



**NAILAH K. BYRD**  
**CUYAHOGA COUNTY CLERK OF COURTS**  
1200 Ontario Street  
Cleveland, Ohio 44113

**Court of Common Pleas**

**BRIEF IN OPPOSITION**  
**July 29, 2021 17:17**

By: DALE H. MARKOWITZ 0016840

Confirmation Nbr. 2313857

CITY OF UNIVERSITY HEIGHTS

CV 21 948437

vs.

UNIVERSITY REALTY USA, LLC, ET AL

**Judge:** JOAN SYNENBERG

**Pages Filed:** 159

**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

**CITY OF UNIVERSITY HEIGHTS,**

**Plaintiff,**

**v.**

**UNIVERSITY REALTY USA, LLC**

**and**

**ALEKSANDER SHUL**

**and**

**RABBI SHNEUR ZALMAN  
DANZIGER  
a/k/a SHNEUR ZALMAN DANCYGER  
a/k/a SHNIOR DENCIGER,**

**Defendants.**

**CASE NO. CV-21-948437**

**JUDGE JOAN SYNENBERG  
MAGISTRATE STEPHEN M. BUCHA III**

**DEFENDANTS' BRIEF IN  
OPPOSITION TO PLAINTIFF'S  
MOTION FOR PRELIMINARY  
INJUNCTION**

Now come Defendants University Realty USA, LLC, ("URU"), Aleksander Shul (the "Shul"), and Rabbi Shneur Zalman Denciger ("Rabbi") (collectively "Defendants"), by and through their undersigned counsel, Thrasher, Dinsmore & Dolan, LPA, Shapero & Green, LLC and Storzer & Associates, P.C., and hereby submit their Brief in Opposition to Plaintiff's Motion for Preliminary Injunction.

**PRELIMINARY STATEMENT**

Since 2009, the Rabbi's home, and that of his wife and their sixteen children, located at 4380 University Parkway University Heights, Ohio 44118 ("Property"), has always been a place

of prayer for Orthodox Jews living in the City of University Heights, Ohio (“City”). Affidavit of Shneur Zalman Denciger, dated July 29, 2021 (“Denciger Aff.”) ¶ 26. What began as strictly a residence, gradually and organically became a location for prayer that has come to be known in the Orthodox Jewish community as the Aleksander Shul,<sup>1</sup> a place that provides space for communal Orthodox Jewish prayer for nearby neighbors according to the style of the Aleksander Chasidic sect. *Id.* ¶¶ 20-29. In 2019, the Shul officially applied for a Special Use Permit (an “SUP”) from the City’s Planning Commission (“Commission”), and the Commission made it “abundantly clear” that it was “receptive to the use” as a Shul, and would grant “final approval” of an SUP subject only to receipt of “as-built drawings” and routine building code inspections. Affidavit of Elliot Jacobs, dated July 28, 2021 (“Jacobs Aff.”) ¶ 23, Ex. F at 58:00-1:02:00. The City’s position abruptly changed on February 19, 2021, when the City, at the direction of the City’s Mayor, Michael Dylan Brennan (the “Mayor”), sent a cease-and-desist letter to the Shul. *See* Denciger Aff. ¶ 37, Ex. A.

This abrupt change from the City’s favorable policy towards the Aleksander Shul was motivated by the Mayor’s responsiveness to a vocal and hostile group of residents of the western side of the City that have made it known to the Mayor that they do not want to live near Orthodox Jews. Denciger Aff. ¶¶ 40-47; Jacobs Aff. ¶ 23; Affidavit of Daniel Grand, dated July 29, 2021 (“Grand Aff.”) ¶ 24, Ex. D; Affidavit of Shneur Zalman Levin, dated July 29, 2021 (“S. Levine Aff.”) ¶¶ 10-17. Because of the lack of shuls in the City, Orthodox Jews currently live clustered against the City’s eastern border so they can exercise their religion by walking to shuls in the neighboring city; however, the existence of the Aleksander Shul has made the interior of the City available for Orthodox Jews to live in. Affidavit of Sharon Friedman, dated July 29, 2021

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<sup>1</sup> A “shul” is any Jewish house of worship, including everything from large synagogues to informal prayer groups held in people’s homes or elsewhere.

(“Friedman Aff.”) ¶¶ 7-9. The Mayor now seeks to prevent Orthodox Jewish prayer groups of any size from forming in the City in order to confine Orthodox Jewish Shuls, and by extension Orthodox Jews, to a small geographic area on the extreme eastern side of the City, that is known by some as the “Green Road Ghetto.” Denciger Aff. ¶ 46.

This case is not about public health or safety. This case is about a Mayor, in an election year (Jacobs Aff. ¶ 32, Aff. Ex. N), adopting a new discriminatory policy to cater to a vocal constituency that does not want to live near Orthodox Jews. Grand Aff. ¶ 23, Ex. C at 3:11:00 (“I hope you don’t get reelected”). This new policy specifically targets Orthodox Jews in general and the Aleksander Shul in particular and violates the United States and Ohio Constitutions, as well as provisions of the Religious Land Use and Institutionalized Person Act (“RLUIPA”), 42 U.S.C. §§ 2000cc, *et seq.* As such, Defendants respectfully request that the Court deny the City’s request for a preliminary injunction and preserve the status quo during the pendency of this action. There is no justification to shut down the ten-year long exercise of religion at the Shul, which has harmed no one and presents no present threat of public health or safety that can justify the interference with Defendants’ free exercise of religion.

### PROCEDURAL HISTORY

On June 6, 2021, Plaintiff filed a Verified Complaint<sup>2</sup> (Dkt. 06/07/2021, (“Complaint”)) alleging that (1) Defendants “conduct religious services and/or offer a place for religious assembly at the [Property], which violates both (sic) UHCO Chapter 1274” (Complaint ¶ 23); (2) the Property is in violation of some unspecified provisions of the City’s Building Code (*Id.* ¶ 24); and

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<sup>2</sup> The Complaint was verified by Mayor Brennan, which for reasons set forth in this Memorandum is highly significant. Pursuant to Ohio R. Civ. P. 65(b) (1), the Complaint also serves as a Motion for Preliminary Injunction. No brief or affidavits were attached to the Complaint in support of the request for preliminary injunction.

(3) Defendants performed some unspecified work at an unspecified time without first obtaining a permit to do so (*Id.* ¶¶ 25-26). Plaintiff contemporaneously filed a Motion for Temporary Restraining Order (“TRO”) seeking relief prohibiting Defendants from continuing to operate their Shul at the Property, and authorizing the City to inspect the residence for compliance with City Building and Zoning Codes. Mot. for TRO at Ex. A. The Motion for Preliminary Injunction, pending before this Court, seeks to (1) prohibit Defendants from continuing to operate its Shul at the Property; (2) mandate that Defendants obtain building SUPs in connection with any work that has been or is to be performed on or within the Property; (3) prohibit Defendants from inhibiting the City from entering the Property for any inspection. *Id.* A hearing was scheduled before Magistrate Stephen M. Bucha, III on June 14, 2021 with respect to the Plaintiff’s Motion for TRO. Dkt. 06/08/2021.

At the hearing, the parties stipulated to the entry of a TRO. Dkt. 6/29/2021. The TRO allowed the Defendants to continue using the Property as a shul under certain conditions that: (1) the Property shall only be operated as a shul on “Shabbos,” defined as from sundown Friday evening through sundown Saturday evening, but not on the Jewish Holy Days; (2) Defendants must cure all applicable building code violations relating to the electrical systems on the Property, as set forth in a Memorandum dated May 25, 2021, and prepared by Defendants’ architect; (3) the maximum number of occupants allowed within the Property was limited to thirty-six, exclusive of family members living in the Property; (4) all Shabbos services shall be confined to the first floor; (5) Shabbos candles and other forms of religious exercise requiring candles were forbidden; and (6) Defendants agreed not to submit any further applications for SUPs to the Commission. *Id.*

On July 27, by consent of the parties, an amended TRO was filed which, in addition to extending the terms of the original TRO, (1) allowed the Shul to operate on the Jewish High

Holidays, in addition to Shabbos; (2) stipulated that the Shul had in fact complied with the initial TRO and cured all issues therein regarding building and/or fire codes; (3) allowed for no more than two candles to be lit for religious purposes; and (4) permitted Defendants to submit an application for an SUP to the Commission. Dkt 07/21/2021. A trial is scheduled for October 1 and 4, 2021. Dkt. 07/26/2021

## STATEMENT OF FACTS

### A. The Aleksander Shul.

The Rabbi, with his wife and children, moved to the City from Belgium around 2007. Denciger Aff. ¶ 2. The Rabbi is a member of the Aleksander sect of Chasidic Judaism (pl. Chasidim), a subset of Orthodox Jews with distinct religious practices and which was almost entirely wiped out during the Holocaust. *Id.* ¶¶ 5, 13. Chasidic Jews pray in a style that is distinct from most other Orthodox Jews. *Id.* ¶ 9. Further, the Aleksander Chasidic sect is distinct from other chasidic sects in its liturgy, interpretations of Torah and Jewish law, religious tunes, and traditions. *Id.* ¶ 10. According to their religious beliefs, Orthodox Jews do not travel in cars on Shabbos. *Id.* ¶ 6. When the Rabbi moved to the City, there was only one shul in University Heights on the outskirts of the City, not within walking distance of the Property, with approximately 200 seats; while it is an Orthodox shul, it is not a Chasidic shul. *Id.* ¶ 17. At that time, there was no Chasidic shul in the entire state of Ohio; to this day, the closest Chasidic shul to the Property is 350 miles away in Chicago, Illinois, and the only other Aleksander Shul in the United States is 450 miles away in Brooklyn, New York. *Id.* ¶¶ 11, 14.

When the Rabbi first moved into the Property, it was used exclusively as the Rabbi's family's residence. *Id.* ¶ 20. The Rabbi and his wife have sixteen children and they frequently invited guests into their home for Shabbos and Jewish holidays; accordingly, there was always at

such times a quorum of ten Jewish men in the home so the Rabbi would pray with his guests in his home in the Aleksander Chasidic tradition. *Id.* ¶¶ 21-23. Orthodox Jewish neighbors began to regularly join in prayers and, as a result, the Aleksander Shul organically came to be and it remains the only place in Ohio that offers communal Chasidic prayer services.<sup>3</sup> *Id.* ¶¶ 25-26. The Shul also serves as one of the only places in the world where Jews can learn about and observe the unique customs of the Aleksander Chasidic Sect, as the sect was almost completely eradicated during the Holocaust. *Id.* ¶ 13. The Shul remains informal; there are no membership dues, it is run by volunteers, it has no paid staff, and no one, including the Rabbi, is paid a salary. *Id.* ¶ 27. Anyone who comes to pray can call themselves a “member.” *Id.* ¶ 28. The Aleksander Shul does not own any property. *Id.* ¶ 30.

