Memorandum of Decision

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

Muslim Center of Somerset County, Inc., Mohammed Husain, Zahid Chughtai
v.
Borough of Somerville Zoning Board of Adjustment, Borough of Somerville

Docket No. SOM-L-1313-04

Decided May 16, 2006

The Honorable Peter A. Buchsbaum, J.S.C.

FACTS

This matter arises out of an application for a conditional use variance and site plan approval by plaintiff, the Muslim Center of Somerset County, Inc., a non-profit religious organization, to use property located at 63 Southside Avenue, Somerville, New Jersey. Plaintiff had purchased the property, a pre-existing two-family home, on June 29, 1998, and began utilizing it for Islamic religious services in the fall of 1998. The congregants used the center to recite the five daily prayers of Islam, conduct Friday services, which were regularly attended by sixty-five to seventy-five people, and conduct a Sunday school.

On March 28, 2001, the Borough of Somerville issued a Notice of Violation of Ordinance 102-73.E (parking and circulation requirements). Plaintiff agreed to apply for the

variances and site plan approval deemed necessary by the Borough, and in or about October 2003, plaintiff applied to the Board for the conditional use variance and site plan approval necessary to use the premises as a house of worship. The application was deemed complete and a public hearing was scheduled for March 17, 2004. The site plan included a proposed expansion of the building of 648 square feet and an enclosure of the stairs to the rear of the building, which did not exacerbate any of the existing deviations except lot coverage. It also included a variance for parking in the side yard, where the center had set up a driveway where congregants could park.

Defendant, the Borough of Somerville Zoning Board of Adjustment ("the Board"), denied plaintiff's application, noting that plaintiffs could not satisfy several of the conditions required under the Borough's Land Use Ordinance to permit a house of worship as a conditional use. The deviations in the application from the conditions set forth in the ordinance included an existing lot area of 17,300 square feet, whereas the ordinance requires 40,000; a frontage of 100 feet, whereas the minimum required is 150 feet; a side yard depth of 2.5 feet to adjacent Lot 7, whereas the minimum side yard depth is 25 feet; 24 existing parking spaces, whereas 39 would be required, and parking in the side yard adjacent to Lot 9. A memorializing resolution was adopted on June 16, 2004 and a Notice of Denial

was published on July 24, 2004. Plaintiff then filed this action in lieu of prerogative writ before this Court.

This Court conducted a hearing on October 14, 2005 and on October 24, 2005, the Court remanded the matter to the Board to apply the balancing tests set forth in *Sica v. Bd. of Adjustment*, 127 N.J. 152 (1992) and *House of Fire Christian Church v. Zoning Bd. of Adjustment*, 379 N.J. Super. 526 (App. Div. 2005). The Board conducted three hearings, which also covered evidence that had been presented at the earlier hearings.

At the first hearing on remand, which took place on November 14, 2005, plaintiff presented the testimony of Arshad Jalil, a member of the congregation, who indicated that seven neighborhood families offered the use of their properties within two-hundred to two-hundred fifty feet from the center to ameliorate the lack of parking. *See* 11/14/05 Hearing Transcript at T15-8 to T17-10. During his testimony, the Board noted what it perceived to be inconsistencies in the testimony as to the size of the congregation. One Board member claimed he personally counted two-hundred cars on the nearby streets at one time. Id. at T41-20 to 42-5. However, plaintiff asserts it never exceeded one-hundred forty-four attendees in 2003, and when attendance reached this level, the service was split and

attendance limited to seventy-two people. Id. at T39-19 to 40-1.

Mr. Jalil also acknowledged that the congregation is growing, that it will soon outgrow the current location, and that the center is looking for a larger location. Specifically, he stated "the Board currently is actively looking around areas, and if we find a use we will be ... holding services at Redwood Inn, and we will not be cramping people around here, that is not in the best interests of providing services to these people. We will grow out of it, and once we do, we will look for a bigger place." Id. at T57:16-24.

