First Amendment establishes that “Congress shall make no law . . . prohibiting the free exercise [of religion],” U.S. Const. Amend. I, and this Free Exercise Clause has been made applicable to the states by incorporation into the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). “The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.” *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990).

1. Standard of Review

There is a disagreement between the parties as to which standard of review this court should apply. The Township argues that opening a school at this exact location is not a “fundamental tenet” of LCS’s faith, and the

² Given that the Township did not impose a “substantial burden” on LCS’s religious exercise, this court will not address whether there was a “compelling governmental interest” or whether the Township’s actions were the “least restrictive means of furthering that interest.” *Living Water*, 253 F. App’x at 742 (“Because we find no substantial burden, we do not reach the district court’s conclusions with regard to whether the Township’s action was in furtherance of a compelling governmental interest or was the least restrictive means of furthering that interest.”).

Township’s denial of the special use permit was, therefore, not a violation of the Free Exercise Clause. *See Lakewood Congregation of Jehovah’s Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 307 (6th Cir. 1983) (“[B]uilding and owning a church is a desirable accessory of worship, not a fundamental tenet of the Congregation’s religious beliefs.”). LCS, on the other hand, argues that the Supreme Court recently rejected this “fundamental tenet” analysis when it clarified that courts should avoid making determinations regarding the centrality of a certain tenet of an individual’s faith. *Employment Div., Dep’t. Of Human Res. Of Oregon v. Smith*, 494 U.S. 872, 886-87 (1990) (“It is no more appropriate for judges to determine the ‘centrality’ of religious beliefs before applying a ‘compelling interest’ test in the free exercise field, than it would be for them to determine the ‘importance’ of ideas before applying the ‘compelling interest’ test in the free speech field.”). Under *Lakewood*, it appears that LCS would fail. Operating a school on the Church property is not a “fundamental tenet” of LCS’s faith. It is merely a “desirable accessory,” especially given the alternative locations at LCS’s disposal. This court, however, does not need to decide whether and how *Lakewood* is impacted by *Smith* because, as the analysis below demonstrates, LCS fails under either analysis.

2. *Application of the Neutral Law of General Applicability Standard*

To establish a violation under the Free Exercise Clause, LCS must prove that the Township’s zoning ordinance is not a neutral law of general applicability, either facially or as applied. When examining an as applied challenge, a court must look at whether the official action is religiously motivated by “survey[ing] meticulously the

circumstances of governmental categories to eliminate, as it were, religious gerrymanders.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (citing *Walz v. Tax Comm’n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)) (internal quotation marks omitted). In drawing its conclusion, the court must pay particular attention to other possible motivations because “a social harm may have been a legitimate concern of government for reasons quite apart from discrimination.” *Id.* at 535.

LCS does not argue that the ordinance is facially invalid. Instead, LCS claims that the Township has not applied the ordinance neutrally. Specifically, the Township has allowed a driver licensing program to operate on the Church property without the proper permit for over a decade. Outwardly, the Township condemned the Church for allowing the driver licensing program to continue to operate on its property and even listed the driver licensing program as one of the reasons for denying the Church’s permit application that would have allowed LCS to operate on the Church property. (Doc. 4-11, Pg ID 219). The Township did, however, meet with the owners of the driver licensing program around the time LCS was denied a special use permit and assured the driver licensing program that it could continue operating on the Church property. (Doc. 43-7, Pg ID 1310). LCS argues that permitting one secular, educational use while denying a religious, educational use on the same property is not a neutral application of the ordinance against LCS, a Christian school.

LCS insists that since at least 1999, the Township has never denied a special use permit, until now. This cuts both ways. Although, the Township has never denied a

special use permit for a secular use, it has also never denied a special permit for a religious use. The Township has approved three other special use permits for the Church, a religious institution. The denial at issue was the first time the Church was denied a special use permit. The Township's history of granting special use permits for religious uses casts doubt on LCS's contention that the Township was motivated by a discriminatory intent. The Church, furthermore, is not just any religious institution, it is a religious institution with which LCS is affiliated. In addition, the driver licensing program does not attract the amount of traffic as would a school located on the property. Nor would the traffic be as consistent. LCS does not present any additional evidence to suggest that the Township was participating in "religious gerrymandering" or otherwise discriminating against LCS as a religious institution. Summary judgment as to this claim is, therefore, GRANTED.