Because some neighbors do not travel in cars on Shabbos pursuant to their beliefs, the Aleksander Shul is physically the only shul in the City that they can attend because the others are too far to walk to. *Id.* ¶ 32. Some of the members of the Shul are old and/or infirm, using a walker or wheelchair, and the Shul is the only place that is within walking distance for them. Jacobs Aff. ¶ 14; Affidavit of Laura Ellis dated July 29, 2021 (“Ellis Aff.”) ¶¶ 3-9. Also, it is a religious exercise for Orthodox Jews to take their young children to shul from the earliest possible age to teach them the religion. Denciger Aff. ¶ 18; Jacobs Aff. ¶ 13; Ellis Aff. ¶ 5. In the cold Ohio winters and the hot summers it is dangerous for some to walk too far, and for a number of residents of the City, the Aleksander Shul is the only option. Denciger Aff. ¶ 18; Jacobs Aff. ¶ 8.

#### **B. Zoning Code Section 1274 and the Green Road Ghetto**

The Property is located in the City’s “U-1” residential district, which permits only single family residences and buildings, structures, and grounds owned and operated by a board of

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<sup>3</sup> Chasidic prayer is distinct from non-Chasidic prayer, such that some Orthodox Jews can only fully observe their religion in a Chasidic Shul. *Id.* ¶ 10

education, municipality, or by a library board. City Code (“Code”) § 1250. Code § 1274 (“Section 1274”) allows houses of worship in U-1 residential zones subject to an SUP. Houses of worship must, *inter alia*, be originally designed and constructed as such (Code § 1274.02(f)(1)) (the “Originally Designed Rule”), must have a minimum lot size of three acres (Code § 1274.02(a)) (the “Three Acre Rule”), and are only allowed on land fronting one of six streets in the City: Cedar Road, Warrensville Center Road, South Taylor Road, Fairmont Boulevard, North Park Boulevard, [and] Green Road. (Code § 1274.02(e)(1)).<sup>4</sup>

Because the neighboring City of Beachwood has a large Jewish community and several Orthodox Jewish shuls, historically, the Orthodox Jews who moved to the City bought homes within walking distance of Green Road so they could cross Green Road and go to shuls in Beachwood, resulting in the Orthodox Jewish community being clustered closely to Green Road. Friedman Aff. ¶ 7. Thus, of the six enumerated streets where shuls are allowed, pursuant to § 1274(e)(1), Green Road is the only one that is practical because it is the only one of the streets within walking distance of the existing Jewish community. Friedman Aff. ¶¶ 7-9.

To obtain an SUP for a house of worship, the applicant must first obtain the recommendation of the majority of the five-member Commission by demonstrating by:

“clear and convincing evidence” that “the provisions of [§ 1274] will be met and that the special use will not impair surrounding property values or uses, vehicular parking and pedestrian or traffic conditions, lighting glare at night, noise pollution to others or other applicable criteria in the Planning and Zoning Code, and will not be otherwise contrary to the public health, safety and welfare.”

Code § 1274.01(d)(1)-(3). Once the first hurdle is overcome, “the recommendation of the Commission shall be subject to the approval of a majority of [City] Council.” Code §

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<sup>4</sup> The Court may take judicial notice that five of these roads form the perimeter of the City. Green Road runs north/south; the west side of Green Road is the extreme eastern border of University Heights, and the east side is the extreme western border of the neighboring city of Beachwood, Ohio.

1274.01(d)(2). Unlike the Commission, which is bound by the “clear and convincing evidence” standard, section 1274.01(d)(2) does not provide any standard by which the City Council is bound. Variances from the provisions of section 1274 require approval of both the Commission and City Council, whereby the applicant must demonstrate “a clear benefit to the community and that denial will result in an unnecessary hardship to the applicant.” Code § 1274.02(f)(5). The City Charter assigns a high level of involvement to the Mayor in the SUP approval process: he presides over the City Council (art. 5 sec 4.B), he serves as one of the five Commissioners, and he appoints three of the others. *Id.* art. 7 sec. 2.

**C. In 2019, the City made it “abundantly clear” that it was “receptive” to granting an SUP to the Aleksander Shul**

On October 14, 2019, the Aleksander Shul submitted an application to the Commission for an SUP to operate as a house of worship. Jacobs Aff. ¶ 16, Ex. A. The Application was scheduled for a hearing held on November 21, 2019. *Id.* ¶ 24, Ex. D. At the Hearing, there was “overwhelming support” for the Shul (*Id.*); “it was literally wall to wall people,” with everyone present “in support of the application, there was no one in attendance who was opposed to the application” (*id.* ¶ 25, Ex. E at 58:00:00-1:02:00). All five of the Commission members, including the Mayor,

[W]ere very receptive to the use, and made that abundantly clear to . . . the applicant, however, they wanted to see as-built drawings of the premises and make sure that the building dept and fire dept have an opportunity to inspect to make sure that the shul as it is currently built is up to code.

*Id.* The Commission unanimously voted to allow the Shul to continue operating while it developed as-built drawings and to arrange for the necessary inspections. *Id.* The Mayor demonstrated his approval of allowing the Shul to operate by participating a few weeks later in a Chanukah celebration where the Shul dedicated a new Torah. Jacobs Aff. ¶ 17.

Right after the 2019 holiday season, on January 15, 2020, the City's Building Commissioner, James McReynolds, inspected the Property with the City Fire Departments to "formulate a plan of action for the owner to perform in order to obtain a certificate of occupancy." Affidavit of James McReynolds, dated July 29, 2021 ("McReynolds Aff.") ¶ 24, Ex. A. On February 11, 2020 the Shul informed the City that it retained an architectural firm to complete the as-built drawings (Jacobs Aff. ¶ 16, Ex. A) and on March 2, the firm submitted a memo to the Building Department setting forth its plan for the drawings (Jacobs Aff. ¶ 22, Aff. Ex. C). One week later, the global pandemic shut down the Nation.

**D. A year later, in February 2021, the City abruptly and without notice changed its policy**

Due to the COVID-19 pandemic, City municipal buildings were closed and City employees were furloughed through November 2020. Jacobs Aff. ¶ 29, Ex. I. The Rabbi strictly adhered to COVID-19 guidelines and would not let anyone into the Property; a tent was erected in the driveway, and no prayer was allowed in the Shul for almost a year until the vaccine was developed and available on January 18, 2021. Denciger Aff. ¶ 36.

During this same period of time, the City Building department went through a period of "turmoil." McReynolds Aff. ¶ 6; McReynolds resigned on April 3, 2020, leaving the City without a full-time Building Inspector for almost an entire year, until March 4, 2021. *Id.* ¶ 5.

Other than emails from the Commission Clerk in April 2020 inquiring as to status, nothing happened with respect to the SUP application from March of 2020 until February of 2021, due to the pandemic. Complaint, Ex. C. On February 11, 2021, the architect for the Shul sent a memo to the Planning Department with proposals to address each of the issues that McReynolds had set forth in his January 23, 2020 Memo. Affidavit of Sally Levine, dated July 28, 2021 ("Sally Aff.") ¶ 4, Ex. A. No response was received. Instead, three days later, Mayor Brennan himself went out

patrolling the streets surrounding the Shul (Complaint ¶ 18), and on February 19, 2021, the City sent a cease-and-desist letter to the Shul in furtherance of the Mayor's new anti-Orthodox campaign. Denciger Aff. ¶ 37, Ex. A.

**E. The Mayor implements “strategies” to shut down Orthodox Jewish Prayer Groups throughout the City.**

In January 2021, the Mayor began systematically implementing, by his own law director's admission, “strategies” to curtail Orthodox Jewish prayer gatherings in City homes. Jacobs Aff. ¶ 31, Ex. K at page 2.

- January 11, 2021: The City sent a cease-and-desist letter to a group of Orthodox Jews who invited neighbors to join them on Shabbos for prayer in a privately owned home on Churchill Blvd., (the “Churchill Shul”). Grand Aff. ¶ 31, Ex. E at (4:35-4:50).
- January 21, 2021: The City sent a cease-and-desist letter to another Orthodox Jew (“Grand”) who invited 10 friends to join him on Shabbos for prayer in his home on Miramar Blvd and the City demanded he obtain an SUP. Grand Aff. ¶ 15, Ex. B.
- February 6, 2021: The Mayor personally testified at a hearing and the City successfully obtained a permanent injunction against the Churchill Shul. Grand Aff. ¶ 31, Ex. E at (4:35-4:50).
- February 14, 2021, a Sunday morning: The Mayor personally went to monitor the Aleksander Shul. Complaint ¶ 18.
- February 19, 2021: The City sent a cease and desist letter to the Aleksander Shul based solely upon the Mayor's report that he saw 50 cars in driveways and streets surrounding the Property and therefore, without any evidence, concluded that the Shul violated the agreement to limit the occupancy to 15 people. *Id.* ¶ 19.
- March 4, 2021: Grand came before the Commission to request an SUP, and was subjected to a procedure that was “dramatically different” from anything the Commission has ever been asked to do in the past. Grand Aff. ¶ 24, Ex. D at 2:56:00-3:00:00.
- March 23, 2021: The Mayor called upon residents of the City to to “report [such activities] to the City” and “the City will enforce its laws . . . and we will seek all appropriate remedies in court.” Grand Aff. ¶ 31, Ex. E at 5:00-5:30.
- May 3, 2021: The City's Law Director said at a City Council meeting that the Mayor has “strategies in place” for dealing with residents who use their private homes as houses of

worship, that begin with a cease-and-desist letter to enforce the City's ordinances. Jacobs Aff. ¶ 31, Ex. K at page 2.

- June 7, 2021: The City filed its Verified Complaint against the Aleksander Shul, seeking a permanent injunction. *Id.* ¶ 32, Ex. L at 19:50-20:00.
- June 21, 2021: At a City Council meeting, Mayor Brennan stated: "I want to be very clear, that while the city did stipulate on June 14, 2021, to allow limited operation to continue, this is merely to afford time to allow the congregation to make alternative arrangements. . . . I am saying this publicly, and on the record, so that there is no question as to where the city stands on the enforcement of its laws, or on its position in this matter. Come July 29, 2021, 4380 University Place may be a residence and nothing more." *Id.* at 20:40-22:30.

At the Commission meeting held via Zoom on March 4, 2021, to decide whether the City would allow Grand to host 10 friends in his home to pray, many of the residents who attended the meeting to express their opposition were affiliated with the "GESU" community, a Jesuit church with an affiliated school with 700 children located on the same street as Grand's property, within the same U-1 residential zone. Grand Aff. ¶ 27. The sentiment was that if he wanted to exercise his Orthodox Jewish religion by walking to Shul on Shabbos, "he should have picked somewhere else [to live]" *Id.* ¶ 24 at 2:39:15-2:39:20.

On June 9, 2021, the Mayor met with the Rabbi and representatives of the Shul. Denciger Aff. ¶ 38; Jacobs Aff. ¶ 23; S. Levine Aff ¶ 5. The Mayor openly admitted that he "sympathized" with the residents who opposed Orthodox Shuls because "the demographics are changing" and "people bought homes expecting one thing, and things are changing." Jacobs Aff. ¶ 23; Denciger Aff. ¶ 41; S. Levine Aff. ¶ 11.

