Case No. 07-2509

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GRACE COMMUNITY CHURCH,

Plaintiff-Appellant

v.

LENOX TOWNSHIP

Defendant-Appellee

On Appeal From United States District Court Of The Eastern District Of Michigan, Southern Division, Hon. Paul D. Borman
U.S. District Court No. 2:06-cv-13526

FINAL BRIEF OF APPELLEE LENOX TOWNSHIP

ORAL ARGUMENT REQUESTED

CERTIFICATE OF SERVICE

Submitted By:

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Dated: April 25, 2008

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STATEMENT IN SUPPORT OF REQUEST FOR ORAL ARGUMENT

Defendant-Appellee Lenox Township ("Lenox Township" or the "Township") requests oral argument on this matter pursuant to F.R.A.P. 34(a)(1) and 6 Cir. R. 34(a). The Township believes oral argument will assist the Court in this matter due to the dearth of case law on the issues raised by Plaintiff-Appellant Grace Community Church ("Grace Community" or "Grace") within this Circuit, requiring Lenox Township to rely on case law from sister Circuits as well as various state law courts that have addressed the issues involved in this case, namely, the application of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA") as it relates to facially neutral zoning ordinances.

STATEMENT OF SUBJECT MATTER AND APPELLANT JURISDICTION

Lenox Township does not contest this Court's jurisdiction to review this matter, as the District Court ruled in favor of Lenox Township and dismissed Grace Community's case in its entirety without prejudice. However, Lenox Township states that just as below, Grace Community's claims lack ripeness due to the doctrine of finality.

COUNTER-STATEMENT OF ISSUES FOR REVIEW

I. WHETHER THE DISTRICT COURT PROPERLY HELD THAT IT WAS NOT BOUND BY THE UNPUBLISHED, NON-BINDING, NON-PERSUASIVE, DISTINGUISHABLE CASE OF *DiLAURA v. ANN ARBOR TOWNSHIP*, 30 Fed. Appx. 501 (6th Cir. 2002), AND THAT THE DISTRICT COURT APPROPRIATELY ENDORSED THE REASONING OF *MURPHY v. NEW MILFORD ZONING COMMISSION*, 402 F.3d 342 (2nd Cir. 2005) AND *WILLIAMSON COUNTY REG. PLANNING COMMISSION V. HAMILTON BANK*, 473 U.S. 172; 105 S. Ct. 3108; 87 L.Ed.2d 126 (1985) TO FIND THAT THE CASE WAS UNRIPE?

II. WHETHER THE DISTRICT COURT PROPERLY DISMISSED GRACE COMMUNITY'S FOURTEENTH AMENDMENT EQUAL PROTECTION CLAIM, WHEN IT DETERMINED THAT GRACE COMMUNITY'S CASE, INCLUDING THE EQUAL PROTECTION CLAIM, WAS NOT RIPE DUE TO GRACE COMMUNITY'S FAILURE TO OBTAIN A FINAL DETERMINATION FROM EITHER THE PLANNING COMMISSION OR THE ZONING BOARD OF APPEALS?

III. WHETHER THE DISTRICT COURT PROPERLY HELD THAT THE ATTORNEY-CLIENT PRIVILEGE WITH REGARD TO CERTAIN LETTERS WRITTEN BY LENOX TOWNSHIP'S MUNICIPAL ATTORNEY HAD NOT BEEN WAIVED BY THE CLIENT AS A RESULT OF THE CLIENT'S INADVERTENT DISCLOSURE OF THOSE LETTERS NOR HAD IT BEEN WAIVED BY PROVIDING COPIES OF THE LETTERS TO LENOX TOWNSHIP'S PLANNING CONSULTANT, AN INDEPENDENT CONTRACTOR SPECIFICALLY HIRED BY LENOX TOWNSHIP FOR PURPOSES OF ADVISING IT AS TO PLANNING ISSUES WITHIN THE TOWNSHIP?

STATEMENT OF THE CASE

This zoning dispute did not arise as a result Lenox Township's denial of any request made by Grace Community with regard to the use of its property within the Township. Rather, this case arises from the revocation of one of Grace Community's two approved Special Land Use Permits ("SUPs") by Lenox Township (the "CDC SUP"). This revocation occurred as a result of uncontested, repeated, and well-documented violations of the express conditions of the CDC SUP and only after Grace Community's senior pastor, Rev. William R. Pacey ("Pacey") was provided an opportunity to explain the violations or to correct any misperception the Township may have with regard to the apparent violations. Pacey refused that opportunity, leaving the Township's Planning Commission no choice but to revoke the CDC SUP. The revocation simply prevented Grace Community from housing residents on the property. It in no way prevented the use of the property for religious activities, including worship, education, counseling, and spiritual mentoring.

Instead of providing the Township's Planning Commission or its Zoning Board of Appeals ("ZBA") with evidence as to why the revocation was not appropriate (e.g. that the violations did not occur or that the Church would ensure that the violations did not happen again), Grace Community brought the instant lawsuit alleging that the revocation, caused as a result of Grace Community's own

actions, violated the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, *et. seq.* ("RUILPA"), and the Equal Protection Clause of the Fourteenth Amendment **(R. 1, Complaint, ¶¶ 15-22; J.A. pp. 13-14)**.[1]

The instant lawsuit was filed despite Grace Community's failure to provide the Township with any information to consider that may have resulted in the revocation not occurring or being reversed. The lawsuit was also filed even though

[1] In its complaint, Grace also asserted an equal protection claim under the Michigan Constitution and money damages as a result of alleged takings in violation of the Fifth Amendment and Michigan Constitution and tortious interference with an economic advantage. However, Grace did not seek summary judgment with regard to these claims, did not respond to the Township's Motion seeking summary judgment with regard to these claims, and does not discuss these allegations in its appeal. Indeed, on appeal Grace specifically states that this case was "brought under [RLUIPA] and the Equal Protection Clause of the 14th Amendment through 42 U.S.C. § 1983" (Grace Community's Proof Brief, p. 2; *see also* Grace Community's Proof Brief, pp. 4-5, 18-43 (no discussion of either the takings claims or the tortious interference claim previous brought by Grace) **(R. 1 Complaint, ¶¶ 26-30; J.A. pp. 15-16)**. Accordingly, Grace has waived, abandoned, and forfeited any claims it originally asserted arising out of the Michigan Constitution or relating to a takings claim under the Fifth Amendment. *See McPherson v. Kelsey*, 125 F.3d 989, 995-996 (6th Cir. 1997) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones"); *Thurman v. Yellow Freight Sys.*, 97 F.3d 833, 834-835 (6th Cir. 1996) (issued not raised in the district court or properly briefed on appeal are considered abandoned and waived); *Renkel v. United States*, 456 F.3d 640, 642 (6th Cir. 2006), *quoting Robinson v. Jones*, 142 F.3d 905, 906 (6th Cir. 1998) ("'Issues which were raised in the district court, yet not raised on appeal, are considered abandoned and not reviewable on appeal'"); *Zomba Enters. v. Panorama Records, Inc.*, 491 F.3d 574, 581 (6th Cir. 2007), *quoting Armstrong v. City of Melvindale*, 432 F.3d 695, 700 (6th Cir. 2006) ("'[T]he failure to present an issue to the district court forfeits the right to have the argument addressed on appeal'"); *see also* Fed. R. App. P. 28(a).

Grace Community was never prevented from using the property for religious activities, including worship, education and counseling. The revoked CDC SUP simply prevented Grace Community from providing revenue generating overnight accommodations. Grace Community has not alleged that providing overnight accommodations at this particular location is a sincerely held religious belief.

Both parties filed summary judgment motions (**R. 28, Defendant's Motion for Summary Judgment ("Township's Motion"); J.A. pp. 33-60; R. 29, Plaintiff Grace Community Church's Partial Motion For Summary Judgment ("Grace's Summary Motion;" J.A. pp. 174-205**). Grace Community also filed a Motion To Compel The Production Of Defendant's Waived Attorney Client Documents ("Grace's Waiver Motion") (**R. 42; J.A. pp. 320-341**), which it ostensibly believed supported its case against the Township.

