UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

CATHOLIC HEALTHCARE INTERNATIONAL, INC., *et al*., Plaintiffs, v. GENOA CHARTER TOWNSHIP, *et al*., Defendants.	No. 21−cv−11303−SDK−DRG Hon. Shalina D. Kumar Magistrate Judge David R. Grand

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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ISSUE PRESENTED

Whether the Court should grant Plaintiffs' motion for partial summary judgment on the issue of liability on Plaintiffs' RLUIPA claim when there is no genuine dispute of *material* fact that (1) the Township imposed or implemented a land use regulation in a manner that imposed a substantial burden on the religious exercise of Plaintiffs and (2) that the Township cannot demonstrate that the imposition of this burden on Plaintiffs' religious exercise is in furtherance of a compelling governmental interest *and* the least restrictive means of furthering that compelling governmental interest as a matter of law.

CONTROLLING AND MOST APPROPRIATE AUTHORITY

Catholic Healthcare Int'l, Inc. v. Genoa Charter Twp., 82 F.4th 442 (6th Cir. 2023)

Livingston Christian Schs. v. Genoa Charter Twp., 858 F.3d 996 (6th Cir. 2017)

42 U.S.C. § 2000cc *et seq.*

Fed. R. Civ. P. 56

Practice Guidelines for Judge Shalina D. Kumar, Motion Practice, F. Summary Judgment

ARGUMENT IN REPLY

I. The Township's Response Is Deficient.

The Township's response is factually, legally, and procedurally deficient. Packing the Court's docket with irrelevant and inadmissible hearsay documents does not create a dispute of material fact, and submitting a declaration with a vague list of discovery topics that will have no impact on the undisputed material facts and thus no impact on the *proper* outcome of this case provides no basis for denying this motion. *See First Floor Living LLC 22-3216 v. City of Cleveland*, 83 F.4th 445, 453 (6th Cir. 2023) (holding that the district court's denial of discovery prior to granting a motion for summary judgment was not an abuse of discretion and noting that the court does not abuse its discretion when, *inter alia*, a Rule 56(d) motion is supported by mere general and conclusory statements, fails to include any details or specificity, or when further discovery would not have changed the outcome). The Township's failure to refute the *material* facts set forth in Plaintiffs' filing, coupled with its misapprehension of the law and how it applies to these facts, compel this Court to grant Plaintiffs' motion. The Sixth Circuit's recent and thorough rejection of the Township's arguments should be a sober reminder that the Township does not understand the demands of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc. *Catholic Healthcare Int'l, Inc. v. Genoa Charter Twp.*, 82 F.4th 442 (6th Cir. 2023).

This is not a hard case. It is a quintessential example of a violation of RLUIPA, a federal statute that was enacted for the *very purpose* of preventing the governmental action at issue in this case. Indeed, "RLUIPA was enacted to protect [religious organizations] like [CHI] from discrimination in zoning laws that 'lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.' 146 Cong. Rec. 16698 (2000) (joint statement of Sens Hatch and Kennedy)." *United States v. City of Troy*, 592 F. Supp. 3d 591, 611 (E.D. Mich. 2022); *see also* 42 U.S.C. § 2000cc-3 ("This Act shall be construed in favor of a broad protection of religious exercise . . . ."); *Holt v. Hobbs*, 574 U.S. 352, 356-58 (2015) (noting the broad protection intended by RLUIPA). Accordingly, "RLUIPA prohibits governments from *infringing* sincerely held religious beliefs and practices *except as a last resort*." *Mast v. Fillmore Cnty.*, 141 S. Ct. 2430, 2433 (2021) (Gorsuch, J., concurring) (emphasis added).

This case is ripe for summary judgment on the issue of liability under RLUIPA because the undisputed *material* facts, which are largely derived from indisputable public records, demonstrate the following.[1] ***First***, that Plaintiffs' use

[1] This case has been ongoing for nearly three years. It was filed in June 2021. (ECF No. 1). It has gone to the Sixth Circuit twice, and both times the court reversed rulings that favored the Township. And there have been multiple evidentiary hearings and presentations of evidence in this Court and in state court related to the use of the CHI Property. The record is more than sufficient for this Court to rule in Plaintiffs' favor on this motion.