C. Fourteenth Amendment - Substantive Due Process

LCS claims that the Township violated its Fourteenth Amendment right to Substantive Due Process by arbitrarily and capriciously denying it a protected property right when the Township denied the requested special use permit. "To state a substantive due process claim in the context of zoning regulations, a plaintiff must establish that (1) a constitutionally protected property or liberty interest exists, and (2) the constitutionally protected interest has been deprived through arbitrary and capricious action." *Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564, 573 (6th Cir. 2008).

1. *LCS Has Standing Even Though It Did Not Apply for the Permit*

As an initial matter, the Township argues that LCS lacks standing because it was the Church, not LCS, that filed for the special use permit. The Township points to what it refers to as a “‘long line of cases’ in which courts held that a claimant lacks standing to challenge the denial of a permit or another benefit for which the claimant never applied.” (Doc. 35, Pg ID 983). The Township argues that, based on these cases, LCS lacks an “injury in fact,” which is a requirement of standing. LCS claims that it does have standing and that the court previously said as much in its Opinion and Order Denying Plaintiff’s Emergency Motion for Temporary Restraining Order. (Doc. 22, Pg ID 647).

The “injury in fact” requirement “ensures that the plaintiff[] ha[s] a ‘personal stake in the outcome of the controversy.’” *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 695-96 (6th Cir. 2015) (citation omitted). This injury must be “concrete and particularized,” “actual and imminent,” and not “conjectural or “hypothetical.” *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

For the most part, the cases cited by the Township are not applicable because the claimants in those cases were only challenging a benefit or policy in the abstract. *See, e.g., Madsen v. Boise State Univ.*, 976 F.2d 1219, 1220-21 (9th Cir. 1992) (also citing a “long line of cases” where plaintiffs merely challenged a benefit or policy in the abstract). Here, however, LCS is not challenging the ordinance in the abstract. The Church applied for the ordinance, and LCS was denied use of the Church property

when the Township denied the Church's application. So those cases do not apply. There is, however, one case, *Miller v. Montgomery County*, 458 Fed. Appx. 304 (4th Cir. 2011), which the Township refers to, that is on point. In that Fourth Circuit case, plaintiff entered into a contract with a landowner to harvest timber on the landowner's property. *Id.* at 305. The contract was contingent on plaintiff complying with county regulations regarding timber harvesting. *Id.* In order to harvest timber, the county required permission to ensure that the harvesting was within the "forest management objectives." *Id.* at 306. The county denied the landowner's application, and plaintiff sued for, among other things, violations of the Fourteenth Amendment. *Id.* at 306-07. The district court found that plaintiff did not have standing to bring his claims because he did not have an "injury in fact." *Id.* at 309. The Fourth Circuit agreed with the district court that plaintiff did not have an "injury in fact."

The matter at hand is distinguishable, however. Unlike the contract to harvest timber in *Miller*, which was contingent on the plaintiff receiving an exemption, the lease agreement between LCS and the Church is not contingent on LCS obtaining a special use permit. (Doc. 43-4). In addition, LCS prepaid the Church approximately \$70,000. It is clear that LCS has a "personal stake in the outcome of the controversy." *Green Party*, 791 F.3d at 695-96 (internal quotation marks omitted). Moreover, the injury to LCS is "concrete and particularized," "actual and imminent," and not "conjectural or hypothetical." *Driehaus*, 134 S.Ct. at 2341 (citing *Lujan*, 504 U.S. at 560). LCS has standing to bring this claim.