On August 31, 2007, the District Court issued its well-reasoned opinions regarding each of these motions (**R. 51, Opinion and Order Denying Plaintiff's Motion To Compel Waived Attorney Client Letters ("Privilege Opinion"); J.A. pp. 509-518; R. 52, Opinion and Order (1) Granting Defendant's Motion To Dismiss Without Prejudice and (2) Denying Plaintiff's Motion For Summary Judgment ("Summary Judgment Opinion"); J.A. pp. 520-532**). First, the District Court held that the attorney-client privilege was not waived with regard to the documents in question as any disclosure was inadvertent and that the

disclosure of the letters to the Township Planner did not waive the privilege, as the Township Planner had a common interest (**R. 51, Privilege Opinion, pp. 8, 10; J.A. pp. 516, 518**). Second, the District Court held that Grace Community's case was unripe due to its failure to seek review of the Planning Commission's revocation decision before the ZBA (**R. 52, Summary Judgment Opinion, pp. 8-13; J.A. pp. 527-532**).

Grace sought reconsideration regarding both opinions (**R. 56, Grace Church's Motion For Rehearing On Waiver Motion; J.A. pp. 617-640; R. 57, Grace Church's Motion For Rehearing On Grace's Summary Motion; J.A. pp. 670-686**) ("**Reconsideration Motions**"). The Reconsideration Motions were denied on November 2, 2007 (**R. 61, "Reconsideration Opinion;" J.A. pp. 844-849**).

Grace now appeals alleging various errors that can be summarized as follows: first, that the District Court erred by not following "binding precedent" of this Court as set forth in the unpublished opinion of *DiLaura v. Ann Arbor Charter Township*, 30 Fed. Appx. 501 (6th Cir. 2002) (attached as Appendix A) (Grace Community's Proof Brief, pp. 2, 18); second, the District Court erred by dismissing the equal protection claim (*Id.* at 2, 30); and third, that the District Court erred when it held that the attorney-client privilege had not been waived (*Id.* at 2, 35).

Grace Community's alleged errors are without merit. The District Court properly granted summary judgment to the Township, as there simply is no factual dispute regarding whether Grace Community had obtained a final decision from the Township regarding the SUP. There is also no factual dispute regarding the merits of Grace Community's claims. The undisputed factual record establishes that the Township did not interfere with a sincerely held religious belief and thus did not violate RLUIPA. In addition, Grace Community cannot establish an equal protection violation as the undisputed facts establish that the Township did not treat Grace Community "differently from others similarly situated" or, assuming Grace was treated differently, "that there was no rational basis for the difference in treatment," *see Willowbrook v. Olech*, 528 U.S. 562, 563; 120 S. Ct. 1073; 145 L. Ed. 2d 1060 (2000), much less any showing that the Township's actions were arbitrary and capricious." *Berger v. City of Mayfield Heights*, 154 F.3d 621, 624 (6th Cir. 1998); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1215-1216 (6th Cir. 1992).

STATEMENT OF FACTS[2]

A. Grace Community Church's Inception.

Grace Community began its mission with Rev. Pacey at the helm in New Haven, Michigan, in September, 1996 (**R. 35, Pacey Aff., ¶¶ 1-3, 5; J.A. pp. 316-317**). In 2000, four years following its inception, Grace Community "realized" the need to house and assist individuals (***Id.*, ¶ 4; J.A. p. 317**). Accordingly, Grace "established a home [in New Haven] for four men . . . to see if they could provide such a service" (***Id.*, ¶¶ 4-5; J.A. pp. 317; R. 52, Summary Motion Opinion, p. 2; J.A. p. 521**). Grace eventually added five additional homes to the program, including one home for women (**R. 35, ¶ 5; J.A. p. 317; R. 52, p. 2; J.A. p. 521**).

These individuals were housed in mobile homes located in Chesterfield Township, and donated to Grace Community, as well as additional homes located in New Haven and New Baltimore[3] (**R. 33, Township's Reply Brief In Support of Summary J., Ex. A, Pacey Dep., p. 34; J.A. p. 294**). Grace Community charged the individuals for the opportunity to reside in a single room (**R. 33 at Ex.**

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[2] Lenox Township notes that § 2 of Grace Community's Statement of Facts, entitled *The Christian Discipleship Center* is in contains facts that were not made part of the record. In violation of Fed. R. App. P. 28(a)(7) and (e), Grace Community has no record citations with regard to any of the "facts" contained within § 2 of its Proof Brief.

[3] This Court may take judicial notice of the fact that published maps, such as Mapquest, establish that New Haven borders Lenox Townhip; New Baltimore, is located approximately five (5) miles from Lenox Township; and Chesterfield Township is located approximately 7.5 miles away from Lenox Township.

A, p. 37; J.A. 295). Grace housed a total of approximately seventeen (17) men and women at these locations, each paying approximately $100 per week plus a $250 initial assessment fee (*Id.*; J.A. p. 295). As a result, Grace generated income in the amount of approximately $6,800.00 per month ($1,700.00 x 4 weeks), plus additional assessment income in the amount of $4,250.00 as a result of these donated properties. During their stay, the individuals received a grand total of one to one and half hours per week of group counseling (***Id.* at 39; J.A. p. 296**).

B. The SUP Approvals and CDC SUP Revocation.

Grace eventually purchased property at 26260 30 Mile Road in Lenox Township ("Grace Property") for the stated purpose of "consolidat[ing] all operations under one roof" (**R. 35, ¶ 8; J.A. p. 317; R. 52, p. 2; J.A. p. 521**). Accordingly, Grace Community wished to use the Grace Property for both a church, including all the ancillary religious activities associated with a church, such as individual and group counseling, and a residential facility, named the Christian Discipleship Center ("CDC") (**R. 52, p. 2; J.A. p. 521**). Due to the Grace Property zoning, a special land use permit was necessary for both church use ("Church SUP") and residential use ("CDC SUP")[4] (collectively referred to as "SUPs") (**R. 28, Township's Motion at Ex. B, 5/23/05 Planning Comm.**

[4] The CDC SUP is referred to by the Township in the lower court filings as the DTC SUP. CDC SUP has been used herein as that was the convention used by the District Court.

Minutes, p. 4; J.A. p. 68).[5]

Grace Community initiated the SUP process in early 2005, with formal consideration of the SUPs by the Planning Commission commencing in April of 2005 (**R. 28 at Ex. A, 4/7/05 Pacey Memo To Planning Comm. ("Pacey Memo"), p. 1; J.A. p. 63; R. 52, p. 2; J.A. p. 521; R. 29, Grace's Summary Motion, p. 4, *citing* Ex. 2, Pacey Memo; J.A. p. 211**). The Church SUP was approved on June 27, 2005, two months after the Planning Commission first considered the SUPs at its April 25, 2005 meeting and merely one month following the public hearing held on May 23, 2005 (**R. 29, p. 4, Ex. 3, 4/25/05 Planning Comm. Minutes, pp. 2-3, Ex. 4, 5/23/05 Planning Comm. Minutes, pp. 1-5, and Ex. 5, 6/27/05 Planning Comm. Minutes, pp. 3-5; J.A. pp. 215-216, 219-229, 229-231; R. 52, p. 2; J.A. p. 521**). The Church SUP has been in full effect since that date; thus, Grace Community has been permitted to use the Grace Property for church-related functions without restriction since June 27, 2005 through the present (**R. 54, Summary Motions Trans., pp. 23-25; J.A. pp. 556-558; R. 52, p. 4; J.A. p. 523**).[6]

The Planning Commission tabled the decision with regard to the CDC SUP

[5] Vickie Fouchia, the Planning Commission's Recording Secretary, averred that the approved meeting minutes referenced herein are a true and accurate summary of the statements and occurrences that occurred at these meetings (**R. 28 at Ex. M; J.A. pp. 125-126**).

[6] The Church SUP is not at issue in this case.

due to its inability to obtain clear and concise answers from Pacey as to what precise activities Grace envisioned taking place in the CDC. There was also concern expressed regarding the number of residents, twenty-five (25), Pacey envisioned living in the CDC, with discussion taking place about limiting the number to fifteen (15) (**R. 29 at Ex. 5, pp. 4-5; J.A. pp. 230-231; R. 52, *citing* R. 28 at Ex. C, p. 2; J.A. p. 521**).

On July 25, 2005, the Planning Commission again discussed the CDC SUP (**R. 29 at Ex. 6, 7/25/05 Planning Comm. Minutes, pp. 1-2; J.A. pp. 235-236**). Because Pacey finally provided the Planning Commission with more specific information regarding what the CDC would be used for as well, as the fact that no alcohol or substance abuse meetings would occur at the CDC, the Planning Commission approved the CDC SUP with conditions on August 22, 2005 (**R. 29, Ex. 7, 8/22/05 Planning Comm. Minutes, pp. 1-4; J.A. pp. 239-242**). Each of the conditions was either agreed to or not objected to by Pacey (***Id.***).