of the CHI Property is "religious exercise" under RLUIPA.[2] ***Second***, that the Township's complete denial of the CHI Project caused a "substantial burden" on Plaintiffs' religious exercise as a matter of law under RLUIPA for at least *four* *independent* reasons, any one of which is sufficient to meet this element: (a) Plaintiffs have no ready or reasonable alternative locations for their proposed development, particularly in light of the unique, rural nature of the CHI Property; and contrary to the Township's position, Plaintiffs are *not* required to bear additional costs, delays, and uncertainty to pursue some hypothetical alternative that might exist somewhere in the universe; (b) Plaintiffs had a reasonable expectation that their proposed development would be approved as the use is *expressly allowed* (and "not prohibited") under the Zoning Ordinance; (c) the Township's complete denial caused substantial delay, uncertainty, and expense for Plaintiffs (all of which continue today); and (d) Plaintiffs are unable to carry out a core function of their religious activities without the development (this is particularly true without the St. Pio chapel). ***Third***, the Township's stated reasons for its complete denial of the proposed development are not compelling. And ***four***, even if the Township's interests were compelling, there are less restrictive means available to accomplish those interests. None of this is refuted with admissible, material, and relevant

[2] Plaintiffs' proposed use of the CHI Property as a prayer campus with an adoration chapel is "religious exercise" protected by RLUIPA. 42 U.S.C. § 2000cc-5(7). Nothing the Township presented in its response refutes this.

evidence nor does the Township explain how its requested discovery would change the outcome (because it won't).

In fact, the procedural deficiencies of the Township's response alone compel this Court to grant Plaintiffs' motion. Pursuant to this Court's Practice Guidelines:

> The response to a Rule 56 Motion must begin with a "Counterstatement of Material Facts" *stating which facts are admitted and which are contested*. *The paragraph numbering must correspond to moving party's Statement of Material Facts.* If any of the moving party's proffered facts are contested, the non-moving party must explain the basis for the factual disagreement, referencing and citing record evidence. ***Any proffered fact in the movant's Statement of Material Facts that is not specifically contested will, for the purpose of the motion, be deemed admitted.*** In similar form, the counterstatement may also include additional facts, disputed or undisputed, that require a denial of the motion.

Practice Guidelines for Judge Shalina D. Kumar, Motion Practice, F. Summary Judgment (emphasis added). The Township's paragraph numbering does not correspond to Plaintiffs' paragraph numbering nor does the Township "specifically contest[]" any of Plaintiffs' Statement of Material Facts. Therefore, these facts are "deemed admitted." This makes the Court's job here even simpler since the denial of this motion must rest on a dispute of *material* fact, and there is none.

Plaintiffs also object to the documents submitted by the Township in its response. The Township submitted twenty-six exhibits. There are only three declarations. One declaration ("Proposed Affidavit of VanMarter") was not signed

and must therefore be rejected.[3] One declaration ("Wyett Declaration") contains irrelevant assertions that do not refute any material fact.[4] And the final declaration submitted by counsel ("Declaration of David B. Burress") does not contain evidence but simply a list of irrelevant discovery topics. Nowhere in the Burress Declaration does he explain how this litany of potential discovery is *material* to refuting any specific or *material* fact set forth in Plaintiffs' motion nor does he explain how any of this potential discovery would apply to the law in a way that would change the legal outcome. (*See* Burress Decl. ¶¶ 4-9 [setting forth discovery topics], ECF No.102-27, PageID. 4839). Plaintiffs' planned use of the CHI Property is set forth in the application for special land use that was submitted to the Township. It was

[3] The Township's late filing of this document on January 16, 2024 (ECF No. 103), *without leave of this Court*, should be rejected. The Township and its counsel should not be permitted to ignore or flout the Court's rules. They had since November 30, 2023, the date Plaintiffs filed their motion, to get their act together. They should not be rewarded for their failure. Indeed, the witness (VanMarter) works for the Township and has been its primary witness in this Court and in state court.

