IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

KAMAL ANWIYA YOUKHANNA, *et al.*,

Plaintiffs,

v.

CITY OF STERLING HEIGHTS, *et al.*,

Defendants.

No. 2:17-cv-10787-GAD-DRG

Hon. Gershwin A. Drain

PLAINTIFFS' RESPONSE TO BRIEF OF *AMICUS CURIAE* THE AMERICAN ISLAMIC COMMUNITY CENTER IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

ISSUES PRESENTED

I. Whether Plaintiffs have standing to pursue their claims.

II. Whether the Consent Judgment entered into between the City of Sterling Heights and the American Islamic Community Center, Inc. is invalid.

III. Whether Plaintiffs are likely to succeed in their challenge to the Consent Judgment such that a preliminary injunction should issue preventing its enforcement during the pendency of this action since Plaintiffs will be irreparably harmed absent such relief, the injunction will not cause substantial harm to others, and granting the injunction is in the public interest.

CONTROLLING AND MOST APPROPRIATE AUTHORITY

Allen v. Wright,
468 U.S. 737 (1984)

Cleveland Cnty. Ass'n for Gov't by the People v. Cleveland Cnty. Bd. of Comm'rs,
142 F.3d 468 (D.C. Cir. 1998)

League of Residential Neighborhood Advocates v. City of Los Angeles,
498 F.3d 1052 (9th Cir. 2007)

St. Charles Tower, Inc. v. Kurtz,
643 F.3d 264 (8th Cir. 2011)

Mich. Comp. Laws § 125.3101, *et seq*.

Mich. Comp. Laws § 15.263

INTRODUCTION

This case challenges the lawfulness of the Consent Judgment entered into between the City and the American Islamic Community Center, Inc. ("AICC") by which the City granted AICC approval to build a large Mosque on 15 Mile Road in violation of the City of Sterling Heights Zoning Ordinance ("Zoning Ordinance"), the Michigan Zoning Enabling Act, Mich. Comp. Laws § 125.3101, *et seq*., the Michigan Open Meetings Act, Mich. Comp. Laws § 15.263, and the Fourteenth Amendment to the U.S. Constitution.

Consequently, this Consent Judgment is invalid and unenforceable, and this Court should preliminarily enjoin its enforcement so as to maintain the *status quo* while this case proceeds.

In sum, the weakness of AICC's arguments (Doc. No. 27) and its lack of supporting evidence[1] are quite revealing and further illustrate that there was no basis for the City to enter into the Consent Judgment.

SUMMARY OF FACTS

In their motion for a preliminary injunction, Plaintiffs set forth a detailed statement of facts supported by the record. (*See* Pls.' Mot. for Prelim. Inj. at 2-14,

[1] AICC provided a copy of the lease agreement in its original filing (Doc. No. 12-4). In addition to AICC's failure to provide evidence authenticating the lease, AICC provided no evidence demonstrating that Hajj Mohamed Amin Chebah Mosque, LLC owns the property such that it can lease it to AICC.

[Doc. No. 9]). To avoid needless repetition, Plaintiffs will summarize the relevant facts below:

- On or about June 16, 2015, AICC submitted a Special Approval Land Use application ("AICC Application") to the City's Planning Commission. (Muise Decl. ¶ 3, Ex. A [AICC Verified Compl. ¶ 33, ECF No. 1] [Doc. No. 9-2]).

- The AICC Application was ultimately denied "based upon [AICC's] failure to address the concerns of the Planning Commission to satisfy the discretionary criteria applied to the special land use application," and "[t]he decision of the Planning Commission was based upon criteria contained in the Zoning Ordinance and was not based upon religion or religious denomination."[2] (Muise Decl. ¶ 4, Ex. B [City Answer, Affirmative Defenses ¶¶ 16, 17, ECF No. 5] [Doc. No. 9-2]).