## ARGUMENT

### I. LEGAL STANDARD

Plaintiff has failed to demonstrate that it can meet the high standard for obtaining a preliminary injunction under Civil Rule 65 or under Ohio Revised Code 713.13. An injunction may only be granted where a petitioner establishes the Rule 65 factors by clear and convincing

evidence. *See Mike McGarry & Sons, Inc. v. Gross*, 2006-Ohio-1759 ¶ 11. The Eighth District Court of Appeals has stated that, in seeking a preliminary injunction, a plaintiff must establish (1) there is a substantial likelihood that the plaintiff will prevail on the merits; (2) the plaintiff will suffer irreparable injury if the injunction is not granted; (3) no third parties will be unjustifiably harmed if the injunction is granted; and (4) the public interest will be served by the injunction. *Id.* at ¶ 10 (citing *Procter & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267, 747 N.E.2d 268 (1st Dist. 2000)). No one factor is determinative, as the Court must balance all four factors in determining whether to grant or deny injunctive relief. *Id.* ¶ 11 (citing *Cleveland v. Cleveland Elec. Illum. Co.*, 115 Ohio App. 3d 1, 14, 684 N.E.2d 343 (8th Dist. 1996)).

Although the City cites both these factors and R.C. 713.13 in an attempt to justify a complete shutdown of long-standing religious worship, the City can neither prevail on the merits, nor prove a violation of its zoning code entitling it to injunctive relief where the application of the ordinances in question are unconstitutional or otherwise contrary to state and federal law. Accordingly, the City is not entitled to the extraordinary remedy of preliminary injunctive relief where (1) the City cannot meet its burden to show it is entitled to injunctive relief by clear and convincing evidence; (2) enforcement of the City's code is also a violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"); and (3) enforcement of the City's code would be a violation of both the Ohio and U.S. Constitutions.

## **II. PLAINTIFF WILL NOT SUCCEED ON THE MERITS.**

### **A. The City cannot meet its burden of proving a violation by clear and convincing evidence**

To obtain a statutory injunction, "the petitioner must prove, by clear and convincing evidence, that the property is being used in violation of the zoning ordinance." *Bd. of Suffield*

*Twp. Trustees v. Rufener*, 11th Dist. Portage No. 2010–P–0061, 2011–Ohio–3294, ¶ 27. The City’s 28-paragraph Complaint makes two allegations. Regarding the allegation work was performed without permits (Complaint ¶¶ 25-26), there is no indication as to what was done or when it was done. Moreover, it is impossible for the City to prove there were no permits issued because “they cannot find any records from before 2017,” and, as the house was built in 1966, the City Law Director admits that there should be more information. Affidavit of Dale H. Markowitz signed July 29, 2021 (“Markowitz Aff.”) ¶¶ 2-5). As the City “cannot find” the required evidence to prove the allegation, there is no clear and convincing evidence.

Second, Plaintiff alleges that “Defendant’s [sic] use of the Premises a [sic] place of religious assembly also violates Ohio Building Code,” Complaint ¶ 24, without specifying a single violation, because there are none.

Third, the City alleges that “Defendants continue to conduct religious services and/or offer a place for religious assembly at the Premises, which violates UHCO Chapter 1274” as well as the Building Code, and that such use has “amongst other issues, disturbed the peace and tranquility of the neighborhood, result [sic] in increased vehicular and pedestrian traffic, created unwanted congestion and parking problems, and is not be [sic] in conformance with the zoning laws of the City of University Heights.” Complaint ¶¶ 23-24, 27. These allegations are untrue. Even according to the Plaintiff itself, the Shul had express permission to operate as a house of assembly. Complaint ¶ 13.

Plaintiff further avers that it only granted this permission for 90 days. *Id.* Again, this is false, as the written agreement between the parties has no expiration date. *See Id.* Exhibit B.

The only condition that the City alleges was violated was the fifteen-person occupancy limit, but the Complaint contains no evidence to support the allegation. Paragraph 17 relies on hearsay from unidentified residents. Paragraph 18 states:

In mid-February 2021 on a Sunday morning, Mayor Brennan personally observed thirteen (13) cars parked in driveway [sic] at the Premises and surrounding dwellings, and another thirty-three (33) cars parked on the streets immediately surrounding the Premises, which would lead to the likelihood of more than fifteen (15) people being in the Premises.

This is circumstantial evidence insufficient to meet the burden required for zoning enforcement cases. *See Hindu Soc. of Greater Cincinnati v. Union Twp. Bd. of Zoning Appeals*, 12th Dist. No. CA2018-11-081, 2019-Ohio-2494, 139 N.E.3d 457, ¶ 29 (holding that evidence presented in zoning enforcement cases must be “direct evidence,” which is “more than speculation or opinion voiced in terms such as ‘might,’ ‘potential,’ ‘feels,’ and ‘wondered’”). Contrary to the Mayor’s conclusion, cars parked in the driveway at “surrounding dwellings,” *i.e.*, in the neighbors’ driveways, do not “lead[] to a likelihood” that the owners of those cars were inside the Shul. Complaint ¶ 18. Moreover, there are any number of equally likely scenarios as to why cars could have been on the street at that time of day, including the presence of a football field a short distance away. “[L]egal matters are determined by facts, not beliefs or desires.” *Hindu Soc.*, 139 N.E.3d ¶ 29. The Mayor’s speculation cannot meet the high burden of clear and convincing evidence to grant the City the extraordinary relief of a preliminary injunction.

**B. Forcing the Shul to Close Would Violate the Federal Religious Land Use and Institutionalized Persons Act.**

1. Ordering the Shul to Shut Down Would Substantially Burden Its Religious Exercise Without Being the Least Restrictive Means of Achieving a Compelling Governmental Interest.

The Substantial Burden provision of the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. § 2000cc(a) and (b)(2)<sup>5</sup> provides:

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

*Livingston Christian Sch. v. Genoa Charter Twp.*, 858 F.3d 996, 1001 (6th Cir. 2017) (“LCS”).<sup>6</sup>

Here, the City is a “government” that is implementing a land use regulation,<sup>7</sup> Code Chapter 1274, in a manner that substantially burdens the religious exercise of Defendants without demonstrating that the imposition caused by the implementation of the regulation is in pursuit of any compelling governmental interest. Even if the City could demonstrate that there was some compelling governmental interest in targeting a shul that has been operating for a decade with no ill effect, shutting it down is hardly the least restrictive means of achieving it. The burden of persuasion is on the City to prove each of these elements, once the Defendants have demonstrated a substantial burden on their religious exercise. 42 U.S.C. § 2000cc-2(b) (burden of persuasion

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<sup>5</sup> RLUIPA’s provisions can be “assert[ed] . . . as a claim or defense in a judicial proceeding and [a person may] obtain appropriate relief against a government.” 42 U.S.C. § 2000cc-2(a) (emphasis added).

<sup>6</sup> “RLUIPA explicitly protects “leasehold” interests in property. *See* 42 U.S.C. § 2000cc-5(5). “Leasehold” and “ownership” interests are listed in the same provision and are therefore presumably entitled to the same level of protection.” *LCS*, 858 F.3d at 1001. Defendants Alexander Shul and the Rabbi possess a leasehold interest in the Property (Denciger Aff. ¶ 3) and fall within the protection of RLUIPA.

<sup>7</sup> The City’s zoning ordinance is a land use regulation under the terms of RLUIPA. 42 U.S.C. § 2000cc-5(7) (“The term ‘land use regulation’ means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant’s use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.”).

shifts to government once religious complainant has established *prima facie* case of substantial burden).

It is undisputed that Defendants are seeking to exercise their religion by engaging in religious services at their Property. RLUIPA defines religious exercise as “any exercise of religion,” regardless of whether or not it is “compelled by, or central to, a system of religious belief.” *Id.* § 2000cc-5(7)(A). Here, Defendants continue to conduct religious services on the Property, and the City is seeking to enjoin them from doing so. *See* Complaint ¶ 23. There could be no clearer burden on religious exercise than shutting down existing worship and prayer. *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020). The issues before this Court on Defendants’ Substantial Burdens defense are: (1) does the Mayor’s implementation of Chapter 1274 such that Defendants cannot under any circumstances conduct religious services without an SUP constitute a substantial burden on their religious exercise? If so, (2) can the City identify a compelling state interest for imposing the substantial burden? And if such an interest exists, (3) is completely shutting down the Aleksander Shul the least restrictive means of accomplishing that compelling governmental interest? Further, guiding the Court’s analysis is RLUIPA’s rule of construction that it “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” 42 U.S.C. § 2000cc-3(g).

- a) Forcing the Shul to shut down would substantially burden the Defendants’ religious exercise.

In a case interpreting RLUIPA’s Substantial Burdens provision, the federal Court of Appeals for the Sixth Circuit has described a standard for whether a burden is “substantial” that is clearly met here. *LCS*, 858 F.3d at 1003-05. The first principle is that the “burden must have some degree of severity to be considered ‘substantial’” and it “must impose a significantly great restriction or onus upon [religious] exercise.” It must be “more than an inconvenience.” *Id.*

Here, shutting down the Shul will completely foreclose Orthodox Jews from gathering to exercise their religion in the way that they believe they must. Jacobs Aff. ¶ 13. For example, for one resident who is terminally ill and bound to a wheelchair, the Shul is the “center of her universe” and because of its proximity it is the only place where she can go to pray and observe her religion. Ellis Aff ¶ 14. These burdens easily rise far beyond an “inconvenience” and are certainly “substantial” in nature. See *LCS*, 858 F.3d at 1009; *Jesus Christ is the Answer Ministries, Inc v. Baltimore County*, 915 F.3d 256, 261 (4th Cir. 2019) (“First, is the impediment to the organization's religious practice substantial? The answer will usually be ‘yes’ where use of the property would serve an unmet religious need, the restriction on religious use is absolute rather than conditional, and the organization must acquire a different property as a result.”); *Thai Meditation Association of Ala., Inc. v. City of Mobile*, 980 F.3d 821, 831-832 (11th Cir. 2020) (citing same for the proposition that a factor in assessing a substantial burden is “whether the [the religious organization has] demonstrated a genuine need for new or more space . . . to facilitate additional programming”).

As “the determination of whether a substantial burden exists due to geographical limitations is factual in nature,” accordingly, it is significant that this case involves Orthodox Jews who do not travel in cars on Shabbos as an exercise of their religion. See *LCS*, 858 F.3d at 1012 (citing *Islamic Center of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 299 (5th Cir. 1988)). The Sixth Circuit cited *Islamic Center of Mississippi* as an example of a substantial burden existing due to geographical limitations, where the Fifth Circuit held that the government had imposed a substantial burden on members of a mosque, many of whom were students living in an urban area located near a university campus, because the government’s action forced them to travel to the mosque using an automobile. *Id.* The court held that the City imposed a substantial burden on a

mosque by forcing it to relocate from an urban area to a suburb because its mission was to cater to “lower-income individuals located in an urban center,” and the court found that the mosque’s mission would be “thwarted by relocating to a suburb that lacked public transportation.” In that case, the mosque’s members had no religious restriction that prevented them from car travel, but they potentially did not own cars and they could not otherwise obtain a ride. *Id.* at 1012. Here, as Orthodox Jews, the Shul’s members are prohibited from driving, so shutting down the accessible Shul, taking into account that many of the members are elderly, infirm, or are families with small children, is certainly a substantial burden. See *Denciger Aff.* ¶ 32; *Jacobs Aff.* ¶¶ 8, 14; *Ellis Aff.* ¶¶ 9-10, 15.