[4] The Wyett Declaration is a perfect example of the Township's absurd "alternative location" argument. In his declaration, Mr. Wyett testifies that "[u]pon information and belief and *subject to Genoa Township approval*, a church, or prayer park would not be a prohibited land use in the PUD." (Wyett Decl. ¶ 6 [emphasis added], ECF No. 102-2, PageID.4553). Of course, "a church, or prayer park" is not a prohibited land use on the CHI Property either, and it is because of "Genoa Township's [failure to grant] approval" in this case that we are here in federal court. Moreover, the Township has the temerity to submit a declaration in which this landowner asserts that "the owners of the property are willing to work with, and encourage CHI to reach out to [Mr. Wyett] to discuss and negotiate the potential *purchase*" of available land. (*Id*. ¶ 7 [emphasis]). Apparently, the Township is in the realtor business as well.

this specific use that the Township denied, and the reasons why the Township denied it are a matter of public record. *This is all undisputed*. Consequently, there is no need for any discovery on "Plaintiffs' interest in the property," "expectations for, and proposed uses of this property, and other properties owned by the Diocese," "Plaintiffs' plans" for the property, Plaintiffs' "awareness of zoning and other regulations that apply to its use," Plaintiffs' "planned and actual operations" of the property, and other related topics asserted by the Township. (*See id*. ¶¶ 4-6). Similarly, discovery requests as to whether there are other locations in the universe for the development based on Plaintiffs' "national and international" operations and whether Plaintiffs "retained real estate professionals or employed other means to identify and operate from alternative locations" (*id*. ¶¶ 7, 8) are irrelevant, immaterial, and absurd, as demonstrated further below. Finally, the Township seeks discovery on damages. (*Id*. ¶ 9). But this motion seeks judgment on the issue of liability; discovery on damages will follow. In short, the Township's efforts to obfuscate the issues to avoid liability should be rejected. The Burress Declaration is simply an affirmation that the Township intends to engage in a costly and harassing fishing expedition. All of this compels the granting of this motion.

The other 23 exhibits are objectionable hearsay and must be excluded. As stated by the Sixth Circuit:

> Rule 56(e) requires that affidavits used for summary judgment purposes be made on the basis of personal knowledge, set forth admissible

> evidence, and show that the affiant is competent to testify. Rule 56(e) further requires the party to attach sworn or certified copies of all documents referred to in the affidavit. Furthermore, hearsay evidence cannot be considered on a motion for summary judgment. *Daily Press, Inc. v. United Press Int'l*, 412 F.2d 126, 133 (6th Cir.), *cert. denied*, 396 U.S. 990 (1969); *see also Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988) (stating that "it is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment").

Wiley v. United States, 20 F.3d 222, 225-26 (6th Cir. 1994); *Alpert v. United States*, 481 F.3d 404, 409 (6th Cir. 2007) ("Evidence submitted in opposition to a motion for summary judgment must be admissible. Hearsay evidence . . . must be disregarded.") (quotations and citations omitted). In sum, the motion should be granted. Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment . . . .").

II. The Township's "Substantial Burden" Argument Is Wrong as a Matter of Fact and Law.

Whether the government has imposed a "substantial burden" on religious exercise is a "question of law." *Livingston Christian Sch. v. Genoa Charter Twp.*, 858 F.3d 996, 1001 (6th Cir. 2017). The Township's main argument in opposition to the motion is that Plaintiffs are unable to make the "substantial burden" showing (or that there is a fact dispute as to this element). The Township is mistaken as a matter of fact, and its legal arguments are wrong as a matter of law.

Per Abraham Maslow, "when all you have is a hammer, everything tends to look like a nail." The Township's argument, undoubtedly based on its success in *Livingston Christian Schools* (a case that is not at all factually similar), is that so

long as there is *some* other place in the universe for the proposed development (including property not even owned by the religious organization), the Township can act with impunity under RLUIPA as there will never be a substantial burden on religious exercise. The assertion is wrong as a matter of fact, particularly in light of the unique nature of the CHI Property, and it is wrong as a matter of law as it would render RLUIPA a nullity.

The weakness of the Township's argument is highlighted by the case law it cites in support. (Defs.' Br. at 23). The Township leads with *Renton v. Playtime Theatres*, 475 U.S. 41 (1986), which is not a RLUIPA case. At issue in *Renton* was whether a city ordinance that prohibits adult motion picture theaters from locating within 1,000 feet of certain properties violates the First Amendment. The Supreme Court held that it did not, concluding that the ordinance was a valid governmental response to the "serious problems created by adult theaters" and therefore satisfied the First Amendment. *Id*. at 54. *Renton* is no help to the Township. The Township's reliance on *Episcopal Student Foundation v. City of Ann Arbor*, 341 F. Supp. 2d 691, 704 (E.D. Mich. 2004), fares no better. At issue in this case was the religious organization's request for a demolition permit to destroy its *existing* facility to build a larger one on the property (*i.e.*, the organization was not being denied the use of its property for religious exercise, as in this case). Moreover, the court noted:

> [T]the Court fails to understand how Defendants' permit denial substantially burdens Plaintiff's religious exercise when the solution to

> a majority of Plaintiff's myriad constraints appears to lie within Plaintiff's control. Plaintiff admitted at oral argument that its entire second floor – or *one half* of its current building space – is leased to commercial tenants. Given Plaintiff's alleged spacial limitations, it seems rather evident to the Court that rather than leasing that space to outsiders, the church could use its second floor to accommodate its own religious needs. At a minimum, it seems the second floor could be used (or renovated for use) as a meditation room, student lounge, and dining area, and could thereby satisfy many of Plaintiff's demands. Indeed, Plaintiff's counsel essentially conceded as much at oral argument.

Id. at 704. And finally, the Township relies on *Livingston Christian Schools* ("LCS"), a case in which LCS wanted to relocate its *existing* school, so it sought to lease property owned by the Brighton Nazarene Church for that purpose. The Township informed the Church that an amended special-use permit would be required before its property could be used as a school. The Church applied for the permit *on behalf of LCS*, and the application was rejected, prompting the lawsuit. The Township ultimately prevailed. However, the Township did not prevent LCS from using its *existing* property for religious exercise nor did it prevent the Church from using its property for religious exercise—the Church just couldn't expand its use to include a school, thus preventing LCS from *leasing* the Church property for use as a school.

The error of the Township's argument is further evidenced by its absurd claim that Plaintiffs imposed the burdens upon themselves by requesting to develop property where churches are an *allowed* use under the Zoning Ordinance (*i.e*., they are not "*prohibited*"). Indeed, the Township argues that Plaintiffs cannot

demonstrate a substantial burden because they can purchase other properties in the Township where churches are an allowed use (*i.e.*, not "prohibited") and go through the onerous and costly special land use application process, which is not a guarantee, yet again. The argument is head-spinning. We will address it in further detail below.

In sum, contrary to the Township's opposition and based on undisputed material facts (not requiring discovery), Plaintiffs easily satisfy the "substantial burden" factor.[5] *Catholic Healthcare Int'l, Inc.*, 82 F.4th at 453 (Clay, J., concurring) ("Plaintiffs are likely to be able to show . . . a substantial burden."). Indeed, based on similar *undisputed* facts, the Sixth Circuit concluded that Plaintiffs were in fact suffering a "substantial burden." *See id*. at 449; *see also infra*.

A. Unable to Carry Out Some Core Function of Their Religious Activities Due to the Inadequacy of ***Their*** ***Current*** Facilities.

A "substantial burden" is found when "land-use regulations . . . prohibit a plaintiff from engaging in desired religious behaviors," *Livingston Christian Schools,* 858 F.3d at 1004, which is precisely the situation presented here. In such cases, "the plaintiffs had demonstrated that they were unable to carry out some core function of their religious activities due to the inadequacy of *their current* facilities." *Id.* at 1006 (emphasis added). Here, the Township banned Plaintiffs from using the

[5] The Supreme Court has held that the denial of unemployment benefits—an indirect burden on religious exercise—was sufficient to establish a substantial burden. *See Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Bd.,* 450 U.S. 707 (1981).

CHI Property for all religious activities, and without the chapel, Plaintiffs are unable to carry out a core function of their religious activities. Plaintiffs do not own other comparable property in the Township, in the state of Michigan, or anywhere else. And the CHI Property, as the plans illustrate, is *uniquely* suited for the proposed development. The Township argues that so long as Plaintiffs might be able to use someone else's facilities or find some other location in the universe for the proposed development then the Township's prohibition on the use of the CHI Property for religious exercise is not a substantial burden. This argument finds no basis in law or fact. When the Township made the similar argument to the Sixth Circuit, it was rightfully rejected. (*See infra).* The Court must do the same here.