The second hearing took place on November 29, 2005, at which plaintiff presented the testimony of Steven Parker, a professional engineer. Mr. Parker described the site plan, including various proposed drainage improvements. Specifically, he noted that the removal of 12 of the 24 proposed parking spaces on the property would bring the application within the Ordinance's impervious coverage requirement of forty percent. See 11/29/05 Hearing Transcript at T21-9 to 13. He also raised the option of grass pavers, which would bring impervious coverage to the Borough standard. Id. at T87-15 to 90-2. It was also unclear how many people ordinarily attend weekday or Friday services now since the testimony suggested a range of attendees, for example 5 to 25 for weekday services.

Plaintiff then called Richard Pantell, a professional planner, who testified that the 17,300 square foot lot could accommodate the proposed use. *Id.* at T65-23 to 66-2. He felt that the location was appropriate for a religious institution serving the community. He also stated that there were only ten lots in the Borough of Somerville in the R-2 Zone that satisfied the 40,000 square foot lot requirement of the ordinance. *Id.* at T66-21 to 67-2. Seven of these lots were schools, churches or a YMCA. However, none of these sites were or are currently available. Mr. Pantell also identified 22 off-street parking spaces and 23 on-street parking spaces at the 9 properties of individuals who had offered to provide parking to congregants. Id. at T84-4 to 9. Additionally, he discussed parking capacity at Chambres Park, which is several hundred yards from the property and has 75 to 100 spaces available. Id. at T112-8 to 11.

Also, Mr. Pantell described characteristics and lot sizes of the other houses of worship in Somerville. Ten of the thirteen houses of worship are situated on lots smaller than 40,000 square feet. Id. at T108-3 to 8. Further, he pointed out that all of these houses of worship lacked sufficient parking spaces and several of them exceeded the impervious coverage requirements. One of the churches, Shiloh, failed to meet the Borough's zoning criteria with respect to parking and

coverage before its expansion application was approved. *See* plaintiffs' Exhibit J. However, most of these churches were on larger lots than plaintiff's lot.

Notably, Mr. Pantell also reiterated the point made by Mr. Jalil that plaintiffs consider the current site to be a temporary location from which they can develop, and that they are seeking larger quarters. Id. at T144:4-7. As Mr. Jalil did in his testimony, Mr. Pantell made clear that this mosque, the only one in Somerset County, is not intended to stay in this location forever.

At the third hearing, which took place on December 13, 2005, the Board presented the testimony of two expert witnesses. The first was Douglas Hopper, a professional engineer. Mr. Hopper did not have any major disagreement with the drainage report which was proffered by Mr. Parker, and agreed that the lot coverage issues would be ameliorated by plaintiff's site plan drainage scheme. *See* 12/13/05 Hearing Transcript at T31.

Michael Cole, a professional planner, also testified for the Board. He first noted that the neighborhood is in a single family area in which small lots predominate, and that the plaintiff's lot is meant for a residential structure and not a church. Id. at T47-50. He further opined that the neighbors on either side of the property would be negatively affected by the parking lot in one side yard, the proximity of the structure to

the adjoining property on the other side, and the overall development patterns. Id. at T50-52.

Mr. Cole also expressed concern over the center's continued expansion, noting testimony that there could be as many as 65 cars in the neighborhood on a normal Friday, a number that could grow as the congregation expands. Also, he pointed out that creating more off-street parking in the area would require another variance. Id. at T52-56. When asked where a mosque could be established in Somerville, however, he answered that he did not know of any area within the Borough where one could be established. Id. at T67. Mr. Cole also suggested a possible discontinuance of Friday services as a potential ameliorative measure. Id. at T59-21 to 23 and T60-9 to 12. However, he also indicated that "given the existing conditions, and the intensity of the use, we don't think the application can be ameliorated." Id. at T60-17 to 23.

