NO. 17-1770

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

KAMAL ANWIYA YOUKHANNA; JOSEPHINE SORO; WAFA CATCHO; MARY JABBO; DEBI RRASI; JEFFREY NORGROVE; MEGAN MCHUGH,
Plaintiffs-Appellants,

V.

CITY OF STERLING HEIGHTS; MICHAEL C. TAYLOR, individually and in his official capacity as Mayor, City of Sterling Heights, Michigan,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
HONORABLE GERSHWIN A. DRAIN
CASE NO. 2:17-cv-10787-GAD-DRG

BRIEF OF APPELLANTS

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 6th Cir. R. 26.1, Plaintiffs-Appellants state the following:

Plaintiffs-Appellants Kamal Anwiya Youkhanna, Josephine Soro, Wafa Catcho, Marey Jabbo, Debi Rrasi, Jeffrey Norgrove, and Megan McHugh are individual, private parties.

No party is a subsidiary or affiliate of a publicly owned corporation. There are no publicly owned corporations, not a party to the appeal, that have a financial interest in the outcome.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

REASONS WHY ORAL ARGUMENT SHOULD BE PERMITTED

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and 6th Cir. R. 34(a), Plaintiffs respectfully request that this Court hear oral argument. This case presents for review important legal issues regarding and surrounding the validity of a consent decree entered in a separate federal case that permitted the controversial construction of a large mosque in a residential neighborhood in the City of Sterling Heights, Michigan ("City"). Plaintiffs, who are residents of the City, challenge this consent decree, arguing that it is invalid and unenforceable because it violates the City's zoning ordinance, which was enacted for the benefit of the public. Plaintiffs sought a preliminary injunction to halt the construction of the mosque while this case proceeds. The district court judge, who approved the challenged consent decree in the prior proceeding and who presides over this case, denied the injunction request. This appeal follows.

Oral argument will assist this Court in reaching a full understanding of the issues presented and the underlying facts. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this Court deems relevant.

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STATEMENT OF JURISDICTION

On March 13, 2017, Plaintiffs filed this action, alleging violations under federal and state law, including violations of the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, and the Michigan Open Meetings Act (Mich. Comp. Laws § 15.263). (Compl., R. 1, Pg. ID 1-34). The District Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367(a).

On March 17, 2017, Plaintiffs promptly filed a motion for preliminary injunction and brief in support. (Pls.' Mot. for Prelim. Inj. & Br. in Supp., R. 9, Pg. ID 46-277). Defendants opposed the motion and responded on April 3, 2017. (Defs.' Br. in Opp'n to Pls.' Mot. for Prelim. Inj., R. 14, Pg. ID 506-998).

On June 28, 2017, the District Court entered an order denying Plaintiffs' motion. (Order Denying Pls.' Mot. for Prelim. Inj., R. 42, Pg. ID 1248-73) (hereinafter "Order").

On July 3, 2017, Plaintiffs filed a timely notice of appeal, (Notice of Appeal, R. 44, Pg. ID 1275-77), seeking review of the District Court's order. This Court has jurisdiction pursuant to 28 U.S.C. § 1292.

PRELIMINARY STATEMENT

This case challenges the lawfulness of the Consent Judgment entered into between the City of Sterling Heights ("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's Zoning Ordinance ("Zoning Ordinance") and the Michigan Zoning Enabling Act. *See* Mich. Comp. Laws § 125.3101, *et seq*. Moreover, the process by which the City voted to enter into the Consent Judgment violated Plaintiffs' due process rights and the Michigan Open Meetings Act.

The legal basis for the requested injunction, and the District Court's authority for issuing the injunction, was set forth by the Ninth Circuit in *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052 (9th Cir. 2007), in which 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. In that case, the Ninth Circuit explained that "[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*." *Id*. at 1055-56 (emphasis added).

Here, the City approved by way of the Consent Judgment the application of AICC to construct and operate a mega-mosque in a residential-zoned area in the City contrary to the unanimous decision of the Planning Commission and in violation of state law. Consequently, this Consent Judgment is invalid and unenforceable, and Plaintiffs are asking this Court to reverse the District Court's order and grant

Plaintiffs' request to preliminarily enjoin the enforcement of the Consent Judgment so as to maintain the *status quo* while this case proceeds.

STATEMENT OF THE ISSUE FOR REVIEW

Whether the District Court erred by denying Plaintiffs' request to preliminarily enjoin the enforcement of the challenged Consent Judgment, which permits the construction of a large mosque in Plaintiffs' residential neighborhood in violation of the City's Zoning Ordinance, in order to maintain the *status quo* while this case proceeds to trial.

STATEMENT OF THE CASE

A. AICC Special Approval Land Use Application.

On or about June 16, 2015, AICC submitted a special approval land use application to the City's Planning Commission. (Muise Decl. ¶ 3, Ex. A [AICC Verified Compl. ¶ 33], R. 9-2, Pg. ID 92). The City's Planning Commission "is the final decision maker" for the City as to whether the application meets the standards set forth in the Zoning Ordinance.[1] (Norgrove Decl. ¶ 6, R. 9-4, Pg. ID 248). The AICC

[1] The District Court incorrectly asserts that "Plaintiffs' mischaracterize the August 13, 2015 Staff Report." (Order at 7 n.2, R. 42, Pg. ID 1254). Indeed, in its Order, the District Court erroneously states that "[p]rior to the [August 13, 2015 Planning Commission] meeting, the *City Planning Commission* prepared a Staff Report." (Order at 7, R. 42, Pg. ID 1254) (emphasis added). This critical factual error by the District Court illustrates the court's misapprehension of the facts and the process that resulted in the unlawful Consent Judgment. The staff reports are prepared by the City Planner, *not* the *Planning Commission.* And the reports are *recommendations to the Commission*, which has the authority to approve or deny a special approval land use

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." (Muise Decl. ¶ 4, Ex. B [City Answer, Affirmative Defenses ¶¶ 16, 17, R. 9-2, Pg. ID 190).

B. City Zoning Regulations.

The standards set forth in the Zoning Ordinance for special approval land use state as follows:

> **SECTION 3.02. SPECIAL APPROVAL LAND USES.**
>
> The following uses, and other similar to those cited in this article, *may be permitted by the Planning Commission* subject to the general standards of section 25.02 and the specific standards imposed for each use:
>
> A. Churches, synagogues, mosques and places of group worship, subject to the following:

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permit application. The City Planner has no such authority. Nonetheless, the District Court goes to great length discussing City Planner Donald Mende's explanation for why he *initially* believed the Planning Commission should approve the permit to build the mosque. (Order at 7-8, R. 42, Pg. ID 1254-55). However, the District Court ignores the critical fact that after the Planning Commission voted to delay the decision on the permit application following the August 13, 2015 hearing (in addition to the fact that the Commission did not believe it had sufficient information to make such an important decision, there were members of the Commission absent that evening and those present wanted the full Commission involved), City Planner Mende ultimately recommended *denying* the permit because AICC refused to cooperate with his office. The Planning Commission ultimately voted *unanimously* to deny the permit application. (Defs.' Ex. F [Planning Comm'n Sep. 10, 2015 Minutes], R. 14-7, Pg. ID 589).

> 1. Buildings of greater than the maximum height allowed in this district *may be permitted*, provided front, side and rear yards are increased above the minimum required yards by one foot for each foot of building height that exceeds the maximum height allowed.
>
> 2. All ingress to and egress from the site shall be directly onto a major or secondary thoroughfare having an existing or planned right-of-way width of at least 86 feet as indicated on the Master Road Plan;
>
> 3. Parking lot screening meeting the requirements for moderate intensity impacts shall be provided as required in section 24.01;
>
> 4. Such facilities may include related community centers, provided that such centers are limited to activities sponsored by church members only. Said facilities shall not be used as banquet facilities to the general public;
>
> 5. All principal and accessory buildings, except for accessory storage buildings, such as a shed or detached garage, shall maintain rear and side yard setbacks of at least 50 feet.

(Order at 5, R. 42, Pg. ID 1252; Defs.' Ex. C [City of Sterling Heights Zoning Code (emphasis added)], Pg. ID 546).