The CDC SUP conditions were, in pertinent part: (1) limiting the initial number of residents to fifteen (15) with the possibility of raising this number to twenty-five (25) by adding two individuals every six (6) months until maximum capacity was met; (2) Grace's agreement that the CDC would never be used as a halfway house or to "house persons that are undergoing alcohol and/or drug rehabilitation;" (3) that the residents would be pre-screened before acceptance – a

process Pacey informed the Planning Commission was already in place; and (4) a limitation on the number of vehicle trips to and from the CDC on a daily basis – specifically excluding the Church from this requirement (**R. 29, Ex. 7, pp. 2-4, ¶¶ 3-5; J.A. p. 240-242; R. 28 at Ex. D, p. 1; J.A. p. 79; R. 52, p. 3; J.A. p. 522**).

The approval also explicitly noted that if there were any complaints "suggesting that good cause exists to believe the following conditions have been breached . . . [Grace Community] shall be notified to reappear before the Lenox Township Planning Commission and show cause as to why the special land use permit shall not be revoked" (**R. 29 at Ex. 7, ¶ 1, p. 3; J.A. p. 241; *see also* R. 28 at Ex. E, ¶ 6, p. 2; J.A. p. 83; R. 52, p. 3; J.A. p. 522**).[7]

Less than one month after the CDC SUP was approved, the Planning Commission, through its General Counsel, became aware of evidence suggesting that the CDC was being used for drug and alcohol rehabilitation or, alternatively, that Grace Community was advertising drug and alcohol rehabilitation services at the CDC location (**R. 29 at Ex. 8, p. 5; J.A. p. 248; R. 28 at Ex. I; J.A. pp. 95-104; R. 52, pp. 3-4; J.A. pp. 522-523**). Specifically, an individual complained that she was not receiving drug and alcohol counseling at the CDC even though

[7] Paragraph F of Article 18 of the Township's Zoning Ordinance ("Ordinance") specifically grants the Planning Commission the authority to impose conditions on the SUP. Grace Community has not challenged the validity or authority of the Planning Commission to impose such conditions (**R. 28, p. 5 n. 4; J.A. p. 45**).

she had been told by Pacey that she would receive such counseling and was sent there by the court system to obtain such counseling (**R. 29 at Ex. 8, p. 5, Ex. 9, pp. 1-2; J.A. pp. 248, 251-252; R. 28 at Ex. H, Macomb County Sheriff's Office Police Report; J.A. pp. 93-95**). The Macomb County Sheriff's Report detailed the interview of Robin Riggi, the complainant, and her father, Ronald Riggi. This report provided the Township with the following information:

> Robin Riggi was . . . charged with prescription fraud [and] was lodged at the Macomb County Jail on a $20000 bond. She ultimately was granted a personal bond with the condition that she obtain[] **substance abuse counseling.**" [Pacey was recommended.] [Ronald] Riggie states that **Pacey told him that he was a licensed substance abuse counselor and that he could supply [Robin Riggi] with the counseling required by the court. Pacey also told him there would be a charge for his services.** Pacey further stated that his organization was called the Care House. . . . **[Robin Riggi] agreed [to Pacey's services] under the assumption that he was a licensed substance abuse counselor at a licensed facility.**
>
> On August 25th, [2005], [Ronald Riggi] and [Robin Riggi] went to the Care House located at **26260 30 Mile Road [the address of Grace's Property]** where they met with Pacey. Pacey requested a $250 application fee . . . . made out to the Care House. Between the dates of August 26th and August 31st [Robin Riggi] attended four sessions with Pacey at the [Grace Property.]
>
> * * *
>
> [Ronald Riggi] . . . looked up the Care House on the Internet and found a web site. The web site had an application for enrollment for a **long term residential program**. The address was listed only as a P.O. box. [Ronald] Riggi later checked the web site and found that it had changed now showing the Care House was at the [Grace Property.]
>
> * * *
>
> [Robin Riggi] stated that [while] she was housed in the Macomb County Jail on a prescription fraud charge[,] **Pacey** came in as a professional visit and **presented her with an application into the Care House**

> **program. . . . Pacey told her that it was a substance abuse counseling and drug rehab outpatient program. He also stated that he was licensed as required by the court. . . .** He informed her that in order for her to get out of jail she would have to sign up with his program and in order to say out of jail she would have to abide by his directives, as well as pay for the counseling in advance.

(R. 28 at Ex. H, pp. 2-3; J.A. pp. 93-94).

The investigation confirmed that Grace Community was advertising the CDC as a drug and rehabilitation counseling center, a halfway house, and three quarter house **(R. 28 at Ex. I; J.A. pp. 96-105)**.

On September 26, 2005, in conformity with the CDC SUP, Grace Community was provided an opportunity to show cause as to why the CDC SUP should not be revoked **(R. 29 at Ex. 8; J.A. pp. 248-249)**. In response to the allegations, "Pacey said 'I have no comment on the incident.' And he was 'not going to answer'" ***(Id.* at 5-6; J.A. p. 248)**. In other words, he did not provide the Planning Commission with any explanation as to why this individual would have been referred to the CDC for drug and alcohol counseling by a court nor did he provide any explanation or reason as to why Grace Community appeared to be advertising the CDC as a halfway house, three-quarter house, and drug treatment center **(R. 29 at Ex. 8, Ex. 9; J.A. pp. 248-252; R. 28 at Ex. I; J.A. pp. 96-105)**.

It is undisputed that Grace Community did not seek reconsideration of this revocation from the Planning Commission or seek an appeal or any other relief from the ZBA before initiating the instant lawsuit **(R. 54, Summary Motions**

Trans., pp. 9-10; J.A. pp. 542-543).

C. The Lower Court Proceedings.

On August 7, 2006, nearly one year after the CDC SUP was revoked and without seeking any administrative relief from either the Planning Commission or the ZBA, Grace Community filed the instant lawsuit, alleging among other things, a RLUIPA violation and a Fourteenth Amendment Equal Protection violation (**R. 1, Complaint; J.A. pp. 11-16**).[8] On July 23, 2007, the Township sought summary judgment with regard to all claims; Grace Community sought partial summary judgment with regard to the RLUIPA claim only (**R. 28, Township's Motion; J.A. pp. 33-60; R. 29, Grace's Summary Motion; J.A. pp. 174-204**). In seeking dismissal, the Township argued not only that Grace Community's claims were unripe due to its failure to obtain a final decision from the Township, but that its RLUIPA claim and equal protection claims failed on the merits (**R. 28; J.A. pp. 174-204**).

Grace Community filed a motion to compel seeking the disclosure of attorney-client privileged documents, asserting that the privilege had been waived (**R. 42, Grace's Waiver Motion; J.A. pp. 320-341**).

1. The Privileged Documents Hearing and Opinion.

Grace Community asserted that the attorney-client privilege had been

[8] As discussed *supra* at n. 1, Grace Community's remaining claims are not before this Court as Grace has abandoned, waived, or forfeited those claims.

waived with regard to five letters from the Township's General Counsel as a result of their inadvertent disclosure during the depositions of Karen Turchi and David Birchler and because Birchler was not an employee of the Township and therefore not a client (**R. 42; J.A. pp. 320-341; R. 48, Grace's Motion To Supplement It's Brief In Support of Plaintiff's Motion To Compel, 8/18/07; J.A. pp. 412-419**). The Township disagreed and argued that (1) the inadvertent disclosure of two of the letters by Turchi did not waive the privilege and (2) disclosure to Birchler, as the hired Planning Consultant of the Township, is protected by the attorney-client privilege (**R. 50, Township's Response to Grace's Waiver Motion, pp. 1-6; J.A. pp. 498-507**). At oral argument, the Township noted that the letters were never disclosed during Birchler's deposition as they "were removed [from Birchler's file by General Counsel] and handed to" Township counsel without disclosure to Grace Community's counsel (**R. 55, Waiver Transcript, p. 14; J.A. p. 593; *see also* p. 18; J.A. p. 597**).