The Board upheld its earlier decision denying the variance application by a unanimous vote at the December 13, 2005 meeting. The Board issued a resolution on December 21, 2005 upholding its previous denial of the application, and concluding that "the grant of the variances would cause a substantial detriment to the public good since the increased noise, traffic and parking problems will, when taken together, change the character of the neighborhood and substantially decrease the

quality of life in the neighborhood." The Board also concluded that "the conditions proposed by the applicant were not reasonable and that they would not ameliorate the problems caused by the inherent overuse of this property if the variances were granted." The matter is now once again before this Court. [1]

LEGAL ANALYSIS

The Court will consider first the balancing test set forth in *Sica v. Bd. of Adjustment*, as applied to plaintiffs' application for a conditional use. New Jersey's Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-1 to -136, authorizes local boards of adjustment to allow for variances from the requirements of a zoning ordinance. These boards have broad discretion in reviewing variance applications, and their decisions are presumptively valid. The decision to grant or deny a variance, however, can be set aside if it is arbitrary, capricious, or unreasonable, or not supported by the evidence in the record. *Cell South of N.J., Inc. v. Zoning Bd. of Adj. of W. Windsor Tp.*, 172 N.J. 75, 81 (2002).

"Generally, a conditional use is 'suitable to a zoning district but not to every location within that district.'" *Coventry Square, Inc. v. Westwood Zoning Bd. of Adj.*, 138 N.J.

[1] The Court notes that following a case management conference in this Court, the Court with the consent of counsel did conduct a site visit by itself without anyone on the site. The visit consisted of driving by on April 20, 2006. Such visits are authorized by *Lazovitz v. Bd. of Adjustment*, 212 N.J. Super. 376, 382 (App. Div. 1986).

285, 294 (1994). "Conditional uses are uses ordinarily requiring special standards relating to traffic patterns, street access, parking, and the like in order to assure their functional and physical compatibility with the district as a whole and their appropriate integration into the district." *Id.* In order to obtain a conditional use variance under N.J.S.A. 40:55D-70(d)(3), an applicant must show both positive and negative criteria. *House of Fire Christian Church*, supra at 534. In *Sica*, supra at 165, the Court suggested the following factors as a general guide to municipal boards balancing such criteria:

> 1) the Board should identify the public interest at stake.
>
> 2) The Board should identify the detrimental impact that will ensue from the grant of the variance. Certain effects such as an increase in traffic, or some tendency to impair residential character, utility or value will usually attend any non-residential use in a residential zone. When minimal, such an effect need not outweigh an inherently beneficial use that satisfies the positive criteria.
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> 3) In some situations, the board may reduce the detrimental effect by imposing reasonable conditions on the use. If so, the weight accorded the adverse effect should be reduced by the anticipated effect of those restrictions.
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> 4) The Board should weigh the positive and negative criteria and determine whether, or balance, the grant of the variance would

cause a substantial detriment to the public good. Id. at 165-66.

In the present case, the application meets the first prong of the *Sica* test, as the construction of a house of worship is an inherently beneficial use and meets the applicant's burden of proving positive criteria. *See House of Fire Christian Church*, supra at 535. As to the second prong, several potentially detrimental impacts would result from the granting of the application. Both the property and the structure are undersized for the proposed use. Also, there would be an increase in noise levels when congregants come to the center, particularly during Friday services. There would be an increase in traffic in the neighborhood, and the on-street parking available in the neighborhood would be insufficient to accommodate the demand, even if the plaintiffs were to increase the number of parking spaces on the property. Further, there would be an increase in impervious coverage from 40% to 59.2% as a result of the expanded parking lot, leading to a decreased green area and potentially drainage problems. Additionally, the establishment of the center would aggravate the non-conforming side yard setback with respect to the adjoining Lot 7, given the enhanced activity associated with a house of worship, and would affect the use of adjoining Lot 9 through parking in the side yard.

Several potential ameliorative measures have been suggested, both by plaintiffs and by the Board. First, plaintiffs claim they could use grass pavers as opposed to a blacktop parking lot on-site. This would conserve green space on the property, maintain impervious coverage at or near its current level, and solve some of the problems related to drainage. The Board's engineer, Mr. Hopper, has concurred that these problems would be ameliorated by plaintiffs' proposed drainage scheme. Plaintiffs have also proposed using the driveways of several neighbors, who are members of the center, for parking for congregants. Additionally, plaintiffs have suggested the possibility of having off-duty police officers control traffic before and after services. These suggestions, however, would not alleviate the problem of increased noise and may only have a minimal impact on traffic conditions.