The general standards that govern the approval of a special approval land use permit are as follows:

> **SECTION 25.02 GENERAL STANDARDS.**
>
> A. The proposed special approval land use shall be of such location, size and character that it will be in harmony with the appropriate and orderly development of the surrounding neighborhood and/or vicinity and applicable regulations of the zoning district (including but not limited to any applicable performance standards) in which it is to be located.
>
> B. The proposed use shall be of a nature that will make vehicular and pedestrian traffic no more hazardous than is normal for the district

involved, taking into consideration vehicular turning movements in relations to routes of traffic flow, proximity and relationship to intersections, adequacy of sight distances, location and access of off-street parking and provisions for pedestrian traffic, with particular attention to minimizing child-vehicle interfacing.

C. The proposed use shall be designed as the location, size, intensity, site layout and periods of operation of any such proposed use to eliminate any possible nuisance emanating therefrom which might be noxious to the occupants of any other nearby permitted uses, whether by reason of dust, noise, fumes, vibration, smoke or lights.

D. The proposed use shall be such that the proposed location and height of buildings or structures and location, nature and height of walls, fences and landscaping will not interfere with or discourage the appropriate development and use of adjacent land and buildings or unreasonably affect their value.

E. The proposed use shall relate harmoniously with the physical and economic aspects of adjacent land uses as regards prevailing shopping habits, convenience of access by perspective patrons, continuity of development and need for particular services and facilities in specific areas of the city.

F. The proposed use is so designed, located, planned and to be operated that the public health, safety and welfare will be protected.

G. The proposed use shall not be detrimental or injurious to the neighborhood within which it is to be located, nor shall such use operate as a deterrent to future land uses permitted within said zoning district and shall be in harmony with the general purpose and intent of the zoning ordinance.

(Order at 6-7, R. 42, Pg. ID 1253-54; Defs.' Ex. C [City of Sterling Heights Zoning Code], Pg. ID 559-60).

C. AICC Litigation and the Consent Judgment.

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. *Am. Islamic Cmty. Ctr., Inc. v. City of Sterling Heights*, No. 1:16-cv-12920 (E.D. Mich. filed Aug. 10, 2016). (Muise Decl. ¶ 3, Ex. A [AICC Verified Compl.], R. 9-2, Pg. ID 84-138). On August 30, 2016, the City filed its Answer, denying *all* wrongdoing. (Muise Decl. ¶ 4, Ex. B [Answer], R. 9-2, Pg. ID 140-93).

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 J.], R. 9-2, Pg. ID 195-213). During this meeting, the Mayor stated that he fully supported the Planning Commission's unanimous decision to deny AICC's permit application, that the Commission had arrived at the right decision based upon legitimate planning and zoning issues, and that he vehemently denied that the 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.' Ex. J [Video at approx. 3 hrs. 19 mins. 55 secs. to approx. 3 hrs. 22 mins. 28 secs.], R. 14-11, Pg. ID 894-96).[2]

[2] Available online at https://shtv.viebit.com/player.php?hash=dL2MjbMD0UdY (last visited Aug. 15, 2017). This video exhibit is being provided to the Clerk of the Court pursuant to 6 Cir. I.O.P. 10.

When it came time for the Council to actually vote on the Consent Judgment agenda item, the Mayor ordered everyone out of the public hearing. (Rrasi Decl. ¶ 5, R. 9-3, Pg. ID 245).

Notice was not provided to affected landowners, such as Plaintiff Rrasi, and Plaintiffs were not provided with a copy of the proposed Consent Judgment prior to the City Council meeting.[3] (Rrasi Decl. ¶ 4, R. 9-3, Pg. ID 244). The terms and conditions of the Consent Judgment were not fully disclosed until it was filed by counsel for AICC in its litigation on February 28, 2017. (Rrasi Decl. ¶ 4, R. 9-3, Pg. ID 244; *see also* Muise Decl., Ex. C [Consent J.], R. 9-2, Pg. ID 194-213).

In the Consent Judgment, the City expressly denied all wrongdoing. (Muise Decl. ¶ 5, Ex. C [Consent J. ¶ 6] [stating the parties' intent to resolve the dispute "without any admission of liability"], R. 9-2, Pg. ID 197).

As noted, AICC filed the Consent Judgment on February 28, 2017; however, it was subsequently stricken by the District Court due to a filing issue. (Muise Decl. ¶ 6, Ex. D [Docket Sheet], R. 9-2, Pg. ID 219).

On March 10, 2017, District Court Judge Gershwin Drain, the same judge who denied Plaintiffs' request for a preliminary injunction at issue in this appeal, signed

[3] Plaintiff Rrasi heard late on Friday, February 17, 2017, through rumors, that the City Council was going to consider the Consent Judgment at this meeting. She found out for certain that it was taking place on the day of the meeting through the City's website. She received no other notice. Moreover, she never saw, nor was she provided a copy of, the terms and conditions of the Consent Judgment prior to the City approving it. (Rrasi Decl. ¶ 4, R. 9-3, Pg. ID 244).

and 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 J.] [finding that the parties desire "to resolve their disputes relative without any admission of liability"], R. 9-2, Pg. ID 224; Order at 16, R. 42, Pg. ID 1263).

In their opposition to Plaintiffs' motion for preliminary injunction, the City stated that "[t]he proposed Consent Judgment . . . considered and positively addressed *most* of the discretionary concerns that were *raised by the Planning Commission* . . . ."[4] (Defs.' Br. in Opp'n to Pls.' Mot. for Prelim. Inj. at 7-8, R. 14, Pg. ID 515-16) (emphasis added). Consequently, per the City, the Consent Judgment did *not* address *all* of the applicable zoning requirements as required by law. Moreover, as Plaintiffs pointed out in their motion and as set forth further in this brief, there are many *other* considerations that the Planning Commission was required to address, but had not yet had a chance to do so because AICC refused to cooperate even with regard to the Commission's initial concerns. (Pls.' Mot. for Prelim. Inj. at 5-10 [observing that because AICC filed its lawsuit, "the Planning Commission did not have an opportunity to pursue the remaining concerns . . . that AICC was required to satisfy before the Planning Commission could have fulfilled its duty under the Zoning

[4] As set forth further in this brief, the Consent Judgment did <u>*not*</u> "positively address" the concerns of the Planning Commission, which voted *unanimously* to deny AICC's special approval land use permit application based on the *fact* that the proposed construction violated the Zoning Ordinance. (*See* Defs.' Ex. F [Planning Comm'n Sep. 10, 2015 Minutes], R. 14-7, Pg. ID 589).

Ordinance . . . ."], R. 9, Pg. ID 57-62; Norgrove Decl. ¶¶ 21-29, R. 9-4, Pg. ID 256-62). Consequently, the Planning Commission itself had yet to *fully* address all of the considerations required by law because the entire process was truncated by AICC. Moreover, the Zoning Ordinance doesn't simply require the City Council to consider what *this* Planning Commission considered in its initial denial, but what the law requires a Planning Commission to fully consider before a special approval land use permit can be approved. *See* Zoning Ordinance § 25.01 ("When the City Council is the reviewing authority with respect to a special approval land use, it shall have the same reviewing authority and *shall* 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.") (emphasis added); Defs.' Ex. C [City of Sterling Heights Zoning Code], R. 14-4, Pg. ID 558-59).

D. The Consent Judgment and Zoning Laws.

Approving AICC's permit application via the Consent Judgment was contrary to the requirements set forth in the Zoning Ordinance and the Michigan Zoning Enabling Act.[5] (Norgrove Decl. ¶¶ 5-30, R. 9-4, Pg. ID 248-62, Ex. A [AICC

[5] Section 125.3504 of the Michigan Zoning Enabling Act provides, in relevant part, as follows: "(1) If the zoning ordinance authorizes the consideration and approval of special land uses or planned unit developments under section 502 or 503 or otherwise provides for discretionary decisions, *the regulations and standards upon which those decisions are made shall be specified in the zoning ordinance*. (2) The standards shall be consistent with and promote the intent and purpose of the zoning ordinance and *shall insure that the land use or activity authorized shall be compatible with adjacent*

Application], R. 9-4, Pg. ID 264-65, Ex. B [August 13 Staff Report], R. 9-4, Pg. ID 267-71, Ex. C [September 10 Staff Report], R. 9-4, Pg. ID 273-77). And the terms and conditions of the Consent Judgment are vague and inadequate, leaving Plaintiffs at great risk of future harm. (Norgrove Decl. ¶¶ 27, 28, R. 9-4, Pg. ID 257-61).