B. No *Feasible* Alternative Location.

Another "factor" considered by the Sixth Circuit for finding a "substantial burden" "is whether the religious institution has *a feasible alternative location* from which it can carry on its mission." *Livingston Christian Schs.*, 858 F.3d at 1004 (emphasis added). Plaintiffs do not own <u>*any*</u> alternative locations for the construction and development of the prayer campus and St. Pio Chapel. Unquestionably, the CHI Property is unique. It's size, layout, and rural nature make it particularly ideal and suitable for the proposed development. That is indisputable. And property is not fungible. There is no *feasible* alternative location from which Plaintiffs can carry on *their* mission. The fact that another church (Holy Spirit) has

generously permitted Plaintiffs to use its property for *some* religious exercise in the interim does *not* negate the substantial burden imposed by the Township. As stated by Circuit Judge Clay in *Catholic Healthcare International, Inc.*,

> As to the first factor, whether [CHI] has a feasible alternative location from which it can carry on its mission, it does not. [CHI] acquired the wooded property with the intention to develop it into a prayer campus, including an adoration chapel, prayer trails, and the display of religious symbols. . . . The Township notes that [CHI] has been able to host events at Holy Spirit Church in Brighton, Michigan. However, [CHI] does not own that church, and moreover the church lacks the qualities which make the property at issue suitable for a prayer campus. . . . The Township fails to explain how the existence of another church, which has permitted [CHI] to host some events, constitutes an adequate alternative location for [CHI's] religious aim of creating a prayer campus.

82 F.4th at 453 (Clay, J., concurring). Here, the Township apparently wants to act as Plaintiffs' realtor, further suggesting that Plaintiffs take on the additional delay, burdens, and costs associated with finding a similar rural property, purchasing this property (assuming it is for sale, which many are not),[6] going through the costly and

[6] While the declaration of Ms. VanMarter and the map attached are not admissible (*see supra*), a cursory review of the highlighted properties where she claims churches are a "permitted" use shows that all but *one* of the locations are a fraction of the size of the CHI Property, thereby making them unsuitable, and the vast majority of these properties are located on a busy and main thoroughfare (W. Grand River), also making them unsuitable. And the only 40-acre property identified is not for sale. (*See* O'Reilly Supplemental Decl. ¶ 4 at Ex. 1). In fact, this map demonstrates the *uniqueness* of CHI's property. As noted, this entire argument that Plaintiffs must somehow canvas the universe for other properties before a "substantial burden" can be shown makes a mockery of RLUIPA and the fundamental right to the free exercise of religion, which RLUIPA protects. (*See also id*. ¶¶ 3, 5-10).

time-consuming design and engineering processes to create a suitable development for this new property, and then submitting (with a significant fee) these new plans to the Township (or another governmental entity) and praying for approval. The suggestion is absurd, and it is contrary to the law. It should be summarily rejected.

C. Substantial Delay, Uncertainty, and Expense.

Another "factor" for finding a "substantial burden" is "[w]hether the religious institution will suffer substantial delay, uncertainty, and expense due to the imposition of the regulation . . . ." *Livingston Christian Schs.*, 858 F.3d at 1004 (internal quotation marks omitted). There is no dispute of material fact that this factor has been met, thus establishing a substantial burden regardless of the availability of other properties. As stated by the Second Circuit, "When [a religious organization] has no *ready* alternatives,[7] *or* where the alternatives require substantial 'delay, uncertainty, and expense,' a complete denial of the [religious organization's] application might be indicative of a substantial burden." *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007) (emphasis added).

As noted, this factor is easily satisfied, and it is dispositive. Plaintiffs have "undisputedly" suffered "substantial delay, uncertainty, and expense" in this case. *The Township presented no facts to refute this*, because none exist. As stated by the

[7] None of the Township's suggested "alternatives" is "ready," and none of them will come without "delay, uncertainty, and expense." In other words, they are not "ready alternatives" as a matter of undisputed fact.

Sixth Circuit in this case: "One factor in determining substantiality, for purposes of 42 U.S.C. § 2000cc(a)(1), is whether the religious institution will suffer substantial delay, uncertainty, and expense due to the imposition of the regulation. Plaintiffs undisputedly have suffered all those things: after two years of administrative proceedings and considerable expense, they remain unable to place the religious displays on their prayer trail." *Catholic Healthcare Int'l, Inc.*, 82 F.4th at 449 (internal citation and punctuation omitted). These facts are not disputed.

The two-plus year delay in the construction of the St. Pio Chapel and prayer campus has resulted in the loss of Plaintiffs' right to religious exercise, ongoing delays to their ability to worship, and unnecessary and substantial costs (specifically including the needless cost [in excess of $9,000] associated with the prayer campus submission as a result of the state court litigation).[8] As a direct result of the Township's rejection of the CHI Project, Plaintiffs have also been forced to litigate a separate state court action, all at great expense and delay. Plaintiffs have no ready alternatives. They do not own other properties. Plaintiffs will suffer further delays, uncertainty, and expense if forced to purchase another rural property and then try to develop it (including navigating governmental restrictions similar to those here).