None of the suggested ameliorative measures would alleviate the problems of putting a major religious center in this small lot single-family area, including increased general activity in the neighborhood, increased traffic and noise, parking impact in the side yard or off tract, or the issue of the 2 1/2 foot non-conforming side yard setback. Also, as discussed above, plaintiffs have suggested that the parking problems could be alleviated by allowing congregants to park on the properties of neighbors who have offered their driveways. However, plaintiffs

have not supplied easements for such parking spaces, and have only applied for licenses which could be revoked at any time. Even if plaintiffs did apply for easements, it would be necessary to provide notice to property owners within 200 feet of the properties allowing the parking. *See Brower Development Corp. v. Planning Bd. of the Twp. of Clinton*, 255 N.J. Super. 262 (App. Div. 1992). Further, the property at 55 Southside Avenue on which ten spaces are proposed might well have to be the subject of a separate application regarding its use as an off-site parking lot.

The Board had also suggested the elimination of Friday services from the site, and using the site only for less intense activities such as smaller services and Sunday school. This suggestion would alleviate the problem of increased activity to some degree. Although plaintiffs suggested at the Board hearings they might be willing to accommodate the discontinuance of Friday services, plaintiffs' brief clearly indicates that they reject such a proposal and consider it to be discriminatory. *See* 11/14/05 hearing Transcript at T72; Plaintiffs' Brief at 20-21.

Given that plaintiffs' application is for a house of worship, the Court must weigh the positive and negative criteria, as required by *Sica*, and in light of both the fourth (balancing) prong of *Sica* and the requirements of the Religious

Land Use and Institutionalized Persons Act ("RLUIPA"). Indeed, the Appellate Division has noted that "the burden-shifting analysis prescribed by RLUIPA is similar to the way in which New Jersey courts analyzed religious zoning issues prior to the enactment of RLUIPA," such as in *Sica*. *House of Fire Christian Church*, supra at 545. Accordingly, this Court will consider the *Sica* balancing and RLUIPA burden shift together.

The Court has presumed that the *Sica* and RLUIPA standards require more deference to inherently beneficial and religious conditional uses than does the test for less favored conditional uses set forth in *Coventry Square v. Westwood Zoning Board of Adjustment*, 138 N.J. 285, 294 (1994). Thus, failure to satisfy the *Sica* or RLUIPA tests *a fortiori* would signify a failure to satisfy the more stringent (from an applicant) standpoint requirements in *Coventry Square* that conditional use variances should not be granted where deviation from conditional use standards would violate the rationale for permitting the conditional use in the first place. In this regard, the two and one-half foot setback to Lot 7, and parking along Lot 9, along with the coverage issues, etc., would on this record, sustain a determination that the proposed variances undercut the evident intent of the ordinance to allow religious institutions only on large, well buffered significantly open/green lots.

Plaintiffs have, as noted asserted that the Board, in denying their application for a conditional use, has violated RLUIPA as well as *Sica*. RLUIPA provides, in pertinent part:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution ... (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. §2000cc(a)(1).

To prevail on a RLUIPA claim, a plaintiff "has the initial burden of demonstrating that the land use regulation 'actually imposes a substantial burden on religious exercise.'" *House of Fire Christian Church*, supra at 545. If plaintiff makes such a showing, the burden then shifts to the local government to show that the challenged regulation "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering" that interest. Id. Therefore, if plaintiff does not show a substantial burden, the court need not reach the analysis of whether the regulation furthers a compelling governmental interest or is the least restrictive means of doing so.

In determining whether plaintiffs have shown that the regulation imposes a substantial burden on religious exercise,

the Court must first note the Seventh Circuit's observation that:

> Application of the substantial burden provision to a regulation inhibiting or constraining *any* religious exercise ... would render meaningless the word "substantial," because the slightest obstacle to religious exercise incidental to the regulation of land use - however minor the burden it were to impose - could then constitute a burden sufficient to trigger RLUIPA's requirement that the regulation advance a compelling governmental interest by the least restrictive means. *C.L.U.B. v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003).