In addition to the actual imminent burdens on Defendants’ religious exercise described above, the Sixth Circuit in *LCS* further set forth several other factors to determine whether a burden on religious exercise is “substantial” under RLUIPA.

(a) “One factor . . . is whether the religious institution has a feasible alternative location from which it can carry on its mission. See *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 352 (2d Cir. 2007).”

(b) “Whether the religious institution will suffer “substantial ‘delay, uncertainty, and expense’” due to the imposition of the regulation is another factor. *Id.* at 349 (quoting *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005)).”

(c) “[W]hen an institutional plaintiff has obtained an interest in land without a reasonable expectation of being able to use that land for religious purposes, the hardship that it suffered when the land-use regulations were enforced against it has been deemed an insubstantial burden. See, e.g., *Andon*, 813 F.3d at 515 (concluding that a burden was not substantial because it was self-imposed when the plaintiff entered into a contingent lease agreement for a property despite knowing that the property failed to meet applicable setback requirements and having been informed that the application for a zoning variance would be denied); *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007) (concluding that the plaintiff was not substantially burdened when it had imposed the burden upon itself by purchasing property in an industrial zone for use as a church after having been informed that its special-use application would be denied because the relevant zoning ordinance banned churches in that zone).”

*Id.* at 1004. All of these additional factors also support a finding of substantial burden here.

- (1) The Alexander Shul has no alternative location from which it can carry on its mission.

In *LCS*, the court found that the burden on the plaintiff's religious exercise was not "substantial" because the religious school in that case owned other property where it could have conducted the same activity. *Id.* at 1005. This case is clearly distinguishable because the Defendants do not own other property in the City (Denciger Aff. ¶¶ 4, 30) and there is no Chasidic Shul within 350 miles and no Aleksander Shul within 450 miles (*Id.* ¶¶ 11, 14).

- (2) If the Shul is no longer permitted to worship at the Property, it will suffer "substantial delay, uncertainty, and expense" if forced to find another location.

For the Shul to find another location that complies with Chapter 1274, the Shul must find and purchase a three-acre lot, or else purchase multiple contiguous lots, on one of the six streets in the City where Shuls are allowed, in order to comply with the Three Acre Rule and the Green Road Rule, and the Shul must demolish the house(s) on the lot(s) and construct a new building to comply with the Originally Designed Rule. As mentioned below, this is impossible, as no lots are currently available on Green Road, let alone several contiguous lots. Friedman Aff. ¶¶ 12-14. Even if there were, it would be prohibitively costly, and the Shul has limited finances. *See* Denciger Aff. ¶ 29.

As the Seventh Circuit held:

The Church could have searched around for other parcels of land (though a lot more effort would have been involved in such a search than, as the City would have it, calling up some real estate agents), or it could have continued filing applications with the City, but in either case there would have been delay, uncertainty, and expense. That the burden would not be insuperable would not make it insubstantial.

*Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005).

Although not necessary to demonstrate under the applicable legal standard, no other properties would be available for the Shul. The Shul serves Orthodox Jews who do not travel in cars on Shabbos, and therefore any Property would have to be within walking distance. To comply with Section 1274, the shul would need a three-acre lot at the perimeter of the City, and the Mayor, who sits on the City Council and the Commission, is adamant that he would not support a variance. *S. Z. Levine Aff.* ¶ 10. As a result, the only street in the City where the Shul could move to is Green Road because that is the only street within walking distance of the current location. *Friedman Aff.* ¶¶ 7-8. According to the GIS Viewer Map of Cuyahoga County (*id.* ¶ 12, Ex. B), there are only 40 lots within walking distance of the Property; there is no lot that is three acres, and even if there were, none of them are for sale (*id.* ¶¶ 13-14). The Shul cannot identify a viable location, and when asked, the Mayor could not identify one either. *S. Z. Levine Aff.* ¶¶ 8-9. There is therefore no alternative location.

- (3) The City's actions demonstrated that the Shul reasonably expected that its religious exercise could continue at the Property.

In *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007) and *Andon, LLC v. City of Newport News, Virginia*, 813 F.3d 510 (4th Cir. 2016), *supra* (cited in *LCS*, 858 F.3d at 1004), the religious institution purchased the property knowing that it was not properly zoned for use as a place of worship. Here, the property is zoned to allow a place of worship (with a special use permit), and the Shul continues to actively pursue its application for an SUP. When the Shul first applied for an SUP, the City Law Director, describing the hearing, stated:

Planning Commission members were very receptive to the use, and made that abundantly clear to, I believe, the applicants; however, they wanted to see as-built

drawings of the premises and make sure that the Building Department and fire Department have an opportunity to inspect to make sure that the shul as it is currently built is up to code. So the way the planning committee left it was that the applicant would provide as-built drawings and arrange for inspections and that the planning committee would reconvene at some point prior to the end of February of 2020 to consider the matter for final approval. That concludes my report.

Jacobs Aff. ¶ 23, Ex. F at 58:00-1:02:00 (emphasis added). A month later in December 2019, the Mayor, who is also a member of the Commission, joined the Shul for its Chanukah celebration. Friedman Aff. ¶ 11, Ex. A.

Building Commissioner McReynolds repeatedly made statements suggesting that the SUP would be approved, saying “we are on the same team” and that “the City wants you to succeed” and “we want to partner with you so that this wonderful thing can continue at this location.” Denciger Aff. ¶ 34; McReynolds Aff. ¶ 25. Similar projects within a few blocks of the Shul had similar issues with the Code and were granted variances by the Commission.

Prior to 2021, Defendants had every reason to believe that the City would grant them the necessary variances and approve their application for an SUP, and that they would be permitted to continue while the application was being processed. It was only after January 2021 that the City’s tune began to change. In a dramatic reversal based on his responsiveness to hostile local residents, he was recently quoted as threatening:

I am saying this publicly and on the record so that there is no question as to where the city stands in the enforcement of the law, or on its position in the matter, come July 29, 2021, 4380 University Parkway may be a residence and nothing more.

Jacobs Aff. ¶ 30, Ex. L at 21:00-22:00.

Granting the City’s requested relief to shut down the Aleksander Shul would substantially burden Defendants’ religious exercise. Plaintiffs may only impose such a burden on Defendants’ religious exercise if it can prove that its action is “in furtherance of a compelling governmental

interest; and . . . the least restrictive means of furthering that compelling governmental interest.”

42 U.S.C. § 2000cc(a); 42 U.S.C. § 2000cc-2(b).

b) The City’s Enforcement Action Cannot Survive Strict Scrutiny Review.

Plaintiffs cannot meet the strict scrutiny required by RLUIPA. As the Sixth Circuit has observed, “it is the rare law that survives” this strict scrutiny review. *Carey v. Wolnitzek*, 614 F.3d 189, 200 (6th Cir. 2010) (internal quotations omitted). The City cannot possibly meet this “heavy burden,” *Fox v. Washington*, 949 F.3d 270, 283 (6th Cir. 2020), especially given the additional burden of the clear and convincing standard required by Ohio law discussed *infra*, see *Humphrey v. Lane*, 89 Ohio St. 3d 62, 66-68 (2000), because the Shul is not a threat to any compelling governmental interest and, even if it was, shutting down the operation is not the least restrictive means of advancing that interest.

The City’s Complaint in this matter seeks relief based on a violation of the zoning code, which does not rise to the level of a compelling governmental interest. It is well established that a compelling governmental interest is one of the “highest order.” *Legatus v. Sebelius*, 988 F. Supp. 2d 794, 806 (E.D. Mich. 2013) (collecting cases) (“The theme that emerges is the identification of ‘overriding,’ ‘paramount’ governmental interests of the very ‘highest order.’ Interests of a lesser magnitude, and interests that are not paramount, including those that are otherwise served, cannot be considered ‘compelling.’”). It involves “some substantial threat to public safety, peace[,] or order,” *Sherbert v. Verner*, 374 U.S. 398, 403 (1963), and includes only the “gravest abuses.” *Id.* at 406.

The City makes three allegations in the Complaint, and none of these nonspecific, overly broad alleged “harms” rises to the level of a compelling interest, and no such interest is otherwise pled. See Complaint ¶¶ 23-27. The Sixth Circuit has cautioned that “the idea behind offering

statutory protection for faith-based practices is to make accommodations — exceptions — for individuals who believe they must do certain things because their faith requires it.” *Haight v. Thompson*, 763 F.3d 554, 562 (6th Cir. 2014) (remanding RLUIPA case based on “threadbare” record and, *inter alia*, failure to adequately define asserted governmental interests). On its face, then, Plaintiff has failed to “show[] a strong or substantial likelihood or probability of success on the merits,” and the preliminary injunction should be denied. *Freeman Indus. Prods., L.L.C. v. Armor Metal Grp. Acquisitions, Inc.*, 2011-Ohio-1995, ¶ 14, 193 Ohio App. 3d 438, 444.

The Supreme Court has also rejected broadly formulated harms like those alleged by the City. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 438-39 (2006) (holding that generalized, overly broad, “slippery-slope concerns” are not sufficient to qualify as a compelling justification to substantially burden religious exercise); *Holt v. Hobbs*, 574 U.S. 352, 362-363 (2015). The “compelling interest test . . . requires the Government to address the particular practice at issue” and the City has failed to do so. *O Centro*, 546 U.S. at 439.

Even assuming, *arguendo*, that the City could identify a compelling governmental interest harmed by the operation of the Aleksander Shul, it would have to “‘demonstrate[] that application of the burden to the person’ represents the least restrictive means of advancing a compelling interest.” *Id.*, at 423. Broadly formulated interests and “the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions” is insufficient. *Haight v. Thompson*, 763 F.3d 554, 562 (6th Cir. 2014) (quoting *O Centro*, 546 U.S. at 436). In this case, the City must show that completely shutting down the Aleksander Shul is necessary due to specific harms to public health and safety caused by the Shul that cannot be alleviated through the imposition of conditions or otherwise. *See, e.g., Holt*, 574 U.S. at 355 (holding that a prison’s grooming policy that prohibited beards was not the least

restrictive means of achieving the government's interest in safety and security because the prison could have instead instituted a policy of searching beards).

The conclusory allegation that the Shul is “disturbing the peace and tranquility of the neighborhood,” is insufficient as a matter of law as a compelling government interest. *Haight*, 763 F.3d at 562. The purported harm of increased street parking and vehicular and pedestrian traffic does not rise to the level of a compelling governmental interest--especially without admissible evidence. *See, e.g., Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (8th Cir. 1995) (noting that, “a municipality's asserted interests in traffic safety and aesthetics, while significant, have never been held to be compelling); *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1570 (11th Cir. 1993) (holding traffic safety is not a compelling governmental interest); *Roman Catholic Archdiocese of Kansas City in Kan. v. City of Mission Woods*, 337 F. Supp. 3d 1122 1140-1141 (D. Kan. 2018) (summary judgment inappropriate to City where City claims increase in traffic as compelling government interest justifying actions).