- "[AICC] has an existing place of worship in Madison Heights, Michigan, and [AICC] has continued to be able to exercise its religious beliefs throughout all relevant periods of time." (Muise Decl. ¶ 4, Ex. B [Answer,

[2] AICC presented <u>no</u> evidence to demonstrate that its proposed Mosque construction complies with the Zoning Ordinance. Moreover, AICC's claim that the Planning Staff initially *recommended* approving the proposed construction is meaningless. (AICC Br. at 4 [Doc. No. 27]). After AICC was given an opportunity to modify its plans to meet the zoning requirements and thus meet the concerns of the *Planning Commission* (which is the entity with authority to approve or deny a special approval land use application) and it refused to do so in any meaningful way, the Planning Staff recommended denial of AICC's Application, and the Planning Commission ultimately denied it. (Norgrove Decl. ¶¶ 12-26 [Doc. No. 9-4]).

Affirmative Defenses ¶ 14, ECF No. 5], Ex. A [AICC Verified Compl. ¶ 8, ECF No. 1] [Doc. No. 9-2]; *see also* Norgrove Decl. ¶ 24 [Doc. No. 9-4]).

- On August 10, 2016, AICC filed a lawsuit against the City, alleging violations, *inter alia*, of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc. (Muise Decl. ¶ 3, Ex. A [AICC Verified Compl., ECF No. 1] [Doc. No. 9-2]).

- On August 30, 2016, the City filed its Answer, denying *all* wrongdoing. (Muise Decl. ¶ 4, Ex. B [Answer, ECF No. 5] [Doc. No. 9-2]).

- On February 21, 2017, following a public hearing held by the City Council, the City entered into the Consent Judgment with AICC. (Muise Decl. ¶ 5, Ex. C [Consent Judgment, ECF No. 18] [Doc. No. 9-2]; Rrasi Decl. ¶¶ 4-6 [Doc. No. 9-3]).

- During this meeting, the Mayor stated that he supported the Planning Commission, that it had arrived at the right decision based upon legitimate planning and zoning issues, and that he vehemently denies that the Planning Commission operated in any way to discriminate or violate the rights of AICC, further stating that he "will stand by that until the day I die," or words to that effect. (Defs.' Opp'n, Ex. J [Video at approx. 3 hrs. 19 mins. 14 secs. to approx. 3 hrs. 21 mins.] [Doc. No. 14-11]).

- Affected landowners were not provided proper notice nor a copy of the Consent Judgment and its terms prior to the meeting and its approval by the City Council. (Rrasi Decl. ¶ 4 [Doc. No. 9-3]).

- Approving the AICC Application violated the Zoning Ordinance and the Michigan Zoning Enabling Act. And the terms and conditions of the Consent Judgment are vague and inadequate, leaving Plaintiffs at great risk of future harm. (Norgrove Decl. ¶¶ 5-30, Ex. A [AICC Application], Ex. B [August 13 Staff Report], Ex. C [September 10 Staff Report] [Doc. No. 9-4]).

ARGUMENT[3]

I. PLAINTIFFS HAVE STANDING TO CHALLENGE THE CONSENT JUDGMENT.

AICC argues that Plaintiffs lack standing to challenge the Consent Judgment. AICC is mistaken. Plaintiffs' standing is easily established. Moreover, to invoke this Court's jurisdiction, it is only necessary for one Plaintiff to have standing. *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986) ("It is clear that members of the Union, one of whom is an appellee here, will sustain injury by not receiving a scheduled increase in benefits. . . . This is sufficient to confer standing

[3] AICC does not address Plaintiffs' claim that the City violated the Michigan Open Meetings Act when it entered into the Consent Judgment. (*See* AICC Br. at 8). That violation alone provides a basis for invalidating the consent decree. (Pls.' Mot. for Prelim. Inj. at 21-22 [Doc. No. 9]). Nor does AICC address Plaintiffs' due process arguments. Surprisingly, AICC also presents no arguments or evidence as to whether the requested injunction will cause substantial harm to it or anyone else or how granting the injunction might impact the public interest.

under . . . Article III. We therefore need not consider the standing issue as to the Union or Members of Congress.").

To begin, it is axiomatic that Article III confines the federal courts to adjudicating actual "cases" or "controversies." U.S. Const. art. III, § 2. As stated by the Supreme Court:

> A justiciable controversy is . . . distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Where there is such a concrete case admitting of an immediate and definite determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised . . . .

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937) (citations omitted).

Here, there is nothing hypothetical, abstract, academic, or moot about the legal claims advanced. This case presents a real and substantial controversy between parties with adverse legal interests, and this controversy can be resolved through a decree of a conclusive character. *Id*. It will not require the Court to render an opinion advising what the law would be upon a hypothetical state of facts. *Id*. In short, this Court has the power (jurisdiction) to decide this case.