Indeed, the Consent Judgment itself acknowledges that it conflicts with and thus supersedes the Zoning Ordinance. (Muise Decl., Ex. C [Consent J. § 2.6 ("*Except as modified by this Consent Judgment*, AICC shall comply with all City codes . . . ."); § 3.4 ("To the extent that this Consent Judgment *conflicts* with any City Ordinance . . . , *the terms of this Consent Judgment shall control*." (emphasis added)], R. 9-2, Pg. ID. 202, 203-04).

To summarize and as set forth by the Planning Commission, the AICC application violates the Zoning Ordinance as follows:

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uses of land, the natural environment, and the capacities of public services and facilities affected by the land use. The standards shall also insure that the land use or activity is consistent with the public health, safety, and welfare of the local unit of government." Mich. Comp. Laws § 125.3504 (1) & (2) (emphasis added). Section 125.3103 of the Act also provides, in relevant part: "(1) Except as otherwise provided under this act, if a local unit of government conducts a public hearing required under this act, the local unit of government shall publish notice of the hearing in a newspaper of general circulation in the local unit of government not less than 15 days before the date of the hearing. (2) Notice required under this act shall be given as provided under subsection (3) to the owners of property that is the subject of the request. Notice shall also be given as provided under subsection (3) to all persons to whom real property is assessed within 300 feet of the property that is the subject of the request and to the occupants of all structures within 300 feet of the subject property regardless of whether the property or structure is located in the zoning jurisdiction. . . ." Mich. Comp. Laws § 125.3103.

- The location and height of the proposed building interferes with and discourages the appropriate development and use of adjacent land and buildings, with the height exceeding that of other structures in the immediate areas by more than 30' at some points of the proposed building. Zoning Ordinance §§ 25.02 A & D.[6]
- The square footage of the proposed building in comparison to the size of the parcel is excessive and not compatible with the established long-term development patterns in this R-60 zoning district. Zoning Ordinance §§ 25.02 A & D.
- Given the approximately 20,500 square foot size of the proposed *main floor* of the building (not counting dedicated meeting space in the basement) and the allocation of floor space to ancillary uses, there is a likely shortage of off-street parking when the principal and ancillary uses of the building are combined, particularly during times of maximum capacity prayer hall usage. Zoning Ordinance § 25.02 B.

[6] It is incorrect to assert (as the District Court did below; *see* Order at 18, R. 42, Pg. ID 1265 [asserting that "the AICC's SALU Application had met all the required objective criteria set forth in SHZO § 3.02"]), that the question of whether the height of the mosque complies with the Zoning Ordinance is an "objective" standard, let alone assert that the mosque complies with this standard. Indeed, one couldn't build a skyscraper (with worship space) in a residential neighborhood simply by complying with setbacks. It is folly to suggest otherwise.

- The scale of the proposed building on the site is not harmonious with the scale of the existing buildings situated in this R-60 zoning district and neighboring areas. Zoning Ordinance §§ 25.02 A, E, F & G.

(Norgrove Decl. ¶¶ 5-17, R. 9-4, Pg. ID 248-55, Ex. B [August 13 Staff Report], R. 9-4, Pg. ID 267-71).

The Planning Commission *unanimously* (9 to 0) denied AICC's permit application on September 10, 2015, because the proposed mosque construction clearly did not comply with the Zoning Ordinance. (*See* Defs.' Ex. F [Planning Comm'n Sep. 10, 2015 Minutes], R. 14-7, Pg. ID 589). When AICC returned after the one-month postponement that was offered for the purpose of allowing AICC to "provide additional information to the Planning Commission" and affording the Planning Commission time to address questions to "Mr. Mende (Planning Department) and the planning office," AICC returned to the Planning Commission with no substantive revisions in the mosque design. The submitted plan change was simply a 9' reduction in the height of the spires and a 7' increase in the height of the dome. These two adjustments provided little relative difference and did nothing to mitigate the overall height concerns. (Norgrove Decl. ¶¶ 18, 19, R. 9-4, Pg. ID 255, Ex. C [September 10 Staff Report], R. 9-4, Pg. ID 273-77).

In fact, AICC's changes worsened the situation by increasing the volume of the structure. Consequently, it was evident to the Planning Commission, and the City

Planner, that AICC had no interest in complying with the Planning Commission's concerns and the Zoning Ordinance. (Norgrove Decl. ¶ 20, R. 9-4, Pg. ID 255-56).

Rather than addressing the concerns and working with the Planning Commission to resolve the zoning issues, AICC filed its lawsuit. As a result, the Planning Commission did not have an opportunity to pursue the remaining concerns (discussed further below) that AICC was required to satisfy before the Planning Commission could have fulfilled its duty under the Zoning Ordinance. (Norgrove Decl. ¶¶ 21, 22; *see also* ¶ 4, R. 9-4, Pg. ID 256, 248).

AICC's blueprints indicate 7,874 square feet of space in the basement that is not counted in the square footage for the main floor (20,500 square feet) addressed in the application for special use. This space will accommodate offices as well as a "women's meeting area." The main floor also indicates spaces for a banquet hall, multi-purpose room, kitchen and meeting spaces that are separate from the prayer space that is traditionally dedicated to men. (Norgrove Decl. ¶ 23, R. 9-4, Pg. ID 256).

AICC is currently worshipping at a Madison Heights location that advertises a broad range of activities beyond those included in the application. AICC represented that the scheduled events will only include daily prayer, Friday prayer service and some Ramadan services (these occur during the entire month of observance). But, in fact, AICC is looking for new space for the purpose of offering "educational activities,

youth activities, and special events" that the existing space would not accommodate.[7] The potential for concurrent or sequential use of the facility for different activities at the same time or in close proximity is contemplated by the Ancillary Parking provision for church and temple parking space requirements, which requires additional parking spaces "for ancillary facilities, such as social halls, schools, etc." Zoning Ordinance § 23.02 B.1. (Norgrove Decl. ¶ 24, R. 9-4, Pg. ID 256-57).

The August 13 Staff Report upon which the August 13, 2015, Planning Commission deliberations and potential decision were based, described the activities that were submitted for special use review by AICC as "individual prayer daily, typically in the afternoon, and group worship to be held on Friday afternoons. Additional services are held during special religious occasions such as Ramadan." Consequently, it is still not clear as to what activities will be occurring at the proposed mosque, and when that question was raised by the Planning Commission, it was met with resistance by AICC. (Norgrove Decl. ¶ 25, R. 9-4, Pg. ID 257).

Moreover, no traffic study was ever completed for the proposed mosque, despite the frequent and legitimate complaints of those living on 15 Mile Road that the

[7] Per AICC, it "offers a variety of services to the local Muslim community, including weekly Thursday programs (Du'aa Kumayl), a Friday afternoon group prayer service, Sunday breakfast and youth program, a program for young children that teaches Arabic and the fundamentals of Islam, community retreats, and other activities. . . . The Friday afternoon service, which is called *Jumma*, is the most important service of the week for Muslims and akin to Christian mass on Sunday. . . ." (Br. of *Amicus Curiae* Am. Islamic Cmty. Ctr. in Opp'n to Pls.' Mot. for Prelim. Inj. at 8, R. 27, Pg. ID 1076; *see also* Order at 3, R. 42, Pg. ID 1250).

increase in traffic will exacerbate the already serious congestion and safety issues in this residential neighborhood, particularly in light of the fact that a school is located in the neighborhood, thereby increasing "child-vehicle interfacing." (Norgrove Decl. ¶ 26, R. 9-4, Pg. ID 257).

In addition to approving an application that violates the Zoning Ordinance, the Consent Judgment is vague and inadequate. It provides highly ambiguous standards, no concrete inspection criteria, and no structure to provide necessary enforcement mechanisms. In short, it leaves residents, particularly those living in close proximity to the proposed mosque, such as Plaintiffs Wafa Catcho, Marey Jabbo, and Debi Rrasi, at great risk of future harm. (Norgrove Decl. ¶ 27, R. 9-4, Pg. ID 257-58).