Nor has the City addressed any means of achieving its interests short of shutting the Shul down. For example, most obviously the City could permit the Shul to continue to operate during the pendency of its SUP application, as it has done since 2019. The City's intent to shut down this ongoing worship is doing “the equivalent of using a sledgehammer to kill an ant,” in violation of RLUIPA. *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) (City failed to demonstrate that it was using the least restrictive means to advance a compelling governmental interest when it condemned Church-owned property over purported interests in “blight” and “revenue generation”).

2. The City Has “Implement[ed] a Land Use Regulation that Discriminates Against” the Shul “on the Basis of Religion” in Violation of RLUIPA.

RLUIPA's Nondiscrimination Provision requires that "[n]o government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." 42 U.S.C. § 2000cc(b)(2). RLUIPA's Nondiscrimination provision was included because churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. *See* House Report 106-219, Religious Liberty Protection Act, to accompany H.R. 1691, July 1, 1999, at 23 (citing cases of discrimination against Orthodox Jewish synagogues). RLUIPA was enacted by a bipartisan Congressional consensus to counteract widespread land use discrimination against religious groups, especially smaller, minority religious congregations. H. Rep. No. 106-219, at 20-24 (1999). Jews in particular were singled out: despite making up just 2% of the population, they accounted for 20% of location cases and 17% of accessory use cases. *Id.* at 21. Evidence demonstrated that land use discrimination is both systematic and, often, racially and ethnically motivated and that there was a "consistent, widespread pattern of political and governmental resistance to a core feature of religious exercise: the ability to assemble for worship." *Id.* at 24. What RLUIPA seeks to combat is exactly what is occurring here: targeted enforcement of Chapter 1274 against the Orthodox Jewish community substantially motivated by hostility toward Orthodox Jews.

The Supreme Court of the United States and various federal courts have applied the Equal Protection analysis developed in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), to claims brought under RLUIPA's Nondiscrimination provision. *See, e.g., Church of the Lukumi Babalu Aye*, 508 U.S. 520, 540 (1993); *Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Commission*, 768 F.3d 183, 198 (2d

Cir. 2014) (analyzing claims under RLUIPA's nondiscrimination provision looking to precedent from Equal Protection claims); *Bethel World Outreach Ministries*, 706 F.3d 548,559 (4th Cir. 2013); *Jesus Christ is the Answer Ministries, Inc. v. Baltimore Cty.*, 915 F.3d 256, 263 (4th Cir. 2019), *as amended* (Feb. 25, 2019) (for RLUIPA Nondiscrimination claims, a “plaintiff must demonstrate that the government decision was motivated at least in part by discriminatory intent, which is evaluated using the ‘sensitive inquiry’ established in *Vill. of Arlington Heights v. Metropolitan Housing Dev. Corp.*, . . . .”). However, unlike an Equal Protection claim, discrimination under RLUIPA is not subject to strict scrutiny review: unequal treatment on the basis of religion or religious denomination is sufficient to establish a violation. 42 U.S.C. § 2000cc(b)(2); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 269 (3d Cir. 2007).

In *Arlington Heights*, the Supreme Court articulated nonexhaustive evidentiary factors to consider in determining whether official action was undertaken with a discriminatory purpose.

Those factors include:

“[T]he historical background of the decision, . . . particularly if it reveals a series of official actions taken for invidious purposes”; “the specific sequence of events leading up [to] the challenged decision”; “departures from the normal procedural sequence”; “substantive departures, . . . particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached”; and the “legislative or administrative history, . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.”

*Spurlock v. Fox*, 716 F.3d 383, 397 (6th Cir. 2013) (quoting *Arlington Heights*, 429 U.S. at 267–68) (alterations omitted); *see also Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 636 (6th Cir. 2016); *Gay v. Cabinet for Health & Fam. Servs. Dep't for Cmty. Based Servs.*, No. 18-5285, 2019 WL 1338524, at \*4 (6th Cir. Jan. 23, 2019). Each of these *Arlington Heights* factors

supports the Shul's defense that the City is discriminating against Orthodox Jewish shuls in general and the Aleksander Shul in particular.

- a) "[T]he historical background of the decision, ... particularly if it reveals a series of official actions taken for invidious purposes"

Prior to the Aleksander Shul, the City's Orthodox Jewish community was clustered close to Green Road at the City's extreme eastern border. Friedman Aff. ¶¶ 7-9. So long as the Orthodox Jews remained within the confines of the "Green Road Ghetto" (Denciger Aff. ¶¶ 45-46) the Aleksander Shul was permitted to operate and the Commission, including the Mayor even supported issuing an SUP (Jacobs Aff. ¶ 25, Ex. E at (59:00-1:01:00)). But the City's position changed when it became aware that the presence of the Aleksander Shul made it accessible for Orthodox Jews to purchase houses further away from Green Road (Friedman Aff. ¶¶ 8-9), such that by 2021, there were Orthodox Jews living farther away from Green Road (Grand Aff. ¶ 5) and the Jewish community was expanding into the interior of the City. As the "demographics" changed (Denciger Aff. ¶ 41) and Orthodox Jews began to settle in certain neighborhoods (Grand Aff. ¶¶ 25-27), residents made it known to the Mayor that they felt that they "bought homes expecting one thing, and now things had changed" (Denciger Aff. ¶ 41). Sensing hostility towards Orthodox activity in neighborhoods west of Green Road (*see, e.g.* Grand Aff. ¶ 31, Ex. E), the Mayor began to take discriminatory action to confine any attempts at Jewish prayer group to the perimeter of town to maintain the "Green Road Ghetto" (Denciger Aff. ¶ 42-47).

- b) "[T]he specific sequence of events leading up [to] the challenged decision" and a longstanding policy that "suddenly was changed" so as to enforce a new policy against a certain group.

Prior to 2021 the City's policy and procedure was, in the words of a former City Building Commissioner, "to work with applicants for a house of worship SUP to navigate the process

collaboratively and help them obtain the permit.” McReynolds Aff. ¶ 20. For example, after an inspection of the Shul on January 15, 2020, the City’s Building Commissioner “contacted the Ohio Board of Building Standards to help formulate a plan of action for the owner to perform in order to obtain a certificate of occupancy.” *Id.* ¶ 24, Ex. A. The Mayor fully approved of this policy. *Id.* ¶ 7.

In 2021, the City’s policy towards houses of worship suddenly changed, and in the words of Commissioner Michael Fine, who had served on the Commission for a number of years, the process was “dramatically different” from what it was before. Grand Aff. ¶ 24, Ex. D at (2:58:00-3:00:00). Rather than the collaborative approach that was the policy in the past, the new approach was “a hostile, confrontational approach.” *Id.* In 2019, when the Aleksander Shul came before the Commission, the Commission unanimously voted to allow the Shul to continue to operate pending a final approval, so long as there were no immediate concerns of public safety. Jacobs Aff. ¶ 25, Ex. E (58:00-1:02:00). In 2021, the Mayor’s new “strategy” (*Id.* ¶ 29, Ex. K) was to send cease-and-desist letters immediately, and threaten legal action. Grand Aff. ¶¶ 20-21.

c) “[D]epartures from the normal procedural sequence.”

Starting in 2021, there were a number of strange departures from normal procedures that only seemed to apply to any attempts at gathering for Orthodox Jewish prayer. First, when the Mayor learned that an Orthodox Jewish resident had invited 10 friends to his home to pray on Shabbos, the Mayor personally called the resident and left an “urgent” message requesting to be called back immediately and leaving his office and personal cell phone. Grand Aff. ¶ 14. The Mayor told the resident that inviting ten Jews into a home to pray constitutes an illegal synagogue, and the Mayor threatened to take legal action. *Id.* ¶ 19. The Mayor called upon citizens to “be on the lookout” for any Orthodox Jewish prayer activity and to report it to the City. *Id.* ¶ 31, Ex. E at

(5:00-5:30). The mayor personally went out patrolling the streets around the Aleksander Shul hoping to find people gathering in the Shul for prayer, and finding none, he resorted to counting the cars on the streets to establish a pretext to send a cease-and-desist letter. Complaint ¶ 18. Finally, rather than allow the Aleksander Shul to complete the process of applying for an SUP and subject the Shul to a vote by the Commission, the Mayor announced at a City Council meeting that he had unilaterally decided that the process was over and that the Shul is not eligible for an SUP, and “come July 29, 2021 [the Property] may be a residence and nothing more.” Jacobs Aff. ¶ 32, Ex. L at 22:15-22:35.

- d) The legislative or administrative history, including contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.

In addition to the facts outlined above, the Mayor’s discriminatory intent is further evidenced by his public statements at a Commission meeting on March 23, 2021, and at a City Council meeting on June 21, 2021. At the former, he stated:

Let there be no confusion: Congregating at 2343 Miramar Blvd., or any other address located in a residence zoned U-1, without a special-use SUP is a violation of city law. I am hopeful that the wording of the withdrawal is not intended to suggest that congregating weekly at a residence to conduct activities consistent with those in a house of assembly does not require a special-use SUP. As recently as two months ago, the city brought suit against the organizers of another residential shul, one on Churchill Boulevard, and ultimately obtained a permanent injunction in court.

To the community members who are here, let there be no question. There is no permission granted here to operate ... a house of assembly or conduct activities consistent with one at 2343 Miramar Blvd. If you observe such activities – I hope you do not – but if you do, you may report them to the city, and the city will enforce its laws. ... And we will seek all appropriate remedies in court.

Grand. Aff. ¶ 31, Ex. E at 5:00-5:30.

At a City Council meeting on June 21, 2021, he stated:

[C]ome July 29, 2021, this temporary new home cannot be where it is now, nor can it be in another residential property zoned U-1 on a residential side street, Otherwise, on July 29, 2021, the city will seek a preliminary and then permanent injunction to shut down operations at 4380 University Parkway, as it did at 4464 Churchill Boulevard at the request of the residents of that street earlier this year.

I am saying this publicly, and on the record, so that there is no question as to where the city stands on the enforcement of its laws, or on its position in this matter. Come July 29, 2021, 4380 University Parkway may be a residence and nothing more.

Jacobs Aff. ¶ 32 L, Ex. L at 20:00-22:35.

- e) Statements made by community members to whom officials are responsive.