In an effort to give meaning to Article III's "case" or "controversy" requirement, the courts have developed several justiciability doctrines, including

standing. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). "The doctrine of standing gives meaning to these constitutional limits by identifying those disputes which are appropriately resolved through the judicial process." *Id.* (internal quotations and citation omitted).

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Consequently, to invoke the jurisdiction of a federal court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

While the necessary injury-in-fact to confer standing is not susceptible to precise definition, it must be "distinct and palpable," *Warth*, 422 U.S. at 501, and not merely "abstract," "conjectural," or "hypothetical," *Allen*, 468 U.S. at 751. Put another way, the injury must be both "concrete and particularized," meaning "that the injury must affect the plaintiff in a personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

To that end, courts have recognized that "[a]n economic injury which is traceable to the challenged action satisfies the requirements of Article III." *Linton v. Comm'r of Health & Env't*, 973 F.2d 1311, 1316 (6th Cir. 1992). Additionally, injury to "recreational" or "aesthetic" interests that are traceable to the challenged

action also satisfy standing requirements. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 184 (2000).

In *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052 (9th Cir. 2007), the court invalidated a settlement agreement approved by a federal district court that granted an Orthodox Jewish congregation approval to operate a synagogue in a residential-zoned area. Pursuant to Article III, if the challengers lacked standing, neither the district court nor the appellate court had authority to issue a decision. Jurisdiction is a threshold issue, regardless of whether or not it is raised by a party because it goes directly to the court's power to hear and decide a case. *See, e.g., Raines v. Byrd*, 521 U.S. 811, 818 (1997) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.") (citation omitted). And while the Ninth Circuit did not address standing in its opinion, the reason is clear: it was obvious that the neighbors had standing to advance a challenge to a decision involving zoning that would affect their property interests. This precise point was made by the Third Circuit in *Goode v. City of Philadelphia*, 539 F.3d 311 (3d Cir. 2008).[4]

[4] AICC cites the *Goode* case without explanation. (*See* AICC Br. at 15).

In *Goode*, the court held that the appellants lacked standing to advance their claims. And in doing so, the court distinguished *League of Residential Neighborhood Advocates* as follows:

> There, the City of Los Angeles entered a settlement agreement with an Orthodox Jewish congregation granting the congregation a conditional use permit subject to numerous restrictive conditions to operate a synagogue in a residential use zone. *Id.* at 1053. In an action that neighbors of the synagogue brought challenging the settlement, the Court of Appeals for the Ninth Circuit held that the agreement violated municipal zoning laws and therefore was unenforceable. *Id.* at 1056-57. In doing so, however, the court of appeals did not address the question of whether the plaintiffs had standing to assert their claims. *See id.* at 1053-55. This omission seems understandable, as *the neighbors surely would be impacted directly by a large public facility located near them and accordingly would suffer a particularized injury from the operation of the facility very different from that of the general public*.

Goode, 539 F.3d at 323 (emphasis added). Here, Plaintiffs reside in the neighborhood where the proposed Mosque is to be built. In fact, some of the Plaintiffs live directly across the street. (Rrasi Decl. ¶¶ 2, 3 [Doc. No. 9-3]). Consequently, Plaintiffs "surely would be impacted directly by a large public facility located near them and accordingly would suffer a particularized injury from the operation of the facility very different from that of the general public." *See id.*; *see generally Vestevich v. W. Bloomfield Twp.*, 245 Mich. App. 759, 762 (Mich. Ct. App. 2001) (affirming the grant of permissive intervention and observing that "the intervening homeowners were close enough to the subject property to be concerned that their interests would be affected by the commercial

development of the residentially zoned parcel, by way of neighborhood character, property values, traffic patterns, and the like"); *Fedder v. McCurdy*, 768 P.2d 711 (Colo. App. 1988) (holding that nearby landowners had standing to challenge the grant of a variance for the construction of a concrete plant, where the applicant proposed to locate the plant one-half mile from the area where the landowners lived, and it would cause dust problems and increased traffic on the road that served the landowners' homes); *Thal v. Cnty. of Santa Cruz*, 204 Cal. App. 2d 645, 22 Cal. Rptr. 637 (1962) (holding that a citizen-taxpayer living within a half-mile of a proposed memorial park and across the road from it had standing to challenge the planning commission's grant of a use permit).