In *C.L.U.B.*, an association of area churches challenged a city ordinance, alleging that it violated RLUIPA. Id. at 755. The Court decided that the plaintiffs had not met the requirement of showing a substantial burden, and held that a regulation must bear "direct, primary, and fundamental responsibility for rendering religious exercise ... effectively impracticable" in order to impose a substantial burden. Id. at 761.

The Seventh Circuit's standard for showing a substantial burden under RLUIPA was alleviated somewhat in *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005). In that case, the Court held that the defendant municipality had created a substantial burden by requiring a church to "search around for other parcels of land" rather than rezone property the church already owned. Id. at

901. However, the city in that case was concerned that if the property were rezoned, a subsequent owner might build a school or other non-religious facility, and the church thus agreed to a restrictive covenant disallowing such an arrangement. Id. at 900-01. Thus, the city had no legitimate concerns on which to base its denial of the rezoning.

The case at hand is distinguishable from *New Berlin* because the municipality here has several legitimate concerns which justify its denial of plaintiffs' application. These include the concerns regarding parking, traffic and noise, the undersized lot, and the non-conforming side-yard setback, as discussed above.

Additionally, the U.S. District Court for the Northern District of Illinois noted in a recent case interpreting *C.L.U.B.* and *New Berlin* that RLUIPA does not entitle religious groups to establish houses of worship anywhere they want. *Petra Presbyterian Church v. Village of Northbrook*, 409 F.Supp. 2d. 1001, 1007 (N.D. Ill. 2006). In that case, a church was not permitted to open in an industrial area, because this was prohibited by the zoning laws of the city of Northbrook, Illinois, and the church sued the city under RLUIPA. Id. at 1003. In holding for the defendant, the Court noted that the plaintiff had failed to "account for other areas of Northbrook where churches are allowed," including the "availability of land

in ... commercial districts where churches are allowed with a permit." Id. at 1007.

While the house of worship in the present case is not located in an industrial zone, its location in a residential neighborhood with relatively small houses creates legitimate concerns, as was the case in *Petra*. Further, as in *Petra*, plaintiffs' argument under RLUIPA has not accounted for other areas in and around Somerville where the Mosque could be located. Plaintiffs have even admitted, through testimony, that they are actively searching for other locations in the area which could better accommodate their congregation. Also, plaintiffs have admitted that they are already conducting many of their larger services in other locations, such as the Residence Inn in Bridgewater, New Jersey, the Redwood Inn and the Manville Elks facility.

Similarly, federal courts have held that mere inconvenience, as a result of the physical limitations of a proposed location, does not amount to substantial burden. *Williams Island Synagogue, Inc. v. City of Aventura*, 358 F. Supp. 2d. 1207 (S.D. Fla. 2005). In that case, a synagogue applied to a municipality to move its location due to various "problems under Jewish law" that were presented by its location at the time, including female congregants being forced to pass

through the men's prayer area and congregants not being able to face toward Jerusalem during prayer. Id. at 1209-10.

The *Williams Island* Court reiterated the Eleventh Circuit's standard that a substantial burden under RLUIPA "must place more than an inconvenience on religious exercise," and there must be significant pressure that directly coerces the religious adherent to conform his or her behavior accordingly. Id. at 1214 (*quoting Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004)). "Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or ... that mandates religious conduct." Id. The Court then found that the plaintiff had not made a persuasive argument that the "distractions" during services of which they complained were actionable under RLUIPA. Id. at 1215.

The Court further noted that plaintiff's argument the Eleventh Circuit, in *Midrash Sephardi*, had rejected the Seventh Circuit's strict interpretation of substantial burden. Nevertheless, it still found that a substantial burden did not exist in that case. The Court concluded that RLUIPA does not protect religious assemblies from being distracted while observing religious beliefs, and that the plaintiffs had not shown that they were forced to forego the tenets of their

religion in the current location. Therefore, they had not shown a substantial burden under RLUIPA. Id. at 1215-16.