Discriminatory motivation can also be imputed to governmental decision-makers if they were “knowingly responsive” to community animus against a protected group. *See, e.g., LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995); *Al Falah Ctr. v. Twp. of Bridgewater*, No. CV 112397, 2013 WL 12322637, slip op. at \*7 (D.N.J. Sept. 30, 2013); *Islamic Soc’y of Basking Ridge*, 226 F. Supp. 3d 320, 327-333 (D.N.J. 2016). *See City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196 (2003) (“statements made by private individuals in the course of a citizen-driven petition drive, [are] sometimes relevant to Equal Protection analysis [of the *Arlington Heights* factors.]”); *Get Back Up, Inc. v. City of Detroit*, 725 F.App’x 389, 392 (6th Cir. 2018) (holding that public discriminatory comments made at a zoning board meeting are enough to show a prima facie case of discrimination.); *see also MX Group, Inc. v. City of Covington*, 293 F.3d 326, 341-342 (6th Cir. 2002) (evidence of discrimination exists where the zoning board relies on citizens unfounded fears and stereotypes.) *Dailey v. Lawton*, 425 F.2d 1037, 1039 (10th Cir. 1970) (“It is enough for the complaining parties to show that the local officials are effectuating the discriminatory designs of private individuals.”). The local residents at the March 4, 2021 Commission hearing voiced their opposition to even the most minimal

Orthodox Jewish prayer within the City and stated that if Orthodox Jews want to walk to shuls they should live somewhere else. *See, e.g.*, Grand Aff. ¶ 24, Ex. D at 1:33:00-1:33:54 (“I understand that Mr. Grand is from New York ... [when] he was looking for a home . . . the location of the Temple [shul] may have been considered.”); *id.* at 1:55:30-1:55:46 (“Over two years ago when he bought this property all of those structures were already in place on Green Road. He knew that he was going to have to walk and yet he chose to buy the house here.”); *id.* at 2:18:00-2:19:00 (“they did not purchase the home on Miramar with no concept of where any temples or synagogues were.”); *id.* at 2:39:15-2:39:29 (“You should have picked somewhere else . . . you should have bought a house closer to where your house of worship is.”). Following the tabling of the application for the SUP for the proposed shul on Miramar Boulevard, the audience erupted in anger expressly telling the Mayor “I hope you don’t get re-elected” and calling him “embarrassing” “ridiculous” and “Gross, Gross, Gross.” *Id.* at 3:11:00-3:12:00.

Many of the residents who attended the meeting to express their opposition are affiliated with the GESU community, a Jesuit church with an affiliate school with 700 children located on the same street as the applicant’s property within the same U-1 residential zone. Grand Aff. ¶¶ 26-27. While they oppose the Jewish prayer group on the same street, they do not complain about a massive church and school very close to the Property. *Id.*

Significantly, in a meeting with the Rabbi and representatives from the Shul, the Mayor said that he “sympathizes” with the people who opposed the Alexander Shul, because “people bought homes in the area with the expectation that it was going to be a certain way, and now it's changed” and that the “demographics are changing.” Denciger Aff. ¶ 41 . The Rabbi stated that the Mayor was “forcing the Jews to live only in the Green Road Ghetto.” Denciger Aff. ¶ 44. The Mayor did not answer, other than saying that “some of the people who complained are Jews.”

Levine Aff. ¶ 16. At no time did the Mayor rescind his comments or attempt to qualify his words as having any meaning other than that people are upset that Orthodox Jews are moving into the community. Levine Aff. ¶ 17.

**C. Forcing the Shul to Close Would Violate the Free Exercise Clause of the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.**

1. Shutting Down the Shul Would Violate Defendants' Free Exercise Rights.

The City's enforcement action also violates the Aleksander Shul's right to free exercise of religion under the First Amendment to the United States Constitution. The Aleksander Shul, with the City's blessing, has been engaged in Jewish prayer at the Property for years. *See supra*. Shutting it down will unquestionably interfere with its religious exercise. Under the Free Exercise Clause, government actions that burden religious exercise are subject to strict scrutiny review unless the regulation at issue is both "neutral" and "generally applicable." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020). Unlike RLUIPA, which also applies to neutral and generally applicable government regulation, *see, e.g.*, 42 U.S.C 2000cc (a)(2)(B) (applying RLUIPA's substantial burden provision to land use regulation affecting interstate commerce), there is no requirement for defendants to demonstrate a "substantial burden" under the Free Exercise Clause:

Because the challenged restrictions are not "neutral" and of "general applicability," they must satisfy "strict scrutiny," and this means that they must be "narrowly tailored" to serve a "compelling" state interest. *Church of Lukumi*, 508 U.S. at 546, 113 S. Ct. 2217. Stemming the spread of COVID-19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as "narrowly tailored."

*Id.* (no requirement of "substantial burden" necessary).

The City's actions here are neither neutral nor generally applicable. They are targeted against Orthodox Jews in general and against the Aleksander Shul in particular and therefore not "neutral." *See supra*. In *Roman Catholic Diocese of Brooklyn*, the Court held that the regulation at issue was not neutral because "statements made in connection with the challenged rules can be viewed as targeting (as here) the "ultra-Orthodox [Jewish] community." 141 S. Ct. at 66. Nor are they "generally applicable." The City's actions are an individualized assessment of the Defendants' use of the Property, and therefore the antithesis of a "generally applicable law." *See, e.g., Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1222 (C.D. Cal. 2002) ("Cases before and after *Smith* have continued to apply a strict scrutiny test to such individualized assessment questions."); *Mount St. Scholastica, Inc. v. City of Atchison*, 482 F. Supp. 2d 1281, 1293 (D. Kan. 2007) (regulation is not generally applicable if "individualized exemptions from a general requirement are available" (citation omitted)); *Castle Hills First Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149-RF, 2004 WL 546792, at \*15 (W.D. Tex. Mar. 17, 2004) ("The City's land-use decisions in this case are not generally applicable laws." (footnote omitted)); *Murphy v. Zoning Comm'n of Town of New Milford*, 289 F. Supp. 2d 87, 106 (D. Conn. 2003) ("The Supreme Court recognized the important distinction between generally applicable laws and those involving "individualized governmental assessment[s]," citing *Smith*), *vacated on other grounds*, 402 F.3d 342 (2d Cir. 2005); *Al-Salam Mosque Found. v. City of Palos Heights*, No. 00 C 4596, 2001 WL 204772, at \*2 (N.D. Ill. Mar. 1, 2001) ("discretionary" land use decisions involving "individualized government assessment" are "not generally applicable"); *cf. Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1877 (2021).

Because the City's enforcement action, which will effectively eliminate Defendants' congregational religious exercise, is neither a neutral nor generally applicable law, it is subject to

strict scrutiny review. The burden is on the City to prove that completely shutting down the Shul is the least restrictive means of achieving a compelling governmental interest. 42 U.S.C. § 2000cc-2(b) (placing burden of persuasion on government for claims brought under “the Free Exercise Clause” as well as RLUIPA). For the reasons discussed above, the City cannot meet this standard.

2. The City’s Discriminatory Actions Violate the Equal Protection Clause.

As discussed above, RLUIPA’s Nondiscrimination provision is applied in a similar manner as the Equal Protection Clause of the Fourteenth Amendment. The targeted application of a law or ordinance violates the requirement of equal protection if “it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances.” *Asher Invests. Inc. v. Cincinnati*, 122 Ohio App. 3d 126, 135, 701 N.E.2d 400 (1997) (citing *Yick Wo v. Hopkins* 118 U.S. 356, 373–374 (1886), *Oyler v. Boles*, 368 U.S. 448 (1962), *Freeman v. Santa Ana* (68 F.3d 1180) (9th Cir. 1995)). An individual’s right to equal protection has been violated if the individual received differential treatment as the result of intentional discrimination directed at a suspect class such as religion or race. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Hassan v. City of N.Y.*, 804 F.3d 277, 294 (3d Cir. 2015). Unlike RLUIPA’s Nondiscrimination provision, such differential treatment is subject to strict scrutiny review. *See State v. Thompson*, 767 N.E.2d 251, 255 (Ohio 2002) (“[W]hen classifications affect a fundamental constitutional right, or when they are based on race or national origin, we will conduct a strict-scrutiny inquiry.”). For the reasons discussed *infra*, the City’s actions in this case cannot meet strict scrutiny review.

**D. FORCING THE SHUL TO CEASE ITS RELIGIOUS EXERCISE WOULD VIOLATE THE OHIO CONSTITUTION.**

1. The City’s enforcement action violates Defendants’ rights under Section 7 of Article I of the Ohio Constitution.

The Ohio Constitution provides even broader protection of the free exercise of religion than the Federal Constitution or RLUIPA, containing an additional phrase that distinguishes itself from the United States Constitution and indicates the framers' intent to create a broader freedom of religion. *Humphrey v. Lane*, 89 Ohio St. 3d 62, 66-68, 728 N.E.2d 1039, 1043-1045 (2000). While the federal Constitution states that Congress shall make no law “prohibiting the free exercise [or religion],” the Ohio Constitution adds the phrase, “nor shall any interference with the rights of conscience be permitted.” Ohio Const. Art. I, § 7 (emphasis added). The difference, according to the Ohio Supreme Court, is that “[b]y its nature the federal Constitution seems to target laws that specifically address the exercise of religion, *i.e.*, not those laws that tangentially affect religion. Ohio’s ban on any interference makes even those tangential effects potentially unconstitutional.” *Humphrey*, 89 Ohio St. at 67, 728 N.E.2d at 1044.

[T]he Ohio Constitution’s free exercise protection is broader, and we therefore vary from the federal test for religiously neutral, evenly applied government actions. We apply a different standard to a different constitutional protection. We adhere to the standard long held in Ohio regarding free exercise claims—that the state enactment must serve a compelling state interest and must be the least restrictive means of furthering that interest. That protection applies to direct and indirect encroachments upon religious freedom.

*Humphrey*, 89 Ohio St. at 68, 728 N.E.2d at 1045. (emphasis added). There is no requirement either that (a) the regulation at issue not be neutral and generally applicable; or (b) that the burden must be “substantial” in nature. *Id.*; see also *State ex rel. Yost v. Church of Troy*, 2020-Ohio-4695, ¶ 145, 159 N.E.3d 818, 841, *appeal not allowed*, 2021-Ohio-254, 161 Ohio St. 3d 1421, 161 N.E.3d 717 (citing *Humphrey*, 89 Ohio St. 3d 62, 68-69 and holding that “a generally applicable, religion-neutral state regulation” violates the provision “if the plaintiff shows ‘that his religious beliefs are truly held and that the governmental enactment has a coercive effect against him in the practice of his religion,’ and the state fails to prove that the regulation furthers a compelling state interest and the regulation is the least restrictive means of furthering that interest.”).

There is no question that the City's enforcement action *at least* "tangentially affect[s]" Defendants' religious exercise, and "Ohio's ban on any interference makes even . . . tangential effects potentially unconstitutional." 89 Ohio St. 3d at 67, 728 N.E.2d at 1044. There also can be no question that prohibiting this decade-old shul from continuing to serve as a location for Defendants to worship "has a coercive effect against [them] in the practice of [their] religion." 89 Ohio St. 3d at 68, 728 N.E.2d at 1045. As discussed above, that action is not the least restrictive means of achieving a compelling government interest. Enforcement of its Code in this draconian manner, which would certainly prevent the Aleksander Shul and its followers to "worship Almighty God according to the dictates of their own conscience" serves neither the purposes of the Code, nor any compelling interest, and is not the "least restrictive means" to serve any interest the City may have in regulating Defendants' religious practices at its University Parkway property. 89 Ohio St. 3d at 68, 728 N.E.2d at 1043.