AICC's reliance on *Sanders v. Republic Services of Kentucky, LLC*, 113 Fed. Appx. 648 (6th Cir. 2004), and other cases restating the unremarkable and irrelevant holding that a non-party lacks standing to *enforce* the terms of a consent decree is misplaced. (*See* AICC Br. at 8-9). Plaintiffs are not seeking to *enforce* directly or in a collateral proceeding the terms of the Consent Judgment. Rather, Plaintiffs are seeking to render it null and void, which, as non-parties, they are permitted to do. *See, e.g., League of Residential Neighborhood Advocates*, 498 F.3d at 1052; *St. Charles Tower, Inc. v. Kurtz*, 643 F.3d 264 (8th Cir. 2011) (holding a consent decree invalid in a case in which intervenors, who were not parties to the agreement entered into between the plaintiffs and the defendant

zoning board, challenged the decree on appeal); *Cleveland Cnty. Ass'n for Gov't by the People v. Cleveland Cnty. Bd. of Comm'rs*, 142 F.3d 468, 477-79 (D.C. Cir. 1998) (vacating a consent decree implementing an election plan in a challenge brought by voters, who were not parties to the decree but who nonetheless had standing to challenge the decree under state and federal law);[5] *Vestevich v. W. Bloomfield Twp.*, 245 Mich. App. 759, 761, 764-65 (Mich. Ct. App. 2001) (affirming the decision to set aside a consent judgment in a case in which "[s]everal owners of adjacent or otherwise nearby property" intervened to challenge it).

Additionally, *Providence Baptist Church v. Hillandale Committee, Ltd.*, 425 F.3d 309 (6th Cir. 2005), doesn't do the work that AICC claims it does. (*See* AICC Br. at 9-12). Contrary to AICC's assertion, there is nothing similar between the instant case and *Providence Baptist Church*, where the Sixth Circuit affirmed the district court's denial of the putative intervenor's motion to intervene and

[5] As summarized by the D.C. Circuit:

> Soon after the district court issued a consent decree incorporating the parties' agreement, the Cleveland County Association for Government by the People, an unincorporated association of voters in the county, and six individual plaintiffs, all of whom are white (collectively, "the CCAGP"), brought suit against the Board and the NAACP, challenging the adoption of the plan as a violation of their constitutional rights and as contrary to state law. The district court, finding none of their challenges to be meritorious, granted summary judgment in favor of the defendants. We conclude, however, that the Board was without authority under state law to consent to such a change in the election plan, and thus we vacate the decree.

Cleveland Cnty. Ass'n for Gov't by the People, 142 F.3d at 469-70.

similarly held that the intervenor lacked standing in its own right to pursue an independent appeal of the challenged consent judgment. As stated by the Sixth Circuit:

> We will assume for purposes of this issue that Hillandale Committee is what it claims to be: "the duly authorized committee which circulated the referendum petitions." The referendum petition took no position on the merits of the referendum; rather, it simply asked that the ordinance rezoning Providence's land be submitted to the electors for their approval or rejection. As such, Hillandale Committee *had no interest in the outcome of the election or in any negotiations between Euclid and Providence after the election was held*.

Providence Baptist Church, 425 F.3d at 317 (emphasis added). In other words, any substantial legal interest the Hillendale Committee may have had in the matter "was terminated when the referendum was held and the results certified." *Id*. Consequently, because "Hillandale Committee's interest in protecting the results of the referendum is not sufficiently particularized to satisfy the requirement of a substantial interest for intervention purposes, then it is clear that the alleged 'injury in fact' is not of 'such a personal stake' as to permit a finding that Hillandale Committee has standing to challenge the entry of the consent judgment." *Id*. at 318. In short, this case does not support AICC's claim that Plaintiffs lack standing in this case. It's not even close.[6]

[6] In fact, unlike the instant case, in *Providence Baptist Church*, the parties (Euclid and Provident) entered a consent judgment "in which they stipulated, and the district court found that Euclid's zoning code was unconstitutional as applied to Providence's property." *Providence Baptist Church*, 425 F.3d at 312. Here, AICC