Similarly, in *Midrash Sephardi*, the Eleventh Circuit rejected an argument by the plaintiffs that locating synagogues in a residential district posed a substantial burden because it would "require their congregants to walk farther," which would "cause them to stop attending services altogether." *Midrash Sephardi*, supra at 1227. The Court found that "the burden of walking a few extra blocks" was not substantial within the meaning of RLUIPA. Id. at 1228. In the instant case, the need to drive to another site in the vicinity to attend services as opposed to driving to 63 Southside Avenue would appear to be the functional equivalent of walking the few extra blocks found in *Medrash Sephardi*, supra, not to burden religious use.

Accordingly, as in *Williams Island Synagogue* and *Midrash Sephardi*, plaintiffs have not shown any particular reason why their faith requires the county-oriented mosque as described in their application to be located in that specific area. As discussed above, plaintiffs have conceded they are searching for other sites, and are already using different sites for larger services. Just as walking a few extra blocks was not a substantial burden in *Midrash Sephardi*, holding Friday services at another location, such as the Residence Inn in Bridgewater, the Redwood Inn or the Manville Elks facility has not posed a

substantial burden here. Thus, plaintiffs have not met either the Seventh Circuit or Eleventh Circuit standards for showing a substantial burden on their religion under RLUIPA, and also have not shown basis for a burden shift under *Sica*.

Plaintiffs' situation is also similar to that of the plaintiffs in *Lighthouse Institute for Evangelism v. City of Long Branch*, 100 Fed. Appx. 70 (3rd Cir. 2004), on remand, 406 F. Supp. 2d. 507 (D.N.J. 2005). In that case, the plaintiff religious institution claimed that a City of Long Branch zoning ordinance violated RLUIPA. The Third Circuit, citing *C.L.U.B.*, supra, for the proposition that a substantive burden is one "rendering religious exercise ineffectively impracticable", found no substantial burden, as the institution was not completely excluded from the city and could have operated in other districts within the city by right, such as in a commercially-zoned district. Id. at 77. Here, the mosque is not being totally excluded from the Borough of Somerville or from Somerset County, which is its drawing area. Rather, its use is being limited in a residential neighborhood where it could have several detrimental impacts. Such a limitation clearly does not constitute a substantial burden under any of the enumerated tests. It should be noted that other federal courts have taken a less stringent approach to the substantial burden analysis under RLUIPA. For example, in *Castle Hills*

First Baptist Church v. City of Castle Hills, 2004 U.S. Dist. LEXIS 4669 (W.D. Tx.), the District Court for the Western District of Texas found that a "municipality that refuses to accept and consider a special use permit application from a place of worship related to the occupancy of already existing facilities works a substantial burden upon religious exercise where the proposed use is religious education." Id. at 38. The Court in that case found there was a substantial burden where the municipality denied a special use permit for the expansion of the fourth floor of an existing building on the Church property used for religious education. It held that the City came too close to "requiring the Church to refrain from conduct required by religious beliefs." Id.

However, in *Castle Hills*, the Church had existed for over 50 years, and an entire facility had been built on the site for religious education. The plaintiffs were simply seeking to expand that facility. In the present case, however, the plaintiffs have acknowledged that they consider the current Mosque to be only a temporary facility, and they are actively searching for a new, more appropriate facility. Therefore, denying plaintiff's application did not require them to refrain from conduct required by their religious beliefs.

It should also be noted that in *Castle Hills*, the Court upheld the denial of the plaintiff's application for a special

use permit for the construction of a parking lot. The Court reasoned that it was not a situation in which the city's conduct prevented people from attending services and worshiping as they choose, and that the plaintiffs had other practical alternatives. The same is true in the present case, as plaintiffs have the alternative of holding services in other locations. Also, the aggravation of the side yard setback in the present case creates a serious potential detrimental impact that did not exist in *Castle Hills*.