The District Court, after oral argument and in camera review, denied Grace's Waiver Motion (**R. 51, Privilege Opinion, pp. 1, 4, 8, 10; J.A. pp. 509, 512, 516, 518**). Specifically, the District Court held that any disclosure by Turchi was inadvertent and did not waive the privilege, relying on the intermediate approach set forth in *Fox v. Massey-Ferguson*, 172 F.R.D. 653 (E.D. Mich. 1995) and *Edwards v. Whitaker*, 868 F. Supp. 226, 229 (M.D. Tenn. 1994), specifically

noting that "it appear[ed] the Sixth Circuit ha[d] not adopted any of the approaches" regarding waiver (**R. 51, p. 7; J.A. p. 515**). Based on the intermediate approach, which has a five-part balancing test, the District Court found that the factors weighed in favor of the Township; therefore the privilege had not been waived through the inadvertent disclosure during Turchi's deposition (***Id.* at 8; J.A. p. 516**).

With regard to the alleged waiver by disclosing the documents to Birchler, the District Court first held that there was no evidence that the documents were disclosed during his deposition (***Id.* at 9-10; J.A. pp. 517-518**). The District Court also held that providing the documents for Birchler's review did not waive the privilege, as it shared a common interest with the Township as its planning consultant, relying on *Fox*, *supra* at 670 and *United States v. White*, 617 F.2d 1131 (5th Cir. 1980) (**id. at 10; J.A. p. 518**).

2. <u>The Summary Motions Hearing and Opinion.</u>

On August 24, 2007 the District Court heard oral argument with regard to the parties' summary motions (**R. 54, Summary Motions Trans.; J.A. pp. 534-578**). During oral argument, Grace Community conceded that it did not seek ZBA review of the Planning Commission's decision, arguing first that it was not required under *DiLaura v. Ann Arbor Twp.*, 30 Fed. Appx. 501 (6th Cir. 2002), and second that there was no mechanism under the Township Ordinance to appeal to

the ZBA (***Id.* at 9-10; J.A. pp. 542-543**).

In response, the Township argued that while *DiLaura* does not apply and is not binding due to its unpublished status, and that the plaintiffs in *DiLaura* sought ZBA approval, therefore distinguishing the case (***Id.* at 29; J.A. p. 562**). The Township also correctly noted that §§ 1903 and 1907 of the Ordinance establish that the ZBA had jurisdiction over the Planning Commission's revocation of the CDC SUP and could have provided Grace Community with its desired relief (***Id.* at 26-27; J.A. pp. 559-560; R. 55, Waiver Trans., p. 31; J.A. p. 610**). Sections 1903 and 1907 provide:

> The Board of Appeals shall act upon all questions as they may arise in the administration of the Zoning Ordinance, including interpretation of the Zoning Maps, and may fix rules and regulations to govern its procedures sitting as such Board of Appeals. It shall hear and decide all matters referred to it, or upon which it is required to pass, under the provisions of this Ordinance. . . . The concurring vote of a majority of members of the said Board of Appeals shall be necessary to reverse any order, requirement, decision or determination of any such administrative official, or to decide in favor of the application any matter upon which they are required to pass under this Ordinance or to effect any variation in this Ordinance. The Board of Appeals shall have the power to permit the . . . use of a building, or an addition to an existing building. . .

(R. 28 at Ex. L, § 1903; J.A. p. 122).

> The Board of Appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision of determination as in its opinion ought to be made in the premises, and to that end shall have all the power of the officer from whom the appeal was taken and may issue or direct the issuance of a permit. . . .[T]he Board of Appeals shall ofave the power in passing upon appeals to vary or modify any o fits rules, regulations or provisions so that the spirit of this Ordinance shall be observed . . . and substantial justice done.

(R. 28 at Ex. L, § 1907; J.A. p. 123; *see also* **R. 52,** *citing* **§ 1907, p. 12; J.A. p. 531).**[9]

The Township also noted Grace Community was provided an opportunity to respond to the allegations that it was advertising and/or accepting residents for drug and alcohol treatment, but that Pacey chose to not "create any record" in that regard **(R. 54, pp. 30, 35; J.A. p. 563, 568)**.

The District Court further noted that based on the record, it appeared as if the parties had reached an agreement with regard to the use of the property, as the Township had originally approved the use subject to no drug or alcohol treatment and Grace Community stipulated that there would be no such treatment (***Id.* at 35-38; J.A. pp. 568-571**).

> THE COURT: I'm not cutting you off, but I just want a preliminary question. If they say, "Come on back, we'll give you the RLUIPA as long as you don't have people there in alcohol and drug treatment and for-paid rooms," what is your response to that?
>
> [GRACE COUNSEL:] I'm pleased we're making progress . . . because we would like to this Christian discipleship center, but part of it is overnight stay.[10] So if overnight stay is not permitted, that's a problem.

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[9] The District Court also noted that pursuant to § 1904 "[a]n appeal may be taken by any person aggrieved or by any officer, department, board or bureau of the Township, County, or State" **(R. 52, p. 12; J.A. p. 531;** ***see also*** **R. 28 at Ex. L, § 1904; J.A. p. 122)**.

[10] As discussed *infra*, Grace Community never alleged as part of its RLUIPA claim that overnight stays on the property of Grace Community was a sincerely held religious belief **(R. 1, Complaint, ¶¶ 1-22; J.A. pp. 11-14; R. 35, Pacey Aff.; J.A. pp. 316-319**. As such, to the extent Grace Community alleges that the

> And I'm not sure if the Township's in a position to say today, "Welcome back and we'll give you overnight stay."
>
> * * *
>
> [TOWNSHIP COUNSEL:] Overnight stay is something they granted initially with a special land use permit. It was up to 15 residents, and assuming . . . if things went well the first six months or so, they could consider up to 25 residents. So they didn't have a problem with overnight stay. It was just the court referral and the drug and alcohol counseling.
>
> [GRACE COUNSEL:] And if we can agree on that today, perfect. That would really help us out and would help the church out because that's what we need, that's what we desire to do.

(R. 54, pp. 37-38; J.A. pp. 570-571).

The District Court granted the Township's Motion in its entirety on August 31, 2005. In granting the Motion, the District Court specifically held it was not bound by *DiLaura*, an unpublished case that's reasoning was overturned in *Murphy v. New Milford Zoning Commission*, 402 F.3d 342 (2d Cir. 2005) (*Murphy II*), but also noted that in *DiLaura*, the plaintiff had in fact sought a ZBA variance, which was denied **(R. 52, pp. 8-11; J.A. pp. 527-530)**. The District Court instead relied on *Murphy II*:

> The Court finds *Murphy II* persuasive. Here, the factual record is not sufficiently developed to produce a fair adjudication of the merits of the parties' respective claim. "Those who have not followed available routes of appeal cannot claim to have obtained a 'final' decision, particularly if they have foregone an opportunity to bring their proposal before a decisionmaking body with broad authority to grant different forms of

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revocation, caused entirely by Grace's failure to correct the valid concern that it was violating the terms of the CDC SUP, does not set forth a prima facie RLUIPA claim.

> relief or to make policy decisions which might abate the alleged taking." *Cmty. Treatment Ctrs. v. City of Westland*, 970 F. Supp. 1197, 1210 (E.D. Mich. 1997) (*citng S. Pac. Transp. Co. v. City of Los Angeles*, 922 F. 2d 498, 503 (9th Cir. 1990)).

(**R. 52, p. 11; J.A. p. 530**). The District Court also specifically held that the ZBA had authority to provide Grace Community with the relief it sought and that there was "no evidence that the zoning agency ha[d] dug in its heels and made it clear that an appeal would be denied" (***Id.* at 12; J.A. p. 531**.

> Without reaching a decision on whether the Planning Commission correctly or mistakenly believed that Plaintiff violated the conditions of his CDC SUP, the Court finds that Plaintiff has not exhausted its administrative remedies by appealing to the Zoning Board of Appeals and receiving from it a final decision. If Plaintiff had appealed the decision, and the Zoning Board of Appeals found that the CDC SUP conditions were not violated, it would restore the SUP and Plaintiff's issue would be moot.

(**R. 52, p. 12; J.A. p. 531**).