For example, in addition to lacking the necessary detail to protect the interests of the residents of the City, the Consent Judgment includes the following vague and inadequate provisions and glaring omissions:

- There is no enforceable parking limitation condition. Where the Consent Judgment is based upon "anticipated" parking arrangements if more than 130 vehicles are expected, AICC is excused from providing the mentioned shuttle service after "utiliz[ing] all reasonable efforts to obtain an alternative site in close proximity." This falls far short of the reasonable condition that would require a "proof of parking" certification. In fact, the entire permit condition may be nullified if AICC protests that all "reasonable efforts" failed.

- Through the Consent Judgment, the City failed to provide any meaningful parking limitations. Rather, it put the burden on nearby residents, providing for "residential permit parking" in not one, but two areas (ostensibly for equal treatment considerations). Residents, including Plaintiffs, have not been consulted on this significant burden that the City intends to impose upon them in the event of AICC's failure to control parking.
- As AICC spokespersons have admitted that the current "100 members" indicated in the August 13 Staff Report is *at least* 300 attendees if family members are counted, it is easy to see that the parking lot as approved for 130 spaces would be filled at present for prayer services alone. This provides no consideration for concurrent meetings or activities.
- The AICC blueprints suggest an occupancy load of near *2,000 persons*, potentially at one time. There are spaces that appear to be adaptable to several uses. The multi-purpose room could be used as a gym, and many spaces described as offices could be classrooms. There has been no consideration for limiting concurrent or consecutive events suggested by this multiplicity of varied use spaces for the purpose of critical parking and traffic controls.
- The Consent Judgment specifically did not authorize "the operation of a school" at the site, but by the explicit instruction that a school would require

a separate permit, the City left open the possibility of operating such a facility.

- There is no provision for the cessation of activity time and assured "quiet use and enjoyment" for neighborhood residents.
- There is no expressed setback requirement that would attempt to mitigate the 58 ½ foot dome and the 61 ½ foot height of the spires as required by the Zoning Ordinance.
- The Consent Judgment asks AICC to "monitor parking" to avoid overflow parking on "*adjacent* residential streets," but the word "monitor" signals no intent to enforce and the use of the word "adjacent" leaves open many other residential street parking possibilities.
- Furthermore, there is no requirement for professional traffic control during heavy traffic hours as indicated by known commuter times and/or concurrent and closely consecutive events at the mosque.
- The height of the structure is still far from compliant with the standards expressed in the Zoning Ordinance that limit buildings in R-60 to 30 feet.
- Restrictions on the concurrent use of large meeting spaces in the building should have been provided: 3,204 square feet are allocated to worship space; 4,043 square feet are shown as lecture space; 4,201 square feet are indicated

for recreational use; and there is additional space dedicated to women's prayer meeting.

- The Consent Judgment does not include a restriction against outdoor activities to preclude noisy youth and adult sport activities as instructed by the City Planning staff.
- The Consent Judgment does not include a provision that general meetings/services cannot begin or end within thirty minutes of the Hatherly Education Center's (which shares a property boundary with the proposed mosque) start and dismissal times.
- There is no provision for the easement promised by the City Planner at the August 13, 2015, Planning Commission meeting that would protect two homeowners' rights to travel over AICC's property in order to access their homes.

(Norgrove Decl. ¶ 28, R. 9-4, Pg. ID 258-61).

D. Irreparable Harm, Harm to Others, and the Public Interest.

Plaintiffs Rrasi, Catcho, and Jabbo live directly across the street from the mosque construction site. (Rrasi Decl. ¶ 2, R. 9-3, Pg. ID 243; Norgrove Decl. ¶ 27, R. 9-4, Pg. ID 257-58). Because of the imminent harm caused by the proposed construction, Plaintiff Rrassi put her house up for sale immediately following the February 21, 2017 City Council meeting where the Consent Judgment was approved.

However, after filing this lawsuit to stop the mosque construction, Plaintiff Rrasi has removed her house from the market, hoping that she will be able to stay in her home and not be forced to move because of the mosque. (Rrasi Supplemental Decl. ¶¶ 3-5, R. 18-2, Pg. ID 1018-19).

Plaintiff Rrasi provides fulltime care in her home for her elderly father and uncle. Bother elderly family members suffer from mental illness, and her uncle is on a feeding tube—Plaintiff Rrasi has to feed him every two hours. The State of Michigan assists Plaintiff Rrasi so she can provide fulltime home care for her family members rather than sending them to a nursing home or other similar state-run facility. Moving to a new home will cause unnecessary disruption and harm to her father and uncle. Neither of them is very strong, and their health is not good. And because Plaintiff Rrasi's uncle suffers from dementia, changing the place where he lives will do more harm because he has to learn new surroundings all over again. (Rrasi Supplemental Decl. ¶¶ 4, 6, 7, R. 18-2, Pg. ID 1019).

The current traffic on 15 Mile Road is a serious public safety concern *without* the extra congestion that will be created by the mosque construction. Video evidence demonstrates this fact. (Rrasi Supplemental Decl. ¶¶ 8, 9, Exs. A, B [Traffic Video],[8] R. 18-2, Pg. ID 1019-25). And traffic was a serious and significant concern raised by many citizens during the Planning Commission's public hearing. (Norgrove Decl. ¶

[8] This video exhibit is being provided to the Clerk of the Court pursuant to 6 Cir. I.O.P. 10.

15, R. 9-4, Pg. ID 251). The City Council ignored the traffic concerns raised by the citizens, claiming during that February 21, 2017 City Council meeting that it was not an issue (causing audible gasps and a strong reaction from those attending the meeting). (*See* Defs.' Ex. J [Video at approx. 3 hrs. 25 mins. 9 secs. to approx. 3 hrs. 25 mins. 35 secs.], R. 14-11, Pg. ID 894-96). The traffic on Fifteen Mile Road is constant throughout the day, and in the morning and late afternoon hours it gets backed up. The mosque traffic, including the construction traffic while it is being built, will only worsen the situation, creating a dangerous situation. Since Plaintiff Rrasi cares for two sick elderly persons in her home, she is seriously concerned that an ambulance or other emergency vehicle would not be able to make it to her house if needed. Given the health of her father and uncle, this is a very real concern—one that is factored into her decision to sell her home if this mosque is built. (Rrasi Supplemental Decl. ¶¶ 4-8, R. 18-2, Pg. ID 1019-20).

Moreover, the nearest intersection where the mosque is to be built (Ryan Road and 15 Mile Road) is one of most dangerous intersections in the City. Not only has Plaintiff Rrasi witnessed this fact since she moved into my home in 2007, but it has been publicly reported as well. (Rrasi Supplemental Decl. ¶ 9, Exs. A, B, R. 18-2, Pg. ID 1021-25; Rrasi Second Supplemental Decl. ¶¶ 3-4, Ex. A, R. 31, Pg. ID 1172-75).

On the other hand, AICC, which was permitted to appear in this case as *amicus curiae* in opposition to Plaintiffs' motion for a preliminary injunction, (Br. of *Amicus*

Curiae Am. Islamic Cmty. Ctr. in Opp'n to Pls.' Mot. for Prelim. Inj., R. 27, Pg. ID 1069-1100), did not present *any* argument or evidence that granting the injunction would cause it harm. AICC currently has a place of worship, and it will continue to use this location while this case proceeds. (Muise Decl. ¶ 4, Ex. B [Answer, Affirmative Defenses ¶ 14, R. 9-2, Pg. ID 189, Ex. A [AICC Verified Compl. ¶ 8], R. 9-2, Pg. ID 87; *see also* Norgrove Decl. ¶ 24, R. 9-4, Pg. ID 256-57).

Finally, there was strong public opposition to the mosque construction as evidenced during the City Council meeting (Order at 13 [noting that over 240 residents attended the February 21, 2017 City Council meeting] , R. 42, Pg. ID 1260) and during the prior Planning Commission hearings (*see* Norgrove Decl. ¶¶ 15, 16 [citing numerous concerns expressed by many residents], R. 9-4, Pg. ID 251-52; Order at 10 [noting that 200 people appeared at the September 10, 2015 Planning Commission Meeting], R. 42, Pg. ID 1257). And because the Consent Judgment itself is vague and inadequate, lacks standards, inspection criteria, and enforcement mechanisms, it leaves residents and the general public at great risk of future harm. (Norgrove Decl. ¶ 27, R. 9-4, Pg. ID 257-58).