[8] Plaintiffs have submitted admissible evidence of the financial burdens associated with submitting their special land use application, which requires professional engineering expertise to complete. (Palazzolo Decl. ¶¶ 40, 49, 67, Exs. C, G, J, at Ex. 1, ECF No. 97-2, PageID. 4172-73, 4175, 4181, 4215-20, 4279-82, 4324-29).

None of these facts are disputed. This factor is easily satisfied, and it is dispositive.

D. Obtained the Land with a *Reasonable* Expectation of Using It for Religious Purposes.

A "substantial burden" factor is whether "an institutional plaintiff has obtained an interest in land without a reasonable expectation of being able to use that land for religious purposes." *Livingston Christian Schs.*, 858 F.3d at 1004. As noted by the Fourth Circuit, "[w]hen a religious organization buys property *reasonably* expecting to build a church, governmental action impeding the building of that church may impose a substantial burden. . . . *This is so even though other suitable properties might be available, because the 'delay, uncertainty, and expense' of selling the current property and finding a new one are themselves burdensome*." *Bethel World Outreach Ministries v. Montgomery Cty. Council*, 706 F.3d 548, 557-58 (4th Cir. 2013) (emphasis added); *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007) ("What is true is that . . . once the organization has bought property reasonably expecting to obtain a permit, the denial of the permit may inflict a hardship on it.").

There is no fact dispute that CHI acquired the property from the Catholic Diocese of Lansing with the expectation of building its prayer campus and modest chapel as this use is an *allowed* use *under the Zoning Ordinance*. In other words, "a church, or prayer park [is] not . . . a prohibited land use" (*see* Wyett Decl. ¶ 6, ECF No. 102-2, PageID. 4553) for the CHI Property. No variance was required.

Plaintiffs easily satisfy this factor as well. The Township's unsupported assertion that Plaintiffs have imposed this burden upon themselves is wrong as a matter of fact and law. In fact, the Township's response *supports* Plaintiffs' argument. Here, the Township suggests that CHI should be required to purchase new property in the Township where churches are allowed via a special land use permit. (Defs.' Resp. at 21, ECF No. 102, PageID. 4539). Consequently, if CHI is expected to buy new property and undergo the same land use process to get approval for constructing a prayer campus and chapel, then by the Township's admission CHI had a reasonable expectation of building a prayer campus and chapel on the CHI Property, which has the same zoning allowance. Remember too that it was Township officials who made it clear that this (special land use) was the process that Plaintiffs had to engage in to get approval for the CHI Project (Verified Compl., ¶ 19, Ex. 3 [email], ECF No. 23-2, PageID. 1166, 1188-89), and if this proposal was so beyond the pale and outside of the realm of a *reasonable* use (*n.b.*, it was not a "prohibited use") of the CHI Property, the project would have never received Planning Commission approval (and approval by the Livingston County Road Commission and the Township's own consultants). The Township's argument is *frivolous*.

In the final analysis, there is no discovery that the Township could possibly seek that refutes the *material* facts demonstrating the substantial burden imposed by

the Township's denial of the CHI Project.[9] The Township's attempt to complicate and obfuscate this issue must be rejected. The Sixth Circuit's prior ruling in this case provides a blueprint for why the Township's efforts fail here as well. As required by Rule 56, "The court *shall* grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (emphasis added).

CONCLUSION

The Court should grant Plaintiffs' motion forthwith.

Respectfully submitted,

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[9] The Township provided no substantive response to Plaintiffs' arguments that the rejection of the CHI Project fails strict scrutiny, the most demanding test known to constitutional law. (*See* Pls.' Br. at 31-39, ECF No. 97). And the reason is simple: it cannot. Indeed, the Township's flimsy traffic argument (Defs.' Resp. at 29, ECF No. 102) is not only wrong as a matter of undisputed fact, the Township never explains how this interest is "compelling" in light of the facts and why complete denial of the CHI Project is the least restrictive means of accomplishing its interest. Accordingly, the Township has waived the strict scrutiny issue. *McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.") (internal quotations and citation omitted).

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2024, 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. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

AMERICAN FREEDOM LAW CENTER

/s/*Robert J. Muise*
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