The District Court also specifically ruled that Grace Community never sought permission to use the CDC for drug or substance abuse treatment and therefore Grace was not required to seek an SUP for a drug or alcohol treatment center (***Id.* at 13; J.A. p. 5332**). This conclusion of law was based on Pacey's testimony, both in deposition and on the record during the continuation of the summary hearing on August 28, 2007 (***Id.*; J.A. p. 532**). Specifically, at that hearing, Pacey was placed under oath and testified that Grace Community does not use the CDC for drug or alcohol treatment and that it has no intention of doing so

in the future (**R. 55, Motion To Compel Trans., pp. 33-34; J.A. pp. 612-613**). Based on this testimony, it is clear that the restrictions placed on Grace Community regarding drug and alcohol treatment are not in dispute.

3. The Reconsideration Motions.

Grace Community filed Motions for Reconsideration with regard to both the waiver issue and the denial of Grace's Summary Motion. Grace Community did not explicitly seek reconsideration of the District Court's grant of dismissal based on the Township's Motion (**R. 56, Grace's Motion for Reconsideration Regarding Its Motion for Summary Judgment Brief, p. 2; J.A. p. 622**). The District Court denied the Motions for Reconsideration on November 2, 2007 (**R. 61, Reconsideration Opinion; J.A. pp. 844-849**).

D. Proceedings Before The Planning Commission Following Dismissal.

Based on the District Court's ruling, Grace Community sought relief from the Township – relief provided by the Planning Commission without the necessity of the ZBA. As Grace Community has stated in its Proof Brief, "[t]he issues of the use have been resolved as the Planning Commission voted to approve the use, at its November 26, 2007 meeting, with conditions" (Grace Community's Proof Brief, p. 16). A review of the November 26 transcript establishes that the conditions set forth are substantially similar to the conditions originally placed on the CDC SUP (**R. 66, Ex. 2, 11/26/07 Planning Comm. Meeting Trans., pp. 8-10; J.A. pp.**

884-886). Indeed, the CDC SUP was approved for a twelve-month period as opposed to a six-month period of time (***Id.* at 8-9; J.A. pp. 884-885**).

Further, while Grace Community alleges that two new conditions were added, paving the driveway and adding a sprinkler system (Grace Community's Proof Brief, p. 16), these conditions are not part of the CDC SUP, but required to obtain a certificate of occupancy for the CDC (**R. 66, Ex. 2, p. 10; J.A. p. 886**). In addition, while Grace Community alleges that these are new requirements, the Planning Commission minutes from April 25, 2005 and August 22, 2005 establish that Grace Community was informed about code issues relating to the driveway and the belief that it must be paved (**R. 29 at Ex. 3, p. 2 and Ex. 7, p. 2; J.A. pp. 215, 240**), and Grace Community was informed at the July 25, 2005 that before any approval would be granted, "it was determined that all code compliance must be done" (**R. 29 at Ex. 6, p. 1; J.A. p. 235; *see also* R. 66, Ex. 1, 10/22/07 Planning Comm. Trans., p. 8; J.A. p. 861** ("And if there is approval, it obviously would have to be conditioned – this is how it was the first time – but it would have to be conditioned on meeting the code requirements, which would basically mean they either have to have a sprinkling system or some equivalent approved system that the department can agree to")).

STANDARD OF REVIEW

The standard of review on an appeal from an order granting summary judgment is *de novo*. *Simpson v. Ernst & Young*, 100 F.3d 436 (6th Cir. 1996).

Summary judgment should be granted where "there is no genuine issue as to any material fact." See *Kraus v. Sobel Corrigated Containers, Inc.*, 915 F.2d 227, 229 (6th Cir. 1990); *Nixon v. Celotex Corp.*, 693 F.Supp. 547, 552 (W.D. Mich. 1988); *Parker v. Diamond Crystal Salt Co.*, 683 F.Supp. 168, 170-171 (W.D. Mich. 1988). Federal Rules of Civil Procedure 56 establishes a burden shifting method of determining whether summary judgment is appropriate:

> Once the moving party presents evidence sufficient to support the motion under Rule 56(c), the adverse party must set forth specific facts showing that there is a genuine issue for trial. The non-moving party is not entitled to a trial merely on the basis of allegations; significant probative evidence must be presented to support the complaint.
>
> * * *
>
> Thus, Rule 56(e) requires a shifting of burdens to the opposing party if the moving party has satisfied Rule 56(c). If the Court finds after reviewing the evidence that no genuine issue of material fact exists, the moving party is entitled to judgment as a matter of law.

Craig v. Allen-Bradley Co., 801 F.2d 859, 861 (6th Cir. 1986).

The standard of review with regard to whether the attorney-client privilege was waived is a mixed question of law and fact, requiring de novo review. *See Reed v. Baxter*, 134 F.3d 351, 355 (6th Cir. 1998).

SUMMARY OF ARGUMENT

The District Court properly dismissed Grace Community's claims as those claims were unripe based on the rule of finality. Grace Community failed to seek relief from the Township, either by responding to the allegations regarding the belief that it was admitting residents seeking drug and alcohol rehabilitation and/or advertising for such residents in violation of the CDC SUP. Without a final administrative ruling or a showing that further administrative review would be futile, there simply was no case in controversy. Thus, the District Court properly dismissed the case based on lack of ripeness.

Alternatively, assuming *arguendo* that the District Court improperly dismissed this case based lack of ripeness, dismissal was still appropriate as Grace Community cannot establish a viable RLUIPA or equal protection violation. Grace Community was never prevented from using the property for a church – this includes using the property for spiritual education, counseling and mentoring. In addition, at the time the CDC SUP was sought, Grace Community had six other nearby residences to house individuals. Grace Community never argued that it was a sincerely held religious belief be house the individuals at the same location as the Church; and, it cannot make such an argument based on its history at the time the CDC SUP was sought. Similarly, Grace never objected to the conditions set forth in the CDC SUP and there is no viable argument that those conditions violated

RLUIPA.

The undisputed factual evidence establishes that the Township had good cause to believe Grace violated the CDC SUP by accepting court referrals for drug and alcohol counseling and soliciting such residents by advertising the CDC as a drug and alcohol rehabilitation center, halfway house, and three-quarter house. Because Grace Community failed to provide any evidence or argument as to why the CDC SUP should not be revoked the Township properly revoked the CDC SUP based on the good faith belief that it had been violated.

In addition, the revocation did not constitute a substantial burden on Grace Community's religious activities, as it simply prevented fee-based overnight stays and did not force Grace or its congregation to choose between their religious faith and severe criminal or economic sanctions. Accordingly, the revocation did not impose any burden, let alone a substantial burden. At best, the revocation of the CDC SUP amounted to no more than mere inconvenience in that it prevented Grace, for a temporary period of time, from consolidating its secular and religious activities at one location. Mere inconvenience does not rise to the level contemplated by the relevant case law.

Further, Grace Community failed to establish a genuine issue of fact regarding its equal protection claim, as there is no evidence that Grace was discriminated against as a result of its religious affiliation or that it had been

treated differently that others similarly situated.

Finally, the District Court properly ruled that the Township had not waived the attorney-client privilege with regard to the letters inadvertently provided to Grace Community's counsel during a deposition and those provided to the Township's hired planning consultant for purposes of obtaining an opinion relevant to the issues of Grace Community's SUPs. In addition, even if the District Court erred with regard to the waiver issue, the Township was still entitled to summary judgment and, therefore, any error was harmless.

ARGUMENT

A. Response To Grace Community's Arguments.

1. The District Court Was Not Bound By *DiLaura*.

Grace Community first argues that the District Court erred by relying on *Murphy II*, a published Second Circuit decision that overruled the reasoning relied on by *DiLaura*, an unpublished Sixth Circuit opinion, because Grace Community alleges that *DiLaura* was "binding Sixth Circuit authority" (Grace Community Proof Brief, p. 18). As the District Court noted in its Motion for Reconsideration, "[a]n unpublished decision does not constitute binding precedent; however, it can constitute persuasive authority where there is no published decision on point" (**R. 61, p. 3; J.A. p. 846**). *Lundgren v. Mitchell*, 440 F.3d 754, 765 n. 3 (6th Cir. 2006) (unpublished decisions are "not binding on future panels of this Court"); *see also* 6 Cir. R. 206 (stating that "[r]eported panel opinions are binding on subsequent panels" and that a panel cannot overrule "a published opinion of a previous panel").

The District Court "conclude[d] that *DiLaura* [was] not persuasive authority where the Second Circuit case on which it relied was subsequently overruled by the Second Circuit" (**R. 61, p. 3; J.A. p. 846**). Accordingly, the District Court relied on *Murphy II* and concluded that Grace Community's case was unripe due to its failure to obtain a final decision from the Township prior to filing suit.