E. The District Court's Ruling.

The District Court denied Plaintiffs' motion for a preliminary injunction, concluding that every factor that the court must consider when ruling on the motion weighed against Plaintiffs. The court first concluded that Plaintiffs were not likely to

succeed on the merits of their claims that (1) the Consent Judgment was invalid because it violates state law, (2) the City violated Plaintiffs' due process rights in the process of approving the Consent Judgment, and (3) the Michigan Open Meetings Act requires invalidation of the Consent Judgment.[9] (Order at 16-23, R. 42, Pg. ID 1263-70).

Regarding Plaintiffs' first claim, the District Court concluded that

> the City Council was authorized under the SHZO to approve a special approval land use via a Consent Judgment to resolve pending litigation. As such, because the City was authorized under the SHZO to approve the special approval land use by approving the Consent Judgment, the Court was not required to make a finding that federal law had been violated. Rather, the Court was required to ensure that the agreement was fair, adequate, reasonable and consistent with the public interest. . . . Here, the Court properly found that the Consent Judgment was fair, adequate, reasonable and consistent with the public interest. Thus, there is no basis to invalidate the Consent Judgment because its approval did not violate the local zoning laws.

(Order at 19-20, R. 42, Pg. ID 1266-67). The District Court rejected Plaintiffs' due process claim, stating, in relevant part, "Contrary to Plaintiffs' assertions, they had no right to a public hearing under the facts of this case." (Order at 21, R. 42, Pg. ID 1268). And the District Court rejected Plaintiffs' claim under the Michigan Open Meetings Act, stating that "[t]here was no secret vote or closed meeting as suggested

[9] The District Court also makes reference to Plaintiffs' First Amendment claim challenging certain speech restrictions imposed by the City during the February 21, 2017 City Council meeting. (*See* Order at 21-23, R. 42, Pg. ID 1268-70). However, that claim was never raised by Plaintiffs as a basis for the requested injunction. Consequently, the court's brief discussion of the First Amendment claim is irrelevant (and erroneous).

by the Plaintiffs, since the meeting was broadcast to a local television channel, which was able to be viewed in the vestibule area where the residents were relocated once the Mayor ordered everyone out of Council chambers." (Order at 23, R. 42, Pg. ID 1270).

Regarding the "irreparable harm" factor, the District Court stated that it "agrees with the Defendants that Plaintiffs have failed to present evidence of irreparable harm other than bare bones conclusions." (Order at 24, R. 42, Pg. ID 1271).

When evaluating the "harm to others" factor, the court stated, "Based on the parties' arguments, the Court finds that preliminary injunctive relief would harm the AICC and its members, as well as the City and the United States." (Order at 25, R. 42, Pg. ID 1272).

Finally, the District Court found "that the public interest is best served by denying the request for injunctive relief because the Consent Judgment represented a voluntary resolution to what could have been strongly contested and lengthy litigation between the City, the AICC and the United States." (Order at 26, R. 42, Pg. ID 1273).

SUMMARY OF THE ARGUMENT

The District Court's ruling misapprehends critical facts and misapplies the relevant law, thereby warranting reversal. The construction of the mosque violates the Zoning Ordinance as a matter of fact, and when the City Council approved the construction via the challenged Consent Judgment it did so in direct violation of the

Zoning Ordinance. There were no findings that federal law necessitated the entry of the Consent Judgment; therefore, it is invalid. And when the City Council held a public hearing to approve the Consent Judgment, it failed to provide adequate notice to affected property owners, including certain Plaintiffs, and it failed to provide an adequate opportunity for these property owners to be heard in violation of the Due Process Clause of the Fourteenth Amendment. Finally, when it came time for the City Council to vote on the Consent Judgment, the Mayor ordered all of the citizens, including the attending Plaintiffs, out of the Council chambers, in violation of the Michigan Open Meetings Act, thereby rendering the City Council's actions invalid.

Plaintiffs will be irreparably harmed by the construction of this mega-mosque in their residential neighborhood. Delaying the construction of the mosque until a final resolution of this case will not harm anyone's interests. In fact, it is in the best interest of all parties to have a final determination regarding the legality of the Consent Judgment (and thus the legality of AICC's special approval land use permit) before more time and resources are spent on the mosque construction. And finally, delaying the mosque construction until its legality is resolved is in the public interest. There has been strong public opposition to this construction project on Fifteen Mile Road from its inception, and upholding the Zoning Ordinance is in the public interest since zoning laws are enacted for the benefit of the public.

In sum, the District Court abused its discretion by denying Plaintiffs' request

for a preliminary injunction to halt the construction of the mosque in order to maintain the *status quo* until a final resolution of the matter.

ARGUMENT

I. STANDARD OF REVIEW.

This Court "reviews a challenge to the grant or denial of a preliminary injunction under an abuse of discretion standard and accords great deference to the decision of the district court. The district court's determination will be disturbed only if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Blue Cross & Blue Shield Mut. v. Blue Cross & Blue Shield Ass'n*, 110 F.3d 318, 322 (6th Cir. 1997). This standard "is a shorthand way of expressing the idea that this court ordinarily extends a high degree of deference to the district court's decision, *but does so only if the district court properly understood the pertinent law and applied it in a defensible manner to the facts as they appear in the record*." *United States v. Any & All Radio Station Transmission Equip.*, 204 F.3d 658, 665 (6th Cir. 2000) (emphasis added). Thus, "[e]ither a legal error, for which [this Court] conduct[s] *de novo* review, or a factual error, for which [this Court] conduct[s] review only for clear error, may be sufficient to determine that the district court abused its discretion." *McPherson v. Mich. High Sch. Ath. Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (internal quotations and citation omitted); *see also Hamad v. Woodcrest Condo. Ass'n*, 328 F.3d 224, 234 (6th Cir.

2003) (concluding that the district court abused its discretion in denying the preliminary injunction). As stated by this Court:

> Our review of preliminary injunction orders is deferential, but not entirely so. The ultimate decision to grant an injunction is reviewed for an abuse of discretion. *Planet Aid v. City of St. Johns*, 782 F.3d 318, 323 (6th Cir. 2015). But the district court's legal conclusions, *including the movant's likelihood of success on the merits*, *are reviewed de novo*, and its findings of fact are reviewed for clear error. *Id.*

S. Glazer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co., 860 F.3d 844, 849 (6th Cir. 2017) (emphasis added).

Here, the District Court judge did not properly understand the pertinent law nor did he apply it in a defensible manner to the facts of this case.

II. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION.

The purpose of a preliminary injunction is to preserve the *status quo* while the case proceeds to a trial on the merits. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Consequently, because a request for a preliminary injunction necessarily occurs before the parties have had an opportunity to fully develop the record, the movant "is not required to prove his case in full at a preliminary injunction hearing." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007).

Four factors guide the decision to grant a preliminary injunction: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would

cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction." *Bays v. City of Fairborn*, 668 F.3d 814, 818-19 (6th Cir. 2012); *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."). This Court has often cautioned that these are factors to be balanced, not prerequisites to be met. *Certified Restoration*, 511 F.3d at 542.

The proper balancing of these factors demonstrates that the District Court abused its discretion by denying the requested injunction.

A. Plaintiffs' Likelihood of Success on the Merits.

1. The Consent Judgment Is Invalid and Unenforceable.

Plaintiffs are likely to succeed on their claim that the Consent Judgment is invalid and unenforceable. As noted previously, "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.

League of Residential Neighborhood Advocates is dispositive. In that case, the city entered into a settlement agreement with a congregation allowing it to operate a

synagogue in a residential-zoned area. The plaintiff neighbors sued alleging that the settlement agreement was void because a conditional use permit was granted without complying with the requirements of the local zoning ordinance. The district court dismissed the action, and the neighbors appealed. The Ninth Circuit reversed, holding the settlement agreement invalid and unenforceable. *Id*. at 1058. In its decision, the court observed that "[b]y placing its imprimatur on the Settlement Agreement, the district court effectively authorized the City to disregard its local ordinances in the name of RLUIPA." *Id*. at 1058.