2. The City's enforcement action violates Defendants' rights under Sections 1 and 19, Article I of the Ohio Constitution.

Ohio courts also have a strong history of requiring municipalities to permit churches and synagogues in residential zones. *State ex rel. Synod of Ohio of United Lutheran Church in Am. v. Joseph*, 139 Ohio St. 229, 251–52, 39 N.E.2d 515, 525 (1942) (holding refusal of Commission to grant special permit for church in residential zone simply because other land was available in a business district "bears no substantial relation to the public health, safety, morals or general welfare, and amounts to an unreasonable and arbitrary interference with the rights of private property guaranteed by Sections 1 and 19, Article I of the Ohio Constitution, and Section 1 of the Fourteenth Amendment to the Federal Constitution."); *State ex rel. Anshe Chesed Congregation v. Bruggemeier*, 97 Ohio App. 67, 77-78, 115 N.E.2d 65, 70-71 (8th Dist. 1953) (holding Council's refusal to grant a special permit to Jewish congregation to build a temple in a residential zone

“constituted an abuse of its discretion with respect to an administrative act,’ and affirming the judgment of the trial court ordering “the respondent to issue a special permit to enable relator to build its temple.”); *Village of Univ. Hts. v. Cleveland Jewish Orphan's Home*, 20 F.2d 743, 746, 5 Ohio Law Abs. 587 (6th Cir. 1927) (zoning ordinance from then-Village of University Heights excluding Jewish Orphans’ Home from residential district held to be unreasonable); *Young Israel Org. of Cleveland v. Dworkin*, 105 Ohio App. 89, 105, 133 N.E.2d 174, 183 (1956) (concluding that denial of religious use on residential property “bears no relation to public health, safety, morals and general welfare,” and holding that “action of the respondent city officials in refusing to issue a special permit for temple or congregational purposes under the administrative provisions of the ordinance, constitutes an abuse of discretion which is also violative of relator’s constitutional rights.”).

Here, the City’s enforcement action would operate to exclude and separate the Shul from the very community it serves. Yet as the Eighth District has explained: “The place of the church is to be found in that part of the community where the people live.” *Anshe Chesed Congregation*, 97 Ohio App. at 76, 115 N.E.2d at 69 (1953) (emphasis added). Such a principle resounds even more strongly for a community whose faith demands walking to its place of worship on Shabbos.

The Eighth District has even recognized the importance of locating shuls and temples in residential neighborhoods because of this tenet of Defendants’ faith, which was shared by the applicant in *Young Israel*, 105 Ohio App. at, 92, 133 N.E.2d at 176: “Because they adhere to this faith their places of worship must be within walking distance of their homes. The site on which relator desires to build is within walking distance of part of the members of the relator organization.” In *Young Israel*, the Planning Commission and Board of Zoning Appeals of the City of South Euclid denied Young Israel a permit to build a Temple in a residential zone. The

*Young Israel* court disposed of purported concerns of the Planning Commission, particularly traffic concerns, to be without substance, and approvingly cited case law reversing denial of a permit to build a church because of off-street parking:

The contention that people congregating for religious purposes cause such congestion as to create a traffic hazard has very little in substance to support it. Religious services are normally for brief periods two or three days in the week and this at hours when traffic is lightest—early in the morning, early in the evening and at 10:00 and 11:00 on Sundays. Many churches are like this one, in residential areas, where traffic is not heavy and where there are side streets and other facilities for parking. The church involved here is a small church which is shown to have ample offstreet parking space for all ordinary purposes. It would rarely if ever require parking space on the street in front of the church. Even if rare occasions should require parking a few cars on the streets we cannot say that a traffic hazard would be created. This is certainly a case in which the balance of convenience rule as to range in judgment might be applied. \* \* \* There is another reason, no doubt the primary one, why the church is not bound by some of the regulations imposed on other institutions. In American life the family is the foundation on which democratic institutions are reared.

*Young Israel*, 105 Ohio App. at 101–02, 133 N.E.2d at 181 (quoting *State v. City of Tampa*, 48 So.2d 78, 79 (Fla. 1950)). Given the practice of walking to the Shul during Shabbos, traffic congestion can hardly be a valid concern for the majority of the Shul’s religious services.

Thus, the City’s attempt to enjoin the Shul’s provision of religious services simply because it is located in and among the community it serves violates Defendants’ rights under Ohio Const. art. I, §§ 1, 19. Moreover, the sites the City will likely point to as locations the Shul could move to in order to comply with the City’s Code are in multi-family zoning districts, already fully developed with apartments or other non-single family uses on busy roads and highways on the perimeter of the City, well away from Defendants’ neighborhood. As noted by the Ohio Supreme Court, such an approach is beyond the police powers of a municipality:

Fully to accomplish its great religious and social function, the church should be integrated into the home life of the community which it serves. Churches in fitting surroundings are an inspiration to their members and to the general public. If located in the residential district-space, perspective, greenswards and trees aid in

setting off the beauty of the building and thereby increasing its inspiration. To require that churches be banished to the business district, crowded alongside filling stations and grocery stores, is clearly not to be justified on the score of promoting the general welfare.

*State ex rel. Synod of Ohio of United Lutheran Church in Am. v. Joseph*, 139 Ohio St. 229, 249, 39 N.E.2d 515, 524 (1942).

Accordingly, a preliminary injunction to enforce the City's Code is not supported by Ohio law, and would serve only to further violate Defendants' property rights under the Ohio and U.S. Constitutions.

### **III. THE CITY HAS FAILED TO MAKE THE REQUIRED SHOWING OF THE REMAINING THREE FACTORS NECESSARY TO OBTAIN A PRELIMINARY INJUNCTION.**

Defendants have already addressed why Plaintiff will be unable to establish the first of the four co-equal factors necessary to obtain a preliminary injunction: the City has failed to establish that it is likely to prevail on the merits of its efforts to stop Defendants from engaging in their religious exercise, particularly in light of the fact that they cannot prove that they have a compelling governmental interest, pursued through the least restrictive means, for doing so. The City's action, however, must also fail because neither the City, nor any third parties will suffer any injury if the injunction is denied and restricting Defendants' religious exercise does not serve the public interest. *Mike McGarry & Sons, Inc. v. Gross*, 2006-Ohio-1759, ¶ 10 (quoting *Procter & Gamble Co. v. Stoneham*, 140 Ohio App. 3d 260, 268, 747 N.E.2d 268, 274 (2000), *cause dismissed*, 91 Ohio St. 3d 1478, 744 N.E.2d 775 (2001)) ("A party requesting a preliminary injunction must show that: (1) there is a substantial likelihood that the plaintiff will prevail on the merits, (2) the plaintiff will suffer irreparable injury if the injunction is not granted, (3) no third

parties will be unjustifiably harmed if the injunction is granted, and (4) the public interest will be served by the injunction.”)

**A. THE CITY WILL SUFFER NO INJURY IF THE INJUNCTION IS DENIED.**

The City claims that it seeks to “avoid irreparable harm by preserving the status quo.” Mot. TRO, at 8-9. As a preliminary matter, the City does not make a claim that any of its alleged harms are “irreparable.” Complaint ¶¶ 27-28. It merely quotes a section of its own ordinance stating that it may seek injunctive relief in an action such as this. *Id.* ¶ 28 (incorrectly conflating the words “available” and “appropriate.”). Ohio law is clear, however, that “irreparable harm” has independent meaning. *Union Twp. v. Union Twp. Pro. Firefighters’ Loc. 3412*, No. CA99-08-082, 2000 WL 189959, at \*3 (Ohio Ct. App. Feb. 14, 2000). Specifically, “‘irreparable’ harm is defined as an injury ‘for the redress of which, after its occurrence, there could be no plain, adequate and complete remedy at law, and for which restitution in specie (money) would be impossible, difficult or incomplete.’” *Id.* (quoting *Cleveland v. Cleveland Elec. Illum. Co.* (1996), 115 Ohio App.3d 1, 12, 684 N.E.2d 343, 350, *appeal dismissed* (1997), 78 Ohio St.3d 1419, 676 N.E.2d 123). It is a context-specific inquiry. *Cleveland Elec. Illum. Co.*, 115 Ohio App. 3d at 13, 684 N.E.2d at 350. In this case, the City cannot show irreparable injury because it has knowingly allowed the alleged “harms” to occur for years.

The City has been aware of the Aleksander Shul as a place of gathering for Orthodox Jewish prayer for the last eight years. Denciger Aff. ¶ 25. The Complaint itself avers that the City was aware as early as 2017 and waited an additional two years before taking action based on this knowledge. Complaint ¶¶ 8-9. In fact, in November 2019 and February 2020, the City expressly allowed the Shul to continue its operations. Compl. Exhibits A, C. Accordingly, the “status quo” is for the Shul to operate as a place for Orthodox Jews to gather for prayer.

The City claims that the use of the Property as a place of religious assembly has “disturbed the peace and tranquility of the neighborhood.” Complaint ¶ 27. There is no evidence to support this conclusory statement. Finally, even if the City were able to show some purported harm, it would be outweighed by the harm suffered by the Aleksander Shul and its members, as set forth below.

**B. MANY THIRD PARTIES WILL BE UNJUSTIFIABLY HARMED IF THE INJUNCTION IS GRANTED.**

The third factor--that the relief sought by the City would not harm third parties--also weighs heavily in favor of Defendants. It is black letter law that “the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). “This principle applies with equal force to violation of RLUIPA rights because RLUIPA enforces First Amendment freedoms, and the statute requires courts to construe it broadly to protect religious exercise.” *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012). Any harm to the City is outweighed by Defendants’ constitutional right to free exercise of religion and equal protection. By enforcing Chapter 1274 in such a way that forecloses any possibility that the Aleksander Shul can operate, the City has prevented Defendants from exercising their religion.

If the Shul is closed, members of the Aleksander Shul will be deprived of the only place that allows them to exercise their religion as there will be no place to fulfil their religious obligation to pray with ten men in the distinct Chasidic style. Jacobs Aff. ¶ 12. Elderly and infirm members of the Shul will not be able to attend shul on Shabbos because there is no Shul within walking distance. Jacobs Aff. ¶ 13; Ellis Aff. ¶¶ 3-13. Parents will be unable to fulfil their religious obligation of bringing small children to Shul. Jacobs Aff. ¶¶ 7-8 . Women will not be able to attend lectures on Jewish law. Ellis Aff. ¶ 12. Closing the Shul will be closing down one of only

two places in the United States that carries on the tradition of the Aleksander Chasidic sect that was decimated during the Holocaust, preserving its teachings of the Torah, and praying with its unique liturgical texts and singing the prayers to their unique religious tunes. Denciger Aff ¶ 13.

Further, closing the Shul will harm residents of the City by taking away a unique place of worship that is “essential to [their] lives.” One woman who is terminally ill and confined to a wheelchair is only able to go to the Shul because it is in close proximity. Ellis Aff. ¶¶ 6-9. The harm caused to the Aleksander Shul and the people it serves by shutting down the Shul would be palpable and widespread.