Further, assuming *arguendo* that the District was somehow bound by *DiLaura*, an unpublished opinion with no precedential value, the case is easily distinguishable, as the plaintiff in *DiLaura*, before bringing a lawsuit, sought a variance from the zoning board of appeals, which was denied. *Id.* at 503; *see also DiLaura v. Township of Ann Arbor*, 112 Fed. Appx. 445, 446 (6th Cir. 2004) (attached as Appendix B) ("the plaintiffs' initial attempts to secure a zoning variance were rebuffed by the defendant township and its zoning board of appeals"). Thus, even if *DiLaura* was binding, the case is inapposite as the plaintiffs clearly sought relief from the ZBA before filing their lawsuit.

Accordingly, it is clear that the District Court was not bound by *DiLaura*.

2. Grace Community's Reliance On *Patsy* [11] Is Misplaced.

Grace Community also relies on *Patsy v. Bd. Of Regents*, 457 U.S. 496; 73 L. Ed. 2d 172; 102 S. Ct. 2557 (1982) for support of its position that its case was ripe for review. However, as Grace Community admits, *Patsy* simply held that in the context of a 42 U.S.C. § 1983 claim, exhaustion of remedies is not necessary. *Id.* at 500. It did not hold that finality was not required. *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354, 1362 (6th Cir. 1992); *see also DLX, Inc. v. Kentucky*, 381 F.3d 511, 519 (6th Cir. 2004) (distinguishing *Patsy* as holding that there is no

[11] *Patsy v. Bd. Of Regents*, 457 U.S. 496; 73 L. Ed. 2d 172; 102 S. Ct. 2557 (1982)

exhaustion requirement, but that finality is still required to proceed on a § 1983 claim).[12]

Here, the District Court relied on the finality rule, not the exhaustion of remedies rule (**R. 52, pp. 11-12; J.A. pp. 530-531**). Thus, *Patsy* provides Grace no relief.

3. The District Court Properly Held That This Case Was Unripe.

a. Grace Community Had Not Obtained Finality.

In *Williamson County Reg. Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186; 105 S. Ct. 3108; 87 L.Ed.2d 126 (1985), the Supreme Court held that before an ordinance decision can be challenged in court, a plaintiff must obtain a final decision regarding the application of the regulations to the property at issue. *Murphy v. New Milford Zoning Commission*, 402 F.3d 342 (2nd Cir. 2005) (*Murphy*

[12] *Patsy* can also be distinguished as it applied to claims under 42 U.S.C. § 1983, not claims brought under RLUIPA, which contains "its own comprehensive enforcement scheme," 42 U.S.C. § 2000cc-2(a) ("[a] person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government"). Because RLUPIA contains its own enforcement mechanism, § 1983 does not apply as "[a] plaintiff may not use *Section 1983* where the underlying statute has its own comprehensive enforcement scheme." *Christian Methodist Episcopal Church v. Montgomery*, Case No. 4:04-CV-222322-RBH, 2007 U.S. Dist. LEXIS 5133, * 18 (1/18/07) (D. S.C. 2007) (attached as Appendix C), *citing City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113; 125 S. Ct. 1453, 1459; 161 L. Ed. 2d 316 (2005) ("in all of the cases in which we have held that § 1983 is available for violation of a federal statute, we have emphasized that the statute at issue . . . *did not* provide a private judicial remedy"); *see also Abrams, quoting in part Smith v. Robinson*, 468 U.S. 992, 1011-1012; 82 L. Ed. 2d 746; 104 S. Ct. 3457 (1984) ("recognizing a § 1983 action 'would . . . render superfluous most of the detailed procedural protections outlined in the statute'").

II) made it clear that this finality ruling applies in the context of RLUIPA claims. *Murphy II*, *supra* at 349-351. Similarly, this Circuit has held finality is required for equal protection claims to be ripe. *Bannum*, *supra* at 1362-1363 (6th Cir. 1992) (applying *Williamson* finality rule to equal protection claim); *see also Bigelow v. Mich. Dept. of Natural Resources*, 970 F. 2d 154, 158-159 (6th Cir. 1992) ("We interpret *Bannum* as requiring the plaintiffs in this case to meet the same standard of finality for both their equal protection and takings claims"); *Vashi v. Charter Twp.of W. Bloomfield*, 159 F. Supp. 2d 608, 616 (E.D. Mich. 2001), *affirmed* 74 Fed. Appx. 575 (6th Cir. 2003) (attached as Appendix D) (holding that "the 'finality analysis' as applied in *Williamson* is also applicable to equal protection claims and substantive due process claims challenging the application of land use regulations, as well as procedural due process claims which do not challenge the constitutionality of a zoning ordinance.").

In *Murphy II*, the Second Circuit was faced with the issue of whether a cease and desist order issued by the zoning commission violated RLUIPA when it prevented the homeowners from hosting prayer meetings, a clear religious activity. *Id.* at 344. Before reaching the merits of the RLUIPA claim, the court concluded that it must "first consider the ripeness issue" because it is a jurisdictional issue, requiring that the court "presume that we cannot entertain [the plaintiffs'] claims 'unless the contrary appears affirmatively from the record." *Id.* at 347, *citing*

Vandor, Inc. v. Militell, 301 F.3d 37, 38 (2nd Cir. 2002) and *Renne v. Geary*, 501 U.S. 312, 316; 111 S. Ct. 2331; 115 L. Ed. 2d 288 (1991). The "Supreme Court has explained [that] the ripeness doctrine's 'basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Murphy II, supra, quoting Abbott Labs. v. Garnder*, 387 U.S. 136, 148; 87 S. Ct. 1507; 18 L. Ed. 2d 681 (1967).

The ripeness analysis set forth in *Williamson* and applied in *Murphy II* requires a plaintiff "to obtain a final, definitive position as to how it could use the property from the entity charged with implementing the zoning regulations." *Murphy II, supra* at 348, *citing Williamson, supra* at 186. *See also Abbott Labs. v. Gardner*, 387 U.S. 136, 148; 87 S. Ct. 1507 (1967), overruled on other grounds, *Califano v. Sanders,* 430 U.S. 99; 97 S. Ct. 980 (1977); *DLX, supra* at 518. There are at least four reasons for the finality requirement: (1) a final decision from local land use authority is needed to fully develop the record; (2) only once this final decision is obtained may a court know precisely how a regulation will be applied; (3) appeal to the local zoning board might provide the relief sought without requiring judicial entanglement because "requiring a meaningful variance application as a prerequisite to federal litigation enforces the long-standing principle that disputes should be decided on non-constitutional grounds whenever possible; and (4) principles of federalism mean that an exhaustion requirement

"evinces the judiciary's appreciation that land use disputes are uniquely matters of local concern more aptly suited for local resolution." *Murphy II, supra* at 348 and n. 12, *citing Williamson, supra* at 187 and *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288; 56 S. Ct. 466; 80 L. Ed. 2d 688 (1936) (Brandeis, J., concurring)).

As this Court has held:

> What is needed before litigation can proceed in a case such as this is that the proceedings have reached some sort of an impasse and the positions of the parties has been defined. We do not want to encourage litigation that is likely to be solved by further administrative action and we do not want to put barriers to litigation in front of litigants when it is obvious that the process down the administrative road would be waste of time and money. We believe that finality . . . is the appropriate determinant of when litigation may begin. By finality, we mean that the actions of the city were such that further administrative action [by the plaintiff] would not be productive. This test, of course, can be met by exhaustion of remedies. It can also be met by other evidence and can be satisfied prior to compliance with all the required procedures.

Bannum, supra at 1362-1363; *see also Bigelow, supra* at 158.[13] In order for finality to be met (absent a showing of futility which will be discussed *infra*), "at least one meaningful application for a variance" is required. *Murphy II, supra* at

[13] In the context of zoning disputes, the finality rule is especially crucial as this Court has held that "[i]f there are alternative ways of solving a problem, [the federal courts] do not sit to determine which of them is suited to achieve a valid state objective" and it ensures that the Court is not faced with the "temptation" of acting as a "super-zoning board." *Schneck v. City of Hudson*, 114, F.3d 590, 594 (6th Cir. 1997), *citing National Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1129 (7th Cir. 1995) and *Exxon Corp. v. Maryland*, 437 U.S. 117, 121, 125; 98 S. Ct. 2207; 57 L. Ed. 2d 91 (1978).