2. *Fourteenth Amendment Claim Is Not
Subsumed by First Amendment Claim*

The Township also argues that LCS's Fourteenth Amendment Claim is subsumed by its First Amendment Claim, and the court should, therefore, not consider the Fourteenth Amendment Claim. The *Graham* doctrine establishes that, "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a *particular sort of government behavior*, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'" *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)) (emphasis added). This doctrine prevents the expansion of the concept of Substantive Due Process where there is another, more specific constitutional provision that protects against the same government action. *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992) ("[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended."). "This does not mean, however, that the applicability of the more explicit provision pre-empts due process protections." *John Corp. v. City of Houston*, 214 F.3d 573, 582 (5th Cir. 2000) (citing other cases holding the same). A Substantive Due Process claim is not subsumed if it "addresses a separate injury." *Warren v. City of Athens, Ohio*, 411 F.3d 697, 708 (6th Cir. 2005).

LCS included its First Amendment Free Exercise claim and Fourteenth Amendment Substantive Due Process claim in "Count IV—Violations of Civil Rights and Due Process" of its amended complaint. The Township argues that, based on the *Graham* doctrine, because these are not distinct claims and are based on the same facts, the Fourteenth Amendment Claim is subsumed by the First Amendment Claim, which is more specific. 490 U.S. at 395.

LCS's response brief is silent as to this argument. The Township relies on *Guindon v. Twp. of Dundee, Mich.*, 488 F. App'x 27, 38 (6th Cir. 2012) to establish that, once the court has ruled on the First Amendment claim, it "need not address any alleged substantive . . . due process violations." The Sixth Circuit in *Guindon*, however, did not discuss the *Graham* doctrine. Instead, the Sixth Circuit merely agreed with the district court that it need not address the alleged Substantive Due Process violations "because all of these claims are derivative of [Guindon's] claims asserting violations of their individual constitutional rights, and those claims lack merit." *Id.*

While LCS, like Guindon, included its Fourteenth Amendment Substantive Due Process claim and First Amendment Free Exercise claim in the same count, the claims are not derivative of one another. LCS alleges different facts to support these claims. LCS's First Amendment claim is primarily supported by facts contrasting the Township's treatment of LCS with the Township's treatment of the driver licensing program. Whereas, in support of its Fourteenth Amendment claim, LCS alleges facts indicating that the Township Board did not have the authority to deny the Church's permit.

Additionally, the First Amendment claim is premised on alleged discriminatory treatment by the Township based on LCS's religious belief; whereas the Substantive Due Process claim is premised on an alleged procedural defect. These are separate injuries, and LCS's Substantive Due Process claim should not be subsumed by the First Amendment.

3. *LCS Has No Protected Property Interest*

To demonstrate a violation of Substantive Due Process, LCS must first show that it had a protected property interest in the special use permit. In order for LCS to have a protected property interest, the Township must not have had discretion in deciding whether or not to grant the special use permit. *Silver v. Franklin Twp. Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992). In other words, LCS must prove that the ordinance at issue required the Township to grant its application for a special use permit and that, by not doing so, the Township violated LCS's protected property interest.

Section 19.02 of the Township's Zoning Ordinance establishes the application and review procedures for special use permits.

19.02.04 Review. The request for special land use approval shall be reviewed as follows:

- a) The special land use request and related documents shall be forwarded to the Planning Commission.
- b) The Planning Commission shall review the Special Land Use application, the Impact Assessment, and the Site or Sketch Plan in terms of the requirements of the Special Land Use General Review Standards Section 19.03, any specific conditions required for the use and the site plan review standards of Section 18.08.
- c) The Planning Commission shall hold a public hearing on the special land use

application in accordance with the Michigan Zoning Enabling Act (Public Act 110 of 2006).

Notice of public hearing shall be provided for in accordance with section 21.05. (as amended 12/31/06)

- d) The Planning Commission shall recommend approval, approval with conditions or denial of the Special Land Use Request, Site/Sketch Plan and Impact Assessment to the Township Board.

If the application is determined to be incomplete or more information is required, then the Planning Commission may either: 1) table the request and direct the applicant to prepare additional information or revise the plan; 2) return the request for additional staff review or analysis; or 3) recommend denial of the request. If the plan revisions are determined to be significant by the Planning Commission, they may elect to conduct another public hearing.