As stated by the Ninth Circuit:

> Before 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.
>
> Such a finding could not have been made in this case. While a district court would not be bound by the parties' stipulation that a violation of federal law had occurred or would occur, the district court here was presented with a settlement agreement that specifically reiterated the City's denial of all of the allegations of the complaint, and disclaimed any "admission of liability . . . under any federal, state, or local law, including [RLUIPA]."

League of Residential Neighborhood Advocates, 498 F.3d at 1058. This is the precise situation presented by this case. (Order at 18 [stating that the court "approved the Consent Judgment without any findings that there was or will be an actual violation of federal law; the City expressly disavowed any liability"], R. 42, Pg. ID 1263).

As stated by the Seventh Circuit,

> [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.

Perkins v. City of Chi. Heights, 47 F.3d 212, 216 (7th Cir. 1995).

In addition to *League of Residential Neighborhood Advocates*, there are numerous other cases that support Plaintiffs' legal challenge in this case and demonstrate Plaintiffs' likelihood of succeeding on the merits. *See St. Charles Tower, Inc. v. Kurtz*, 643 F.3d 264, 270 (8th Cir. 2011) (holding consent decree invalid, stating, "State actors cannot enter into an agreement allowing them to act outside their legal authority, even if that agreement is styled as a 'consent judgment' and approved by a court"); *Kasper v. Bd. of Election Comm'rs*, 814 F.2d 332, 341-42 (7th Cir. 1987) ("A consent decree is not a method by which state agencies may liberate themselves from the statutes enacted by the legislature."); *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, holding that "if a violation of federal law necessitates a remedy barred by state law, the state law must give way; if no such violation exists, principles of federalism dictate that state law governs"); *Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997) ("To the extent the parties to the Consent Decree intended to ban advertising displays next to I-105, they could not agree to terms which would exceed their authority and supplant state law."); *Vestevich*

v. W. Bloomfield Twp., 245 Mich. App. 759, 764-65 (Mich. Ct. App. 2001) (affirming the decision to set aside the consent judgment and stating that "the trial court properly recognized that the consent judgment brought to court ostensibly to settle plaintiff's renewal of his long-settled claim was, in effect, an attempt by the parties to circumvent the legislatively prescribed processes for raising and deciding zoning issues").

The District Court was dismissive of *League of Residential Neighborhood Advocates* (and the other cases cited by Plaintiffs), claiming that they "are distinguishable from the instant matter because in all of those actions, a consent decree actually violated local zoning laws as opposed to the Consent Judgment at issue here." (Order at 18-19, R. 42, Pg. ID 1265-66). More specifically, the court distinguished *League of Residential Neighborhood Advocates*, stating that it was "unlike the situation herein, where the City Council was authorized under the SHZO to approve a special approval land use via a Consent Judgment to resolve pending litigation," referring to § 25.01 of the Zoning Ordinance. (Order at 17-19, R. 42, Pg. ID 1264-66). Consequently, per the court, "because the City was authorized under the SHZO to approve the special approval land use by approving the Consent Judgment, the Court was not required to make a finding that federal law had been violated." (Order at 19-20, R. 42, Pg. ID 1266-67). The District Court is wrong.

Section § 25.01 of the Zoning Ordinance, which grants the City Council authority to approve special approval land use permits "[a]s a development pursuant to a consent judgment approved by the City Council," does not resolve this issue in the City's favor. This section expressly requires that "[w]hen the City Council is the reviewing authority with respect to a special approval land use, it shall have the same reviewing authority and *shall 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). This makes eminent sense. Otherwise, consent judgments could be a mechanism by which the City could circumvent the Zoning Ordinance to the detriment of the public. Consequently, the City cannot (and a court should not allow it to) rely on this provision as a convenient way to use a Consent Judgment to circumvent the requirements of the Zoning Ordinance, which are in place to protect the public, including Plaintiffs in this case. The Ninth Circuit appropriately rejected such a ploy. *See League of Residential Neighborhood Advocates*, 498 F.3d at 1057 ("[W]e reject any argument that the City may circumvent its zoning procedures by referencing its general authority to settle litigation under § 273(c) of the city charter.").

Thus, if the City Council is going to approve a special approval land use permit via a consent decree, it is required to abide by the same zoning standards as the

Planning Commission. *See* Zoning Ordinance § 25.01. The Zoning Ordinance is not a mere inconvenience that the City Council members can dispense with by simply raising their hands in a vote so as to end an inconvenient and politically-charged lawsuit. Here, the District Court excuses the City Council's actions, stating,

> That the Planning Commission's review of the general discretionary criteria lead its members to conclude that the SALU should be denied does not mean the City Council was required to reach the same conclusion after its review of the general discretionary criteria set forth in SHZO §25.02. The general discretionary standards of §25.02 require the exercise of discretion and judgment, including criteria such as harmony with the neighborhood. As such, it is not surprising that differences of opinion regarding these factors has occurred.

(Order at 18, R. 42, Pg. ID 1265). The District Court's reasoning is erroneous. Because a standard is "discretionary" does not mean it can be ignored. It means that there must be some factual development and basis to demonstrate that the applicant meets the standard. There is *nothing* in the record to suggest that the proposed mosque meets *any* of the standards that served as the basis for the Planning Commission's unanimous denial of the application. None. And the standards are not vague, subjective, and amorphous, as the District Court suggests (referring simply to "harmony with the neighborhood"). They are quite specific and require specific findings. (*See* Order at 6-7, R. 42, Pg. ID 1253-54 [setting forth standards]). As noted above in the Statement of the Case, there is *no* basis *in fact* for concluding that the mosque construction complies with the Zoning Ordinance. None.

One final point: The District Court's reference to alleged anti-Muslim statements and motives is entirely irrelevant. (Order at 8-11, R. 42, Pg. ID 1255-58). Citing to these allegations was no doubt an effort to provide a *post hoc* justification for the court's role in approving the Consent Judgment without the required findings by *insinuating* that there was a potential violation of federal law that would have *necessitated* its entry. Such revisionist history has no place here. As stated by the D.C. Circuit:

> 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); *see also id*. at 477-79 (vacating consent decree implementing an election plan).

In this case, there is no dispute that there were no findings that federal law *necessitated* the entry of the Consent Judgment, and the District Court's claim that no findings were necessary under the circumstances (Order at 19-20, R. 42, Pg. ID 1266-67) is wrong as a matter of law.[10] The District Court was no doubt dismissive of this requirement because no such findings could be made in this case: the parties to the Consent Judgment specifically disavowed any liability and the court failed to make any findings.

In sum, the basis for Plaintiffs' claim that the Consent Judgment is invalid and unenforceable is well established. Therefore, contrary to the District Court's erroneous conclusion, there is a strong likelihood that Plaintiffs will prevail on this claim.

2. The Approval of the Consent Judgment Violated Due Process.

When the City approved the Consent Judgment through its City Council it did so in violation of Plaintiffs' due process rights. "Deprivation of procedural due process" is a basis for relief under 42 U.S.C. § 1983 from unlawful zoning. *See Pearson v. Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir. 1992) (reviewing "the various kinds of constitutional violations typically asserted in federal zoning cases," including

[10] The case relied upon by the District Court is not applicable because it did not involve a situation where the consent decree itself was contrary to state law. (Order at 20, R. 42, Pg. ID 1267). Rather, *United States v. Lexington-Fayette Urban Cnty. Gov't*, 591 F.3d 484, 485 (6th Cir. 2010), involved the question of whether the lower court abused its discretion by denying a consent decree based on the court's conclusion that the civil penalty provision was too high.

procedural due process). In *Nasierowski Brothers Investment Company v. City of Sterling Heights*, 949 F.2d 890, 893-94 (6th Cir. 1991), for example, this Court stated, "Nasierowski's injuries accrued and attached immediately when Council convened in executive session and materially deviated from the recommendations of the planning commission, thus subverting the purpose of the duly conducted notice and comment process." The same is true here.