348, *citing Williamson, supra* at 190 and *McDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352 n. 8; 106 S. Ct. 2561; 91 L. Ed. 2d 285 (1986).

Here, Grace Community conceded at oral argument that it did not seek review before the ZBA (**R. 54, pp. 13-14; J.A. pp. 546-547**). It is also undisputed that pursuant to the Ordinance, the ZBA had the power to fully address Grace Community's concerns. *See* Ordinance §§ 1903, 1904, and 1907 (**R. 28 at Ex. L; J.A. pp. 122-124**). In short, The ZBA has the power to provide Grace Community with relief had it been sought, as the ZBA's had the power to both rescind the revocation of the CDC SUP and the authority to correct any errors in the interpretation of the provisions of the Ordinance (**R. 28 at Ex. L, § 1903; J.A. p. 122**).

Accordingly, it is clear that there was not a final ruling with regard to the CDC SUP before Grace Community sought review in federal court.

b. Futility Was Not Present In This Case.

Finality is not required if the plaintiff can show that further attempts to obtain administrative relief would be futile. *Bannum, supra* at 1362-1363; *see also Bigelow, supra* at 158. As stated in *Murphy II*:

> A property owner . . . will be excused from obtaining a final decision if pursuing an appeal to a zoning board of appeals or seeking a variance would be futile. That is, a property owner need not pursue such applications when a zoning agency lacks discretion to grant variances or has dug in its heels and made clear that all such applications will be denied.

Id. at 349, *citing Southview Assocs., Ltd. V. Bongartz*, 980 F.2d 84, 98-99 (2nd Cir. 1992), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 739; 117 S. Ct. 1659; 137 L. Ed. 2d 980 (1997) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012 n. 3; 112 S. Ct. 2886; 120 L. Ed. 2d 798 (1992).

Here, further administrative review would not have been futile. Grace Community was provided an opportunity to explain to the Planning Commission why the CDC SUP should not be revoked, but Pacey, as Grace Community's representative, chose to stand mute with regard to the allegations (**R. 28, p. 4 and Ex. J; J.A. pp. 44, 110-111**). Further, the record reflects that after returning to the Planning Commission, the CDC SUP was reinstated (Grace Community's Proof Brief, p. 16; **R. 66, 11/26/07 Trans., pp. 8-10; J.A. pp. 884-886;** ***see also*** **R. 58, Township's Response to Grace's Motion for Reconsideration, ¶¶ 1-6 and Exs. 1 & 2; J.A. pp. 827-828, 830-832**). Indeed, Grace Community did not even have to seek ZBA review to obtain the desired relief it sought (***Id.***). Grace Community simply had to confirm that it did not wish to use the CDC for drug and alcohol treatment and that it would cease any advertising that could be construed as a solicitation to individuals seeking drug and alcohol inpatient treatment (**R. 28 at Ex. I; J.A. pp. 96-105**). Once it did, the CDC SUP was reissued.

Based on the undisputed facts, it is clear that neither a final ruling had been obtained nor was further administrative review futile. Accordingly, the District

Court correctly held that Grace Community's claims were unripe based on the rule of finality (**R. 52, pp. 11 – 13; J.A. pp. 530-532**).

4. The Equal Protection Claim Was Properly Dismissed.

Grace Community next argues that the District Court erred by dismissing its equal protection claim (Grace Community's Proof Brief, pp. 30-35). This issue is without merit.

While the District Court did not explicitly discuss Grace Community's equal protection claim in either its initial opinion or on reconsideration, the District Court dismissed Grace Community's case in its entirety (**R. 53, Judgment; J.A. p. 19**). This Court has applied the finality requirement set forth *supra* to equal protection claims based on land use disputes. *Bigelow*, *supra* at 159, *quoting Hoehne v. San Benito County*, 870 F.2d 529, 532 (9th Cir. 1989) ("'the final decision requirement is applicable to . . . equal protection claims brought to challenge the application of land use regulations'"); *see also Bannum*, *supra* at 1365 ("The finality requirement – the requirement that the administrative agency responsible for deciding such matters make a 'conclusive" determination that the land may not be used in the desired manner – is no less applicable to equal protection claims") (*citing Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717, 722 (10th Cir. 1989) and *Harris v. Riverside*, 904 F.2d 497, 500 (9th Cir. 1990)).

Grace Community concedes that the finality requirement of *Williamson*

applies, but incorrectly argues that finality was met. For the reasons set forth above, Grace Community is in error.[14] Accordingly, the Township respectfully requests that this Court affirm the District Court's implicit ruling that the equal protection claim was unripe.

5. The Attorney-Client Privilege Had Not Been Waived.

Grace Community next argues that the District Court erred when it held that the Township had not waived the attorney-client privilege with regard to two letters inadvertently provided to Grace's counsel by Turchi and by providing those two letters (and three others) to its paid planning consultant for purposes of obtaining expert advice (Grace Community's Proof Brief, pp. 35-43). This argument is without merit.

a. Inadvertent Disclosure Did Not Waive The Privilege.

Three lines of authority have evolved with regard to the claim of inadvertent disclosure: (1) the objective approach; (2) the subjective approach; and (3) the intermediate approach. *Fox*, *supra* at 653 (1995). The Eastern District of Michigan applies the intermediate approach, which requires a court to balance the

[14] Grace Community's reliance on *Wedgewood Limited Partnership I. v. Liberty*, 456 F. Supp. 2d 904 (S.D. Ohio 2006) is misplaced, as the plaintiff submitted six variance applications to the zoning commission (which were denied), the zoning inspector denied permit requests, and the plaintiff sought review of the zoning inspector's denial to the BZA. *Id.* at 913-914. As such, this case further establishes the need to seek at least one meaningful appeal or variance before seeking judicial review. *Murphy II*, *supra* at 348.

following factors: (1) the reasonableness of precautions taken in view of the extent of document production; (2) the number of inadvertent disclosures; (3) the magnitude of the disclosure, (4) any measures taken to mitigate the damage of the disclosures, and (5) the overriding interests of justice. *Id.*[15] The District Court properly applied this balancing test to find in favor of the Township (**R. 51, pp. 7-8; J.A. pp. 515-516**).

The Township intended to maintain the confidentiality and privileged nature of the communications with its attorneys. The Township took reasonable precautions, especially considering the extent and time constraints of the document production, to avoid the disclosure of privileged documents. The documents produced in the initial discovery were combed thoroughly. Then, in the minutes before Turchi's deposition, the Township uncovered additional discoverable documents and provided them to its counsel – which required a prompt review of the approximately 250 to 300 documents.[16]

Regrettably, some privileged documents were inadvertently disclosed. In the Township's favor, however, only two privileged documents out of hundreds of

[15] This approach is also followed in the Middle District of Tennessee. *See Edwards v. Whitaker*, 868 F. Supp. 226, 229 (M.D. Tenn. 1994).

[16] Similarly, immediately prior to Birchler's deposition, additional documents were provided for defense counsel review. Again, the Township undertook a privilege review so that it could produce copies of the non-privileged documents to Grace Community on the spot. The privileged documents were removed from the file and held by the Township's counsel, without ever being provided to Grace's counsel.

documents produced were inadvertently disclosed and the Township promptly retrieved the documents.

The fairness considerations also weigh in the Township's favor. The Township took the necessary steps to protect the attorney-client privilege and did not intend a waiver. Intent to maintain the confidentiality is evidenced by the Township's document review before production. It was Grace Community's continual reading of the privileged documents that breached the confidential nature, rather than the Township's counsel's mistake in inadvertently producing the documents. The Township should not suffer from a clerical error.

Based on these undisputed facts, the District Court properly applied the *Fox* factors to find that the privilege had not been waived by the inadvertent disclosure.[17]

b. Birchler Is Covered By The Attorney-Client Privilege.

Grace incorrectly asserts that the Township waived any privilege by virtue of disclosing certain documents to Birchler, the Township planning consultant. As the Township's planning consultant, he acts as an independent contractor on behalf

[17] Plaintiff reliance on *In re Grand Jury Proceedings Oct. 12, 1995,* 78 F.3d 251 (6th Cir. 1996), which involved the waiver of attorney-client privilege by a client who verbally and voluntarily revealed his attorney's legal argument and legal conclusions to third-party investigators, and *Grand Jury Investigation No. 83-2-35,* 723 F.2d 447, 451 (6th Cir. 1983), which dealt with a charge of contempt against an attorney who refused to reveal the identity of his client, are clearly inapplicable.

of the Township. His duties include offering opinions on whether certain proposed uses and/or developments can legally operate in specified locations in the Township. As such, the Township officials, including the Township's General Counsel, rely on Birchler regarding the legality of proposed uses, including Grace's proposed uses.