- e) For any use requiring special land use approval, the site or sketch plan for such use shall require Township Board approval, based upon a recommendation of the Planning Commission.

- f) Township Board Action: Following receipt of the Planning Commission's recommendation, the Township Board shall take one of the following actions on the Special Land Use, Site/Sketch Plan and Impact Assessment.
1. Table: If the application is determined to be insufficient, does not fully respond to Planning Commission conditions or more information is required, then the request may be tabled. The Township Board shall direct the applicant to prepare additional information, revise the plan or direct the Township staff or consultant's to conduct additional analysis.
 2. Reconsideration: If the Township Board believes there is new information which might modify the recommendation of the Planning Commission, the Board may return the application with the new information to the Planning Commission for reconsideration.
 3. Approval: Upon determination that a special land use and plan proposal is in compliance with the standards and requirements

of this Ordinance and other applicable ordinances and laws, the Township Board shall approve the application.

4. Conditional Approval: The Township Board may impose reasonable conditions with the approval of a special land use, to mitigate impacts associated with the proposed use or activity to ensure that public services and facilities affected by a proposed special land use or activity will be capable of accommodating increased service and facility loads generated by the new development; protect the natural environment; ensure reasonable compatibility with adjacent uses of land and the overall character of the Township, to the extent practical for the use; ensure the standards of this Article and the Zoning Ordinance are met.
5. Denial of Special Land Use and Site/Sketch Plan Application: Upon determination that a special land use or site/sketch plan proposal does not comply with standards and regulations set forth in this Ordinance, or requires extensive revision in

order to comply with said standards and regulations, the Township Board shall deny the application. Resubmittal of an application which was denied shall be considered a new application.

According to LCS, Section 19.02 describes a review process whereby the Planning Commission makes a recommendation to the Township. If the Planning Commission recommends approval because the ordinance is satisfied, then the Township “shall” approve the special use permit and “may impose reasonable conditions with the approval.” *Id.* In other words, the Township must rubber stamp the Planning Commission’s decisions. The Township, on the other hand, argues that the Planning Commission merely makes a “recommendation” to the Township, and a “recommendation” is, by its nature, non-binding.

Upon review of the statute, it is clear that the Township, not the Planning Commission, makes the final determination whether or not to grant an application for a special use permit. The recommendation the Planning Commission makes to the Township is exactly that, a recommendation. Section 19.02.04 establishes several actions the Township may take once it receives the Planning Commission’s recommendation. One of those actions is “Denial of Special Land Use and Site/Sketch Plan Application.” The Township chose to deny LCS’s application, as it was authorized to pursuant to the ordinance. The Township did have discretion to deny LCS’s special use permit, and LCS, therefore, does not have a protected property interest. Because there is no protected

property interest, the court does not need to reach the question of whether the Township's denial was arbitrary and capricious. Summary judgment as to this claim in GRANTED.

IV. CONCLUSION

For the reasons set forth above, Defendant's motion for summary judgment is GRANTED.

IT IS SO ORDERED.

Dated: June 30, 2016

Respectfully submitted,

/s/Gerorge Caram Steeh

GEORGE CARAM STEEH

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

Copies of this Order were served upon attorneys of record on June 30, 2016, by electronic and/or ordinary mail.

s/Marcia Beauchemin

Deputy Clerk

APPENDIX C

FILED

Jul 26, 2017

DEBORAH S. HUNT, Clerk

No. 16-2060

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Livingston Christian Schools,

Plaintiff-Appellant,

v.

Genoa Chapter Township,

Defendant-Appellee.

ORDER

BEFORE: MERRITT, GILMAN, and DONALD, Circuit
Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

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Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/

Deborah S. Hunt, Clerk

APPENDIX D

42 U.S.C. § 2000cc. Protection of land use as religious exercise (excerpt):

(a) Substantial Burdens

(1) General Rule. 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.

* * *