Finally, AICC filed a notice of "supplemental authority" (Doc. No. 27-1), directing this Court to *Gagliardi v. City of Boca Raton*, No. 16-CV-80195-KAM, 2017 U.S. Dist. LEXIS 46805 (S.D. Fla. Mar. 28, 2017). AICC's reliance on this case is also misplaced. To begin, *Gagliardi* was not a case challenging an unlawful consent judgment. In other words, *Gagliardi* does not resolve *this* case. In *Gagliardi*, the plaintiffs were challenging the City's approval of the construction of a Jewish religious project pursuant to the City's ordinances. The district court held that the plaintiffs lacked standing to advance their constitutional claims. In doing so, the court stated, "Far from the particularized and concrete injury required to confer standing, Plaintiffs have simply reasserted, again and again, a list of *conjectural* injuries *to the whole of the area* surrounding the proposed Chabad site, and potentially beyond." *Id*. at *17 (emphasis added). Quite frankly, the district court was likely wrong about that. Nevertheless, the court provided an alternative basis for denying standing based on "prudential" reasons. As stated by the court, "Alternatively, even had Plaintiffs' pled their alleged injuries with sufficient particularity and definiteness, Plaintiffs have failed to allege that those injuries were within the zone of interests protected by the Constitution's Establishment

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and the City of Sterling Heights stipulated that no violation of federal law occurred, and the Court entered the Consent Judgment without making any findings that there has been or will be an actual violation of federal law. (Muise Decl. ¶ 7, Ex. E [Consent Judgment, ECF No. 20] [finding that the parties desire "to resolve their disputes relative without any admission of liability"] [Doc. No. 9-2]).

Clause and, as such, are without prudential standing to bring the present action." *Id*. at *19-20. The court applied the same "prudential" standing analysis to the plaintiffs' equal protection and due process claims, finding these claims wanting as well. *See id*. at * 21-24; *see also id.* at *23 ("This is not to say, of course, that municipal zoning decisions cannot violate the Constitution's guarantees of equal protection under the law and certain minimums of due process.").

Here, Plaintiffs are seeking a preliminary injunction to stay the enforcement of the Consent Judgment while this case proceeds. The legal basis for this challenge is well established, and so is Plaintiffs' standing as land owners who are directly affected by it. *See supra*.

In the final analysis, Plaintiffs have standing to advance the challenge *at issue here*.

II. The Consent Judgment Violates Local, State, and Federal Law.[7]

"A federal consent decree or settlement agreement cannot be a means for state officials to evade state law. . . . Municipalities may not waive or consent to a violation of *their* zoning laws, which are enacted for the benefit of the public." *League of Residential Neighborhood Advocates*, 498 F.3d at 1055-56 (emphasis added); *St. Charles Tower, Inc.*, 643 F.3d at 270 ("State actors cannot enter into an

[7] AICC does not address Plaintiffs' due process argument arising under the Fourteenth Amendment.

agreement allowing them to act outside their legal authority, even if that agreement is styled as a 'consent judgment' and approved by a court.").

Consequently, "[b]efore approving any settlement agreement that authorizes a state or municipal entity to disregard its own statutes in the name of federal law, a district court must find that there has been or will be an *actual* violation of that federal law." *League of Residential Neighborhood Advocates*, 498 F.3d at 1058; *Perkins v. City of Chi. Heights*, 47 F.3d 212, 216 (7th Cir. 1995). ("[U]pon properly supported findings that such a remedy is *necessary* to rectify a *violation of federal law*, the district court can approve a consent decree which overrides state law provisions. Without such findings, however, parties can only agree to that which they have the power to do outside of litigation.").

Here, the Court approved the Consent Judgment *without making any findings* that there was or will be an *actual* violation of federal law. In fact, the parties to the Consent Judgment specifically disavowed any liability. (Muise Decl. ¶¶ 5, 7, Ex. C [Consent Judgment ¶ 6, ECF No. 18], Ex. E [disclaiming "any admission of liability"]; [Consent Judgment, ECF No. 20] [finding same] [Doc. No. 9-2]). This undisputed fact is fatal to AICC's (and the City's and the Department of Justice's) position. Consequently, AICC's argument (which we will address in greater detail below) that the Sterling Heights Zoning Ordinance

violates RLUIPA's Equal Terms Clause on its face is of no avail. No such findings were made below.