However, the District Court held that Plaintiffs due process claim fails because they "had no right to a public hearing under the facts of this case." (Order at 21, R. 42, Pg. ID 1268). The court concluded that the Zoning Ordinance did not require a hearing because the City Council approved the mosque construction "pursuant to a consent judgment that is approved by the City Council to resolve pending litigation with the city." (Order at 21 [citing § 25.03(A)(3)(a)-(b) of the Zoning Ordinance], R. 42, Pg. ID 1268). But the question is not whether the Zoning Ordinance required proper notice and an opportunity to be heard, but whether, under the circumstances, the Fourteenth Amendment demands it. Indeed, "[i]n this Circuit, . . . a § 1983 plaintiff may prevail on a procedural due process claim by . . . demonstrating that he is deprived of property as a result of established state procedure that itself violates due process rights." *Macene v. MJW, Inc.*, 951 F.2d 700, 706 (6th Cir. 1991). Whether a person has a "property" interest is traditionally a question of state law. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) ("The hallmark of property . . . is an

individual entitlement grounded in state law."). However, "[a]lthough the underlying substantive interest is created by an independent source such as state law, *federal constitutional law* determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 757 (2005) (internal quotation marks omitted) (emphasis added); *see also Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571-72 (1972).

Thus, the extent of process due to any person before they are deprived of a state-created right is measured by a three-factor balancing test: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of that interest; and (3) the governmental interest in additional safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). This balancing analysis is fact-specific. *Id.* at 334; *Zinermon v. Burch*, 494 U.S. 113, 127 (1990).

Here, Plaintiffs Rrasi, Catcho, and Jabbo, who reside directly across the street from the property where the mosque is to be built, have a protected property interest as affected, adjacent land owners. *See, e.g.*, *Bd. of Regents of State Colls.*, 408 U.S. at 571-72 ("The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money."); *Peterman v. Dep't of Natural Res.*, 446 Mich. 177, 190 (1994) ("[A]ny injury to the property of an individual which deprives the owner of the ordinary use of it is equivalent to a taking . . . .) (internal quotations and citation omitted); *Arill v.*

Maiz, 992 F. Supp. 112, 117 (D.P.R. 1998) (holding that the complaint fully alleged a due process claim under § 1983 based on the deprivation of a cognizable property interest in the plaintiffs' quiet use and enjoyment of their property). However, Plaintiffs did not receive proper notice of the pending approval of the construction of the mosque—a material deviation from the Planning Commission's decision—nor were they provided with an adequate opportunity to be heard. And this is particularly the case since Plaintiffs were never served with a copy of the proposed Consent Judgment so as to allow them to review, consider, and comment upon its terms and conditions. The Zoning Ordinance and the Michigan Zoning Enabling Act have in place procedures for notifying affected landowners and holding hearings to allow these landowners to express their concerns to ensure that an informed and just decision can be made regarding a zoning application *that will directly affect them*. *See, e.g.*, Mich. Comp. Laws § 125.3103 (providing notice requirement for adjacent land owners). No such actions were taken by the City when it approved the AICC Application *via* the Consent Judgment—a decision that was contrary to the *unanimous* vote of the Planning Commission. Indeed, the City's decision to enter into the Consent Judgment was a *fait accompli*, and the February 21, 2017 City Council meeting was essentially a sham.

In sum, the private interests (interests of Plaintiffs) affected by the official action (approval of the AICC permit application *via* the Consent Judgment) were

significant. The risk of erroneous deprivation of those interests was great in that Plaintiffs' interests were in fact deprived by the official action. And the governmental interest in complying with the procedural safeguards of the zoning regulations are significant in that these regulations were enacted for the benefit of the public (*i.e.*, for the benefit of affected landowners such as Plaintiffs) in the first instance. Without question, an important and essential element of the land-use hearing process is the notice of pending action. Proper notice provides advance warning to parties so that they can intelligently prepare for and meaningfully participate in the hearing. That was not done here, in violation of Plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment.

3. The Consent Judgment Approval Violated the Michigan Open Meetings Act.

The Consent Judgment is invalid since its approval by the City, through the City Council, violated the Michigan Open Meetings Act.[11] "[T]he Open Meetings Act

[11] *Naumovski v. City Council* of *Sterling Heights*, No. 2017-0899-CZ (Mich. Cir. Ct. 2017), an unreported case raised in a supplemental brief filed by Defendants (*see* Defs.' Ex. 1, Mot. for Leave to File Supplemental Br., R. 34-1, Pg. ID 1215-23), does not resolve this claim in the City's favor. In *Naumovski*, the Macomb County Circuit Court granted the City's motion to dismiss a *pro se* plaintiff's complaint alleging multiple violations of the Michigan Open Meetings Act. The plaintiff claimed that these violations require invalidation of all decisions reached at the February 21, 2017, City Council meeting, including the decision to enter into the challenged Consent Judgment. As an initial matter, this case does not address the gravamen of Plaintiffs' challenge here: that the Consent Judgment is invalid because it waives or consents to a violation of the City's zoning laws. Nor does this case address Plaintiffs' constitutional claim. Additionally, this lawsuit was brought by a *pro se* plaintiff who

was enacted to provide openness and accountability in government, and is to be interpreted so as to accomplish this goal." *Esperance v. Chesterfield Twp.*, 89 Mich. App. 456, 463 (Mich. Ct. App. 1979). Consequently, "[i]t should also be recognized that because the act requires all meetings to be opened to the public it implicitly requires that *all parts* of the meeting (unless specifically excluded by the act) also be open to the public." *Id*. at 463 (emphasis added).

Here, the City, through the vote of its City Council, approved the Consent Judgment in violation of the Michigan Open Meetings Act by ordering all of the citizens out of the meeting during the actual vote. Consequently, the meeting was no longer a public meeting, and the vote was taken in violation of the Act. *See* Mich. Comp. Laws § 15.263(1)-(3); *Esperance*, 89 Mich. App. at 463 ("It can hardly be contended that a vote by secret ballot at an open meeting is any more open than a vote at a closed meeting.").

And because the City failed to comply with the Act and this failure impaired the rights of the public, specifically including the rights of Plaintiffs, as set forth above, the City's action (*i.e.*, approval of the Consent Judgment) should be invalidated. *Esperance*, 89 Mich. App. at 464 ("Those seeking to have the decision invalidated

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didn't bother to file a written response to the City Council's motion for summary disposition. In sum, this decision should not insulate the City's unlawful actions. It gives short shrift to the purpose of the Act; it is not persuasive; and, indeed, the District Court did not cite to it in its decision below.

must allege not only that the public body failed to comply with the act, but also that this failure impaired the rights of the public.").

B. Irreparable Harm to Plaintiffs without the Preliminary Injunction.

Contrary to the District Court's conclusion, Plaintiffs will be irreparably harmed without the preliminary injunction. This harm is real and substantial and not "bare bones conclusions," as the District Court stated. (Order at 24, R. 42, Pg. ID 1271). The Consent Judgment expressly permits AICC to proceed with building the mosque without complying with the Zoning Ordinance, which is in place to protect the interests of the public, specifically including Plaintiffs' interests, which will be directly affected by the construction. It is simply incorrect as a matter of fact to conclude that the harm caused by the construction of a giant (over 20,500 square feet) structure that is over 60 feet tall and that dwarfs all of the other buildings in a residential neighborhood is illusory or speculative. It defies reality to conclude that the construction of this mosque will not harm Plaintiffs' use and enjoyment of their homes, and it is contrary to the undisputed facts to conclude that this construction on Fifteen Mile Road will not subject Plaintiffs and the general public to increased and serious safety risks. In sum, this construction will adversely affect property values of adjacent homes, disrupt Plaintiffs' quiet use and enjoyment of their homes, and worsen an already horrendous and unsafe traffic situation, particularly in light of the fact that a school (Hatherly Education Center) is located in the neighborhood, thereby

increasing the chances that a child could be involved in an accident. As Plaintiff Rrasi testified, this construction will affect her and her family in a very real and personal way since she provides fulltime care in her home for her elderly father and uncle. Both elderly family members suffer from mental illness, and her uncle is on a feeding tube. Moving to a new home will cause unnecessary disruption and harm to her and the failing health of her family members. And because Plaintiff Rrasi's uncle suffers from dementia, changing the place where he lives will do more harm because he has to learn new surroundings all over again. No amount of money can remedy this situation.