Plaintiffs cite *Kali Bari Temple v. Board of Adj.*, 271 N.J. Super. 241 (App. Div. 1994), a New Jersey case in which the plaintiffs' application for variances for a Temple were denied by the Township of Readington. The Court found that the rejection was arbitrary and the application should have been granted, as the inherently beneficial religious use of the property outweighed the potential for adverse impact on the neighborhood. Id. at 252. The Court further held that concerns about excessive activity, noise, traffic, parking or other legitimate zoning concerns should not justify the denial of such an application as "the Board and the Township have available the full range of police powers to impose conditions aimed at the avoidance of detrimental effects." Id. at 251.

Kali Bari, however, is factually distinct from the case at bar. The Temple in that case was a small facility with a

congregation of only 15 to 20 individuals, at which religious services only were held by appointment, and in which one family member at a time prayed together with the religious leader. Id. at 244. As the Court noted, "one should erase from the mind any image of ... plopping down Canterbury Cathedral in the middle of bucolic Somerset County...[w]e are talking about a few folks gathering at someone's home. Id. at 251 (*quoting State v. Cameron*, 184 N.J. Super. 66, 75 (L. Div. 1982)). Additionally, the Temple had attempted to alleviate the Board's concerns that the congregation's size could not be controlled once variances were granted by limiting the size of the congregation to the fire code capacity of the Temple room, and it was also willing to make various other accommodations. Id. at 245. In the present case, the number of congregants at either weekday or Friday services at the Mosque is uncertain, due to the varying testimony on this subject. However, it appears that there could be between 70 and 150 congregants at any given Friday service. Thus, this is a substantially larger institution than the one in *Kali Bari*. The potential traffic, noise and parking problems, along with the other detrimental impacts discussed above, could create much more of a detrimental impact here than in *Kali Bari*. This is not the community facility assumed by plaintiff's planner Pantell, or described in *Kali Bari*.[2]

[2] It is noteworthy that the kind of intimate services involved in the *Kali*

In sum, the Court finds that the Board's denial of plaintiffs' application was not unlawful. Under the *Sica* balancing test, the potentially detrimental impacts outweigh the public interest in granting the variance. The site is arguably not appropriate for a substantial religious institution that would serve Somerset County. Further, plaintiffs have not shown that defendants have violated RLUIPA, as they have not met the burden of showing a substantial burden on their exercise of religion. It should also be noted that the Court is not passing on plaintiffs' arguments under 42 U.S.C. §2000cc(b) regarding violation of equal terms under RLUIPA, discrimination, and exclusion from the community. However, these are separate issues, they would require consideration of evidence not currently in the record, and must be considered at another time in this case.

The Court also notes that its decision does not address if whether, under *Sica*, a small community-oriented house of worship such as the one in *Kali Bari* could function within this neighborhood, if plaintiffs were willing to agree to such an arrangement. A small house of worship accommodating up to a number like 30 individuals might well not involve impacts on the character of the neighborhood. Deprivation of the rights of

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Bari case, involving the Imam and a few worshippers, are apparently being conducted now at the Mosque without objection.

neighborhood members to conduct religious services in their neighborhoods might also result in a different analysis under RLUIPA. Compare *Murphy v. New Milford Zoning Committee*, 402 F.3d 342 (2nd Cir. 2005), dismissing a RLUIPA claim as unripe, thus allowing a limit of 25 people on religious service attendance to remain in effect. However, as in *Murphy*, the Court will not make any determination at this time as to such an option since it is not the present application, and has not been clearly presented to the Zoning Board.

Plaintiffs could also make the center more consistent with the character of the neighborhood by discontinuing Friday services on-site and holding them at larger, more appropriate locations, as plaintiffs have already done on some occasions. In fact, the intensity of use which creates many of the detrimental impacts on the community is largely related to the Friday services, as mentioned by Mr. Cole. However, plaintiffs have not definitively agreed to exclusively hold Friday services at other locations, and therefore this option is also not a part of the current application.

For the reasons stated above, the decision of the Borough of Somerville Zoning Board of Adjustment on December 21, 2005 denying plaintiffs' application for a conditional use with variances is sustained.

Ms. Brown shall submit an appropriate order.