Moreover, AICC's claim that Plaintiffs' challenge to the Consent Judgment "lacks merit" (AICC Br. at 12-15) is without support, and the support that AICC musters fails to address the issue presented. AICC's inability to address the legal basis for Plaintiffs' challenge head-on is quite telling.

To begin, AICC claims that "[t]he Michigan Court of Appeals has squarely addressed this issue [*i.e.*, a "collateral attack" to a consent judgment involving zoning]," citing *Green Oak Township v. Munzel*, 255 Mich. App. 235 (2003), for the proposition that "the Court rejected a similar argument that a consent judgment entered in settlement of a zoning lawsuit constitutes *de facto* rezoning in violation of the former Township Rural Zoning Act, which is now the Michigan Zoning Enabling Act." (AICC Br. at 12-13). But Plaintiffs are not arguing that the Consent Judgment is a "*de facto*" rezoning. Indeed, AICC's reading of *Green Oak Township* is entirely incorrect and puzzling.

At issue in *Green Oak Township* was whether the consent judgment was *subject to the right of referendum* under the former Township Rural Zoning Act, which it wasn't based on the plain reading of the Act. In its decision, the court stated as follows:

> While the consent judgment may have been an attempt to bypass the zoning regulations, *that claim is not properly before us*. The only

> question properly presented to this Court *is simply whether the consent judgment was subject to a right of referendum* pursuant to MCL 125.282.
>
> Furthermore, *we are not suggesting that Munzel had no avenue by which to contest the action of the township*, *we simply believe that Munzel could not effectively do so by a referendum*.

Green Oak Twp., 255 Mich. App. at 241-42 (emphasis added). This case hardly stands for the proposition that the Michigan Courts have "squarely addressed" the challenge presented here. This case does no such thing. In fact, it suggests the exact opposition.

Moreover, AICC apparently overlooked *Vestevich v. West Bloomfield Township*, 245 Mich. App. 759, 761, 764-65 (Mich. Ct. App. 2001), in which the Michigan Court of Appeals affirmed the lower court decision to set aside a consent judgment in a zoning case in which "[s]everal owners of adjacent or otherwise nearby property" intervened to challenge the consent decree. *Vestevich* is more to the point, and it entirely supports Plaintiffs' position.

In sum, AICC makes a meritless argument that Plaintiffs have no legal basis for challenging the Consent Judgment. Noticeably absent is any cogent argument that AICC's Application (and the Consent Judgment approving it) actually complies with state and local zoning requirements. Indeed, no such argument can be made because it doesn't, as the Planning Commission concluded. Moreover, when the City Council seeks to approve a special approval land use application

pursuant to a consent judgment, it must "consider the *same standards* as the Planning Commission under the special approval land use criteria applicable to such use in the particular zoning district and Article 25." Zoning Ordinance § 25.01 (emphasis added). In other words, the City Council has no authority to "bypass the zoning regulations," which it has done here through the Consent Judgment—a Consent Judgment which this Court should declare invalid and unenforceable.[8]

III. AICC's Claim that the Zoning Ordinance Violates the Equal Terms Clause Is Both Irrelevant and Wrong as a Matter of Law.

To begin, AICC apparently seeks to redo the Consent Judgment by arguing that there was a violation of federal law that precipitated its entry (despite the fact that the parties expressly disavowed such a finding and the Court never made one). AICC's argument must be rejected out of hand. As stated by the D.C. Circuit:

[8] AICC states that "[t]he Plaintiffs have not sought to invalidate the Consent Judgment between the City and the United States, which also requires the City to approve the site plan for the AICC Mosque." (AICC Br. at v). AICC's statement is incorrect. To begin, there is no "Consent Judgment" entered in the case between the City and the United States. The Court entered a "Consent Order," and the order merely requires the City to "abide by the terms of the Consent Judgment filed in the case titled *American Islamic Community Center, Inc. v. Sterling Heights*, 2:16-cv-12920 (E.D. Mich.), which includes the right of the AICC to build a place of worship on the Property subject to the terms of that Consent Judgment." (Consent Order, *United States v. City of Sterling Heights*, No. 2:16-cv-14366 (E.D. Mich. Mar. 1, 2017), ECF No. 7). Consequently, should Plaintiffs succeed in challenging the legality of the Consent Judgment, the "Consent Order" is meaningless.