In the final analysis, it is clearly erroneous to dismiss this real, substantial, and irreparable harm to Plaintiffs as mere "bare bones conclusions."

C. Whether Granting the Preliminary Injunction Will Cause Substantial Harm to Others.

In this case, the likelihood of harm to Plaintiffs is substantial because the construction of the mosque will disrupt the *status quo* of this residential neighborhood in which Plaintiffs live and travel, causing harm to Plaintiffs' important interests and creating serious public safety issues. Moreover, the Zoning Ordinance was enacted to benefit the public. That is, the zoning requirements are in place to ensure public safety and to protect the property rights and interests of persons that might be affected by a zoning decision that grants permission to construct a building, such as the large mosque at issue.

On the other hand, if the City is restrained from enforcing the Consent Judgment, the *status quo* will be maintained. In fact, it is in the best interests of the City, as a representative of its residents, to have its Zoning Ordinance enforced.[12] And while Plaintiffs certainly acknowledge that AICC has an interest in the construction of the mosque, AICC currently has a place to worship in Madison Heights, so its religious exercise is not impaired in any way. There is no reason to believe that its worship services will not continue in Madison Heights while this case is proceeding (or even while the mosque is in the construction phase for that matter). Moreover, it would be in AICC's interest to have the legality of the Consent Judgment resolved before it starts committing substantial time and resources to a project that might ultimately be halted by the courts.

Nor will the United States be harmed by the requested injunction. The United States is not a party to the challenged Consent Judgment, and there is no "Consent Judgment" entered in the case between the City and the United States. Rather, the District Court entered a "Consent Order," and the order merely requires the City to "abide by the terms of the Consent Judgment" challenged here. (*See* Consent Order, *United States v. City of Sterling Heights*, No. 2:16-cv-14366 (E.D. Mich. Mar. 1,

[12] Additionally, allowing this mosque to be built will create a "comparator" to be used in the religious land use context that will essentially nullify the Zoning Ordinance when it comes to future religious applications.

2017), ECF No. 7). Consequently, should Plaintiffs succeed in their challenge to the Consent Judgment, this provision of the "Consent Order" will be meaningless.

In sum, granting the requested injunction is in the best interest of all parties, and it is in the public interest.

D. The Impact of the Preliminary Injunction on the Public Interest.

The impact of the preliminary injunction on the public interest turns in large part on whether the approval of AICC's permit application via the Consent Judgment comports with the zoning requirements necessary for building a large mosque at the proposed location on 15 Mile Road. As the facts demonstrate, there can be little doubt that the Consent Judgment grants AICC special rights and privileges, thereby allowing it to circumvent the Zoning Ordinance to the detriment of the general public, and more specifically, to the detriment of Plaintiffs, who will be directly harmed by the mosque construction. There is clear evidence that building the mosque at this location will create substantial harm to the general public by creating significant safety concerns with regard to traffic, particularly in light of the fact that this a residential neighborhood and there is a school located adjacent to the proposed mosque site, and with regard to the inability of emergency vehicles (fire department in particular) to maneuver and travel as a result of the traffic congestion. (*See* Rrasi Decl. ¶ 3, R. 9-3, Pg. ID 243-44; Norgrove Decl. ¶ 15, R. 9-4, Pg. ID 251). For good reasons, the public opposition to the construction of this mosque was overwhelming—and it was

overwhelming with regard to safety, congestion, and maintaining the residential character of the neighborhood (*see* Norgrove Decl. ¶ 15, R. 9-4, Pg. ID 251) and not with regard to some fabricated notion of "Islamophobia," as the District Court's decision suggests, (*see* Order at 8-11, R. 42, Pg. ID 1255-58). Indeed, the fact that the District Court completely ignored the overwhelming evidence regarding the *primary* concerns of the vast majority of the residents and instead highlighted a few cherry-picked allegations of anti-Muslim sentiments is telling.

In sum, the public interest is promoted by granting Plaintiffs' motion, upholding the requirements of the Zoning Ordinance, and maintaining the *status quo* until this case is ultimately resolved. *See generally G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws").

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this Court reverse the District Court and grant their motion for a preliminary injunction in order to maintain the *status quo* as this case proceeds.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

/s/ *David Yerushalmi*
David Yerushalmi, Esq.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 12,024 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise (P62849)

ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

No.	Page ID	Description
R. 1	1-34	Complaint
R. 9	46-78	Plaintiffs' Motion for Preliminary Injunction
R. 9-2	80-82	Plaintiffs' Exhibit 1: Declaration of Robert J. Muise
R. 9-2	83-138	Plaintiffs' Exhibit A to Muise Declaration: Verified Complaint in *American Islamic Community Center, Inc. v. City of Sterling Heights*, No. 1:16-cv-12920 (E.D. Mich. filed Aug. 10, 2016)
R. 9-2	139-193	Plaintiffs' Exhibit B to Muise Declaration: Answer filed by the City in *American Islamic Community Center, Inc. v. City of Sterling Heights*, No. 1:16-cv-12920 (E.D. Mich. filed Aug. 10, 2016)
R. 9-2	194-213	Plaintiffs' Exhibit C to Muise Declaration: Proposed Consent Judgment filed by counsel for American Islamic Community Center, Inc. in *American Islamic Community Center, Inc. v. City of Sterling Heights*, No. 1:16-cv-12920 (E.D. Mich. filed Aug. 10, 2016)
R. 9-2	214-219	Plaintiffs' Exhibit D to Muise Declaration: Docket Sheet for *American Islamic Community Center, Inc. v. City of Sterling Heights*, No. 1:16-cv-12920 (E.D. Mich. filed Aug. 10, 2016)
R. 9-2	220-241	Plaintiffs' Exhibit E to Muise Declaration: Consent Judgment entered by Court on March 10, 2017 in *American Islamic Community Center, Inc. v. City of Sterling Heights*, No. 1:16-cv-12920 (E.D. Mich. filed Aug. 10, 2016)
R. 9-3	242-245	Plaintiffs' Exhibit 2: Declaration of Debi Rrasi
R. 9-4	246-262	Plaintiffs' Exhibit 3: Declaration of Jeffrey Norgrove

R. 9-4	263-265	Plaintiffs' Exhibit A to Norgrove Declaration: American Islamic Community Center's Special Approval Land Use Application
R. 9-4	266-271	Plaintiffs' Exhibit B to Norgrove Declaration: Planning Commission Staff Report dated August 13, 2015
R. 9-4	272-277	Plaintiffs' Exhibit C to Norgrove Declaration: Planning Commission Staff Report dated September 10, 2015
R. 14	506-534	Defendant City of Sterling Heights' Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction
R. 14-4	544-567	Defendants' Exhibit C: City of Sterling Heights Zoning Code
R. 14-7	584-590	Defendants' Exhibit F: City of Sterling Heights Planning Commission September 10, 2015 Minutes
R. 14-11	894-896	*Defendants' Exhibit J: February 21, 2017 Council Meeting Video
R. 18-2	1017-1021	Plaintiffs' Exhibit 1: Supplemental Declaration of Debi Rrasi
R. 18-2	1022	*Plaintiffs' Exhibit A to Rrasi Supplemental Declaration: Video of Traffic on 15 Mile Road
R. 18-2	1023-1025	Plaintiffs' Exhibit B to Rrasi Supplemental Declaration: "Top 10 dangerous intersections in Sterling Heights, Michigan"
R. 27	1069-1100	Brief of *Amicus Curiae* The American Islamic Community Center in Opposition to Plaintiffs' Motion for Preliminary Injunction.
R. 31	1172-1173	Second Supplemental Declaration of Debi Rrasi
R. 31	1174-1175	Exhibit A to Rrasi Second Supplemental Declaration: "Top 10 Most Dangerous Intersections in Metro Detroit"

R. 34-1	1215-1223	Defendants' Exhibit 1 to Defendants Motion for Leave to File Supplemental Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction: *Naumovski v. City Council* of *Sterling Heights*, No. 2017-0899-CZ (Mich. Cir. Ct. 2017)
R. 42	1248-1273	Order Denying Plaintiffs' Motion for Preliminary Injunction
R. 44	1275-1277	Notice of Appeal

*The video exhibits referenced here are being provided to the Clerk of the Court pursuant to 6 Cir. I.O.P. 10.