### **C. THE PUBLIC INTEREST WILL NOT BE SERVED BY AN INJUNCTION.**

Granting an injunction in this case--which would cause irreparable harm to Defendants and others due to the deprivation of their First Amendment rights--would harm rather than serve the public interest. Even in cases where First Amendment claimants seek affirmative relief rather than preservation of the status quo, “injunctions protecting First Amendment freedoms are always in the public interest.” *A.C.L.U. of Illinois v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012) (quoting *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006)). The reverse is true in this case; an injunction vitiating First Amendment freedoms is never in the public interest. The Supreme Court of Ohio has recognized the same:

While religiously inspired *acts* do not receive absolute protection, “ \* \* \* [o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.” *Thomas v. Collins* (1945), 323 U.S. 516, 530, 65 S.Ct. 315, 323, 89 L.Ed. 430; *Sherbert v. Verner* (1963), 374 U.S. 398, 406, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965; see, also, *Wisconsin v. Yoder* (1972), 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15. Freedom of religion may be infringed “only to prevent grave and immediate danger to interests which the State may lawfully protect.” *West Virginia State Bd. of Edn. v. Barnette* (1943), 319 U.S. 624, 639, 63 S.Ct. 1178, 1186, 87 L.Ed. 1628.

*In re Milton*, 29 Ohio St. 3d 20, 24 (1987), 29 Ohio St. 3d 20, 24, 505 N.E.2d 255, 258 (1987), holding modified by *Steele v. Hamilton Cty. Cmty. Mental Health Bd.*, 2000-Ohio-47, 90 Ohio St. 3d 176, 736 N.E.2d 10. There is no “grave and immediate” danger related to alleged harms that have been ongoing for many years.

There is no evidence that the public was ever harmed by the Shul in the past, and there is copious evidence that the public has benefited. No evidence was presented in the Complaint of any negative impact on the public, and certainly none that would outweigh Defendants’ interest in their First Amendment freedoms. The public interest, therefore, would be harmed by granting the injunction.

### **CONCLUSION**

Based upon the foregoing, the Defendants respectfully request that this Court deny the Plaintiff’s Motion for Preliminary Injunction. The City’s enforcement of its Code to shut down a long-standing shul violates Defendants’ constitutional right to engage in the free exercise of religion.

Respectfully submitted,

**THRASHER, DINSMORE & DOLAN**

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*Attorney for Defendants*

**CERTIFICATE OF SERVICE**

A copy of the foregoing has been filed with the Court's electronic filing system. Notice of this filing will be sent to all parties and parties may access this filing through the Court's electronic filing system.

/s/Dale H. Markowitz

Dale H. Markowitz, Esq. (0016840)

**IN THE COURT OF COMMON PLEAS**  
**CUYAHOGA COUNTY, OHIO**

**CITY OF UNIVERSITY HEIGHTS**

**Plaintiff,**

**v.**

**CASE NO. CV-21-948437**

**UNIVERSITY REALTY USA, LLC**

**and**

**ALEKSANDER SHUL**

**and**

**RABBI SHNEUR ZALMAN DANZIGER**  
**Aka SHNEUR ZALMAN DANCYGER**  
**Aka SHNIOR DENCIGER**

**AFFIDAVIT OF SHNEOR LEVINE**

**Defendants.**

I, Shneur Levine, being of sound mind and legal age, first duly affirmed, and having personal knowledge of the facts set forth state as follows:

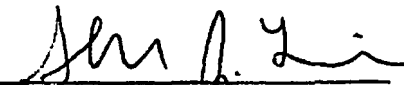
1. I have lived in University Heights for over 15 years, and work as a manager for a large international company based in Ohio.
2. My home is located within a few blocks of the Aleksander Shul.
3. I met Rabbi Dancyger when he first moved to town approximately ten (10) years ago and I consider myself a friend of Rabbi Dancyger.

4. Because of my management background, Rabbi Dancyger has occasionally approached me for assistance in shul management issues, and I have volunteered in a lay capacity.
5. On June 9, 2021, at Rabbi Dancyger's request, I accompanied him to a meeting at City Hall with University Heights Mayor Michael Brennan.
6. Mayor Brennan told us that it was a waste of time to attempt to continue with the Shul at its current location because there is no possible way we could succeed.
7. I responded by saying that he owed it to the community to at least try, to which he responded "we already tried."
8. He said you have to find a different location. I said there is no other viable location, and asked if he could suggest one.
9. The Mayor then responded saying it is not his role to help the Shul find a viable location.
10. The Mayor then said that any plan must be about finding a new location. He was adamant and made it abundantly clear that the Alexander Shul cannot be located where it is in the residential community and that it must be located at one of the streets at the outer perimeter of the City.
11. The Mayor said to me people bought homes in the neighborhood expecting it to be different from what the neighborhood has become.
12. As soon as he said that, I understood it to mean that those who oppose the Alexander Shul and its location are upset that Orthodox Jews are moving into the neighborhood.

13. I asked the Mayor: "They do not like the type of people who have moved in?" to which the Mayor did not respond.
14. When he repeated the same thing a second time later in the meeting, I stopped him.
15. I said to the Mayor that what he said sounded racist. It sounded like he was saying that people are upset about the kind of people who moved in.
16. The Mayor's response was that some of the people who complained are Jews.
17. The Mayor apologized and said he did not mean to offend me, but at no time did the Mayor rescind his comments or attempt to qualify his words as having any meaning other than that people are upset that Orthodox Jews are moving into the community.

FURTHER AFFIANT SAYETH NOT.

Date: July 29, 2021

  
\_\_\_\_\_  
Shneur Z. Levine

SWORN TO/AFFIRMED AND SUBSCRIBED before me, a Notary Public, by Shneur Z.

Levine this 29<sup>th</sup> day of July, 2021.

My Commission Expires: Nov 3, 2024

  
\_\_\_\_\_  
NOTARY PUBLIC

NOTARY SEAL:



**TIN THE COURT OF COMMON PLEAS**  
**CUYAHOGA COUNTY, OHIO**

**CITY OF UNIVERSITY HEIGHTS**

**Plaintiff,**

**v.**

**CASE NO. CV-21-948437**

**UNIVERSITY REALTY USA, LLC**

**and**

**ALEKSANDER SHUL**

**and**

**AFFIDAVIT OF JAMES  
MCREYNOLDS**

**RABBI SHNEUR ZALMAN DANZIGER**  
**Aka SHNEUR ZALMAN DANCYGER**  
**Aka SHNIOR DENCIGER**

**Defendants.**

I, James McReynolds, being of sound mind and legal age, first duly sworn, and having personal knowledge of the facts set forth state as follows:

1. I reside at 682 Trebisky Road South Euclid, OH 44143.
2. I received my Bachelors degree with a double major in English Literature and History from Cleveland State University.
3. I am licensed as a Building official Residential building official, electrical safety inspector, building inspector by the State of Ohio.

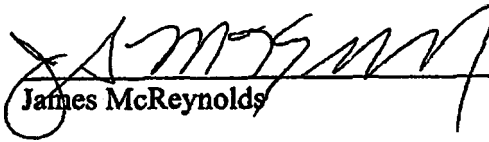
4. I have been a code enforcement officer for 27 years.
5. I was first appointed as Building Commissioner of the City of University Heights, Ohio ("City") by Mayor Susan Infield, Mayor Michael Brennan's predecessor, in May of 2017, and served in that capacity until I retired on April 3, 2020.
6. After I left, the City's building department was in a state of turmoil, and they could not find a suitable full-time replacement.
7. In July 2020, Mayor Brennan called me. He said he liked the way I ran the City's Building Department and he invited me to come out of retirement and be the part-time interim Building Commissioner.
8. I was then reappointed part-time interim Building Commissioner from July 2020 through November 2020, when I resigned.
9. I am currently retired.
10. In the capacity of Building Commissioner, I was the head of the City's Building Department.
11. I also managed the City's building and housing inspectors.
12. The Department is tasked with implementing and enforcing the City and State building code for structures throughout the City and that they are in compliance with federal and local codes, contractual specifications and zoning laws.
13. My tasks also included evaluating building plans, inspecting construction sites and newly constructed buildings, and issuing citations and corrective advice with respect to construction issues.
14. In my capacity as Building Commissioner, I worked closely with the City Planning Commission and with the City Council.

15. The City Planning Commission would seek my opinion when reviewing applications for Special Use Permits and Variances submitted to it.
16. In my capacity as Building Commissioner, I attended all City Planning Commission hearings.
17. I was at the Planning Commission hearing for the Aleksander Shul's application for a special use permit ("SUP") on November 21, 2019.
18. Prior to the November 21, 2019 hearing, I did a walk-through of the Property where the Aleksander Shul is located at 4380 University Parkway, University Heights.
19. At that time, I met with Rabbi Dancyger for the first time and told him that I would partner with him to assist the Shul to successfully navigate the process.
20. The City's policy and procedure at the time was to work with applicants for a house of worship SUP to navigate the process collaboratively and help them obtain the permit.
21. This was part of my duties as Building Commissioner.
22. Going before the Commission for these applicants was not to be adversarial, but more an exercise in determining how to achieve the permit.
23. At the end of the November 21, 2019 hearing, the Planning Commission unanimously agreed that they would recommend granting a Special Use Permit to allow the Shul to continue to operate at the Property, pending an inspection by the City's Building Department and Fire Department, and the submission of as-built drawings by an architect that addressed any building code issues that were discovered during the inspection.

24. On January 15 and 16, 2020, I inspected the Property with the Fire Department and wrote a memo dated January 23, 2020 based on my inspection. A true and correct copy of the January 23, 2020 Memo is attached hereto as **Exhibit A**.
25. At the time of the inspection, I met with the Rabbi and I assured him, "the City wants to work with you," that "We are all on the same team," and I gave him the impression that the City supported their application to operate at the current location.
26. I told him that I was there to "help the Shul through the process."
27. Though the Shul required several variances, based on my experience, the variances requested are reasonable and I was confident that these variances would have been granted by the Planning Commission.
28. As Building Commissioner, I was aware of a very similar project a few blocks away that had similar issues and received numerous variances for all of their issues and they were ultimately approved.
29. So long as the code issues are resolved, there is no other reason from my perspective why the SUP should not be granted, and I would recommend such to the Planning Commission and the City Council.
30. Further, so long as the code issues are resolved, I can see no issue from a safety perspective why the Shul should not be able to operate during the pendency of its application.

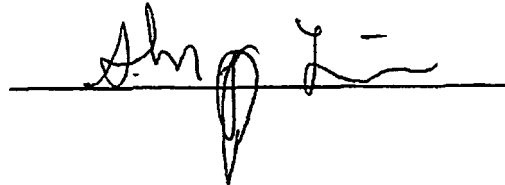
FURTHER AFFIANT SAYETH NOT.

Date: July 28, 2021

  
James McReynolds

SWORN TO/AFFIRMED AND SUBSCRIBED before me, a Notary Public, by James  
McReynolds this 28<sup>th</sup> day of July, 2021.

My Commission Expires: N/A



NOTARY PUBLIC

NOTARY SEAL:



SHNEOR Z. LEVINE  
NOTARY PUBLIC  
STATE OF OHIO  
My Commission Does  
Not Expire