> In this case, then, if the election plan set forth in the consent decree were intended to remedy an admitted or adjudged violation of the Voting Rights Act, the fact that the Board's actions collided with the state statutory scheme just discussed would not stand in the way of the plan's implementation. *Notably, however, the consent decree in this case specifically provides that no violation of the Voting Rights Act is to be inferred, and the Supreme Court has specifically held that consent decrees should be construed simply as contracts, without reference to the legislation that motivated the plaintiffs to bring suit*. *See United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 (1975); *see also Paralyzed Veterans of Am. v. Washington Metro. Area Transit Auth.*, 894 F.2d 458, 461 (D.C. Cir. 1990) (same). Nor is there any other basis for concluding that the consent decree was anything more than a settlement of the NAACP's claims against the county: The fact that the plan received section 5 preclearance from the Attorney General is irrelevant, as is the fact that the district court in *Campbell* might ultimately have concluded that the county's previous election method was in violation of the Voting Rights Act—neither circumstance establishes that a Voting Rights Act violation did indeed exist, and none is to be presumed from the fact of the consent decree's existence.

Cleveland Cnty. Ass'n for Gov't by the People, 142 F.3d at 477 (emphasis added). Nevertheless, AICC's Equal Terms argument fails as a matter of law.

AICC complains that the City has committed a "*prima facie* facial" RLUIPA Equal Terms violation because the Zoning Ordinance does not provide for religious land use as of right in any zones or requires special land use approval for group worship in 10 of 23 zones. (*See* AICC Br. at 19-24).

What AICC does not demonstrate, as required, is that there are *similarly situated* secular assembly comparators to show that religious assemblies or institutions are treated on less than equal terms. *See Primera Iglesia Bautista*

Hispana of Boca Raton, Inc. v. Broward Cty., 450 F.3d 1295, 1313-14 (11th Cir. 2006) (noting that "without identifying a similarly situated nonreligious comparator that received favorable treatment, Primera [clearly] failed to establish a *prima facie* Equal Terms violation."); *see also Tree of Life Christian Schs. v. City of Upper Arlington*, 823 F.3d 365, 372 (6th Cir. 2016) (White, J., concurring in part, dissenting in part) (citing *Primera* favorably for this proposition). Furthermore, the identified secular assemblies used to demonstrate less than equal treatment for religious sites must be those that provide "a *meaningful* comparison." *Lighthouse Inst. for Evangelism Inc. v. City of Long Branch*, 100 F. App'x 70, 77 (3d Cir. 2004) (emphasis added).

AICC's facial attack on the Zoning Ordinance for disfavoring religious worship sites suffers this fact-based deficiency. When, as in the instant case, an ordinance "subjects all such uses to the same approval process considering traffic congestion, water supply, waste disposal, and fire and police protection," an equal terms claim without proper qualification "necessarily fails." *Thai Meditation Ass'n of Ala., Inc. v. City of Mobile*, No. 16-0395-CG-M, 2016 U.S. Dist. LEXIS 142651, at *18-19 (S.D. Ala., Oct. 12, 2016); *see also id.* at *17-18 ("[I]n evaluating a facial challenge, the Court 'must consider [a city's] authoritative constructions of the ordinance, including its own implementation and interpretation

of it.'") (quoting *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 131 (1992)).

Critical to this analysis, the Sixth Circuit has established a secondary line of inquiry that generally comports with the Third, Fifth, Seventh, and Ninth Circuit's Equal Terms regulatory intent approaches: What is a local government's expressed *regulatory purpose* for zoning criteria across the similarly situated comparators? *Tree of Life*, 823 F.3d at 371 ("TOL Christian Schools has pled facts sufficient to allege that at least some of these assemblies or institutions are situated, relative to the government's regulatory purpose, similarly . . . , they would fail to maximize income-tax revenue.").

Here, AICC disregards both the "similarly situated" and "regulatory purpose" instructions and only offers generalized comparators that are *city-owned* venues: "Article 3 permits several secular assemblies as of right: 'City-owned and/or operated libraries, museums, administrative offices[,] parks and recreational facilities.'" (AICC Br. at 21) (citing § 3.01.C. of the Zoning Ordinance).

AICC dodges any regulatory meaning when it tries to say that parks are the same as assemblies within the meaning of RLUIPA, arguing that both are "places where groups or individuals . . . can meet together to pursue their interests." (*See* AICC Br. at 22-23) (citing *Covenant Chr. Ministries, Inc. v. City of Marietta*, 654 F.3d 1231, 1245-46 (11th Cir. 2011) (internal quotations omitted)). But the

analogy is inapplicable when AICC does not even attempt to answer the Sixth Circuit's threshold "objective" question: "Are [these places] similarly situated or are they not?" *Tree of Life*, 823 F.3d at 372.

AICC then asserts that "museums and libraries" are appropriate comparators, basing this on a Fifth Circuit rendering of the "similarly situated" assessment that includes a regulatory gloss of "stated purpose or criterion." (AICC Br. at 23) (citing *Opulent Life Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 293-94 (5th Cir. 2012)). However, the Fifth Circuit concluded that a facial Equal Terms violation was rebuttable when, *according to the ordinance*, a city could identify the *regulatory purpose* behind the alleged unequal treatment of a religious facility "and then show that it has treated religious facilities on equivalent terms as all nonreligious institutions that are similarly situated *with respect to that stated purpose or criterion*." *Id.* at 293 (emphasis added). AICC completely ignores this critical analysis, which is fatal to its argument.

If AICC had engaged the regulatory purpose inquiry within a framework of similarly situated comparators, it would first have addressed the manner in which both the Michigan Zoning Enabling Act and the Zoning Ordinance underscore the baseline municipal duty to protect the character of residential health, safety and welfare directives. It is no accident that the Zoning Ordinance uses the term

"harmonious" repeatedly to stress that residential neighborhoods should be protected from "injurious or detrimental uses."

The Zoning Ordinance's essential guidelines for permitted uses in a residential zone include the following:

> The proposed use shall relate harmoniously with the physical and economic aspects of adjacent land uses . . . . The proposed use is so designed, located, planned and to be operated that the public health, safety and welfare will be protected. The proposed use shall not be detrimental or injurious to the neighborhood . . . and shall be in harmony with the general purpose and intent of the zoning ordinance.

Zoning Ordinance §§ 25.02 (E.-G.)

Concurrently, AICC fails to acknowledge the reality that cities, including Sterling Heights, have a duty with any city-housed service to comply with the essential regulatory mission. Furthermore, a city must meet the highest standards of accountability, both in civic and political terms, when planning and implementing a locally-funded public facility. Moreover, by their very nature and organizational *raison d'etre*, city venues for recreation, reading, and art appreciation are for the universal use and enjoyment of the general population and not just for a select congregation that may or may not issue from the very neighborhood that city venues are situated to serve.

The test for regulatory rationale among similarly situated uses only makes sense as zoning officials may then provide for assemblies, both religious and nonreligious, while still upholding essential zoning prerogatives in areas regulated

for generally compatible uses. Otherwise, when an overly large, active, and imposing Mosque "community center" is granted a residential special use with few normative regulatory constraints, there is danger that RLUIPA's equal treatment becomes unlawful "special treatment." *See Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1241 (11th Cir. 2004).

In sum, the Sixth Circuit model for applying the "similarly situated, according to regulatory purpose" equal terms inquiry leads to a reasonable line of questions for religious land users. The City has a duty to protect the residential character of neighborhoods, and admitting a specially permitted use must be based upon the regulatory rationale that governs the zone. In other words, the Zoning Ordinance does not violate the Equal Terms clause of RLUIPA, facially or otherwise. *See generally Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 n.11 (11th Cir. 2004) (requiring religious organizations "to apply for [conditional use permits] allows the zoning commission to consider factors such as size, congruity with existing uses, and availability of parking" and finding "that such reasonable 'run of the mill' zoning considerations do not constitute substantial burdens on religious exercise") (quoting *Lady J. Lingerie, Inc. v. Jacksonville*, 176 F.3d 1358, 1362 (11th Cir. 1999)); *Opulent Life Church*, 697 F.3d at 293 n.14 (acknowledging the validity of requiring religious organizations "to conform to

standards that embodied more typical zoning criteria such as traffic flow and noise levels").

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this Court grant their motion for a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2017, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system.

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