"Disclosure to a third person with a common interest has been held not to waive privilege when asserted against adversaries." *Fox*, *supra* at 670-671 (1995). "The attorney-client privilege is not waived through a communication to a third party where it is made in furtherance of legal services." *Id.* (holding that sharing of a benefit plan analysis, including confidential communications, legal advice, and advice regarding the current state of the law, with the actuarial consultant did not waive the privilege).

The Eighth Circuit has specifically held "that when applying the attorney-client privilege to a corporation or partnership, it is inappropriate to distinguish between those on the client's payroll and those who are instead, and for whatever reason, employed as independent contractors." *In re Bieter Co.*, 16 F. 3d 929, 937 (8th Cir. 1994), *citing Upjohn v. United States*, 449 U.S. 383; 66 L. Ed. 2d 584; 101 S. Ct. 677 (1981). In *FTC v. Glaxosmithkline*, 294 F.3d 141, 148 (D.C. Cir. 2002), the D.C. Circuit concluded that the attorney-client privilege "extends also to . . .

communications [with the client's] public relations and government affairs consultants."[18]

Here, there is no question that the privileged documents were provided to Birchler in his role as a planning consultant for the Township for the express purpose of obtaining his expert opinion with regard to legality of Grace Community's proposed uses within the specified zoning district. Accordingly, the attorney-client privilege was not waived as Birchler and the Township shared a common interest and because Birchler was an independent contractor of the Township. Accordingly, the District Court correctly held that the attorney-client privilege had not been waived.[19]

B. Even If Grace Community's Case Was Ripe, The Township Is Still Entitled To Summary Judgment On The Merits.

The District Court's dismissal of Grace Community's case in its entirety may also be affirmed on the alternative grounds that Grace failed to create a genuine issue of material fact with regard to either its RLUIPA or equal protection

[18] *See also Horton v. United States*, 204 F.R.D. 670, 672 (D. Co. 2002); *Viacom, Inc. v. Sumitomo Corp*, 200 F.R.D. 213, 219 (S.D.N.Y. 2001).

[19] Further, assuming the District Court erred and the attorney-client privilege was waived, due to Grace Community's failure to obtain a final decision from the Township (which was in its favor following the dismissal of this case), any error regarding this issue would have been harmless, as the letters in no way establish ripeness. Should the Court find it necessary to review these documents, they are available for an in camera review.

Claim.[20]

1. Grace Failed To Establish A Prima Facie RLUIPA Violation.

As a threshold matter, Grace was never denied the use of the property for church activities and all ancillary activities, including worship, education, counseling, fellowship, and community outreach. Rather, Grace simply was unable to use the CDC for the revenue generating residential purposes of overnight stays.

RLUIPA prohibits land use regulations that: (1) impose a substantial burden; (2) on a religious belief. 42 U.S.C. § 2000cc(a)(1).[21] This does not, however, permit a religious organization to disregard land use regulations.

> This Act does not provide religious institutions with immunity from land use regulation, **nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations**, where available without discrimination and unfair delay.

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[20] While not decided by the District Court, this Court has jurisdiction over these issues as the issues were fully briefed and argued below. *See Hammon v. DHL Airways, Inc.*, 165 F.3d 441, 445 (6th Cir. 1999) ("an appellate court may affirm a district court where the district court reached the right result for the wrong reason"); *United States v. Ellison*, 462 F.3d 557, 560 (6th Cir. 2006), *citing Pinney Dock and Transport Co. v. Penn. Central Corp.*, 838 F.2d 1445, 1446 (6th Cir. 1988) (court should consider legal issues that "the parties fully briefed [when] the issue [] is 'presented with sufficient clarity and completeness' to ensure a proper resolution," there is no danger of prejudice to the parties, and there is no need for additional development of the record). This is precisely the case before the Court.

[21] Additionally, a RLUIPA plaintiff must establish one of the three jurisdictional requirements under. 42 U.S.C. § 2000cc(a)(2)(A) through (C). The Township has never conceded that Grace met these requirements.

146 Cong Rec § 7774 (July 27, 2000) (emphasis added).

For RLUIPA to be implicated, the religious exercise does not need to be central to plaintiff's system of belief, but it must be a "sincerely held" religious belief. *Episcopal Student Found., d/b/a Canterbury House v. City of Ann Arbor,* 341 F. Supp.2d 691, 700 (E.D. Mich. 2004); *Living Water Church of God v. Charter Twp. of Meridian*, 384 F. Supp.2d 1123, 1133 (W.D. Mich. 2005); *Shepherd Montessori Center v. Ann Arbor Charter Twp.*, 259 Mich. App. 315; 675 N.W.2d 271 (2003).

A plaintiff bears the burden of proving each of the elements of a RLUIPA claim. 42 U.S.C. 2000cc-2(b). Grace Community cannot establish that the Township imposed a substantial burden on its sincerely held religious exercise.

The Sixth Circuit has long held that actions that regulate non-religious activities of a religious entity should not be construed as infringing on religion simply because the regulation makes the desired act more costly:

> **A zoning act is valid and constitutional where it "simply regulates a *secular activity* and, as applied to the appellants, operates so as to make the practice of their religious beliefs *more expensive.*"** It does not pressure the Congregation to abandon its religious beliefs through financial or criminal penalties. Neither does the ordinance tax the Congregation's exercise of its religion. Despite the ordinance's financial and aesthetical imposition on the Congregation, we hold that the Congregation's freedom of religion, as protected by the Free Exercise Clause, has not been infringed.

Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood,

699 F.2d 303, 307 (6th. Cir. 1983) (emphasis added), *quoting Braunfield v. Brown,* 366 U.S. 599, 605; 81 S. Ct. 1144 (1961)); *see also Living Water*, *supra* at 1133, *quoting Shepherd Montessori Center*, *supra* at 330 ("For a burden on religion to be substantial under RLUIPA, 'the government regulation must compel action or inaction with respect to the sincerely held belief; mere inconvenience to the religious institution or adherent is insufficient'").

In *The Cathedral Church of the Intercessor v. Village of Malverne*, 353 F.Supp.2d 375 (E.D.N.Y. 2005), the court found that plaintiff's use of a building was not a "religious exercise" because it was being used primarily for administrative offices, even though the sanctuary areas was also being expanded. *Id.* at 390. Important to the court's holding was its analysis of RLUIPA's legislative history.

> '[N]ot every activity carried out by a religious entity or individual constitutes "religious exercise." In many cases, real property is used by religious institutions for purposes comparable to those carried out by other institutions"... **Simply because the Church is a religious institution does not mean it receives an unencumbered right to zoning approval for non-religious uses.**

Id. at 390-91, *quoting* 146 Cong. Rec. §7774-01 (July 27, 2000) (emphasis added).

Recently, in *The Greater Bible Temple of Jackson v. City of Jackson*, 478 Mich. 373; 733 N.W.2d 734 (2007), the Michigan Supreme Court held that the operation of an apartment complex was not a "religious exercise" for the purposes of RLUIPA. Plaintiff's sole evidence that the complex was a "religious exercise"

was an affidavit from the bishop of the plaintiff church. *Id.* at 343; 733 N.W. at 746. The court found that this evidence alone was insufficient to establish that the apartment complex constituted a "religious exercise" and, thus, failed to establish a RLUIPA violation. *Id.* at 394.

Moreover, in *Canterbury*, *supra* at 704-706, the court held that there is no substantial burden on a plaintiff's religious exercise under RLUIPA where there are other feasible practical alternatives available to the plaintiff. There, the plaintiff sought relief under RLUIPA by alleging that the City's denial of an application to demolish and reconstruct a church amounted to a substantial burden. Specifically, plaintiff desired to enlarge its facility so that it could, "provid[e] a spiritual community for its members, creat[e] a progressive and creative worship experience for its members, offer[] meditation, prayer and study groups for its members, and continually work[] to welcome new members into the congregation." *Id.* at 695. When the City denied the plaintiff's permit application, it sued alleging violations of RLUIPA. The court disagreed. Pointing to the severity contemplated by the United Supreme Court and the Sixth Circuit, the court granted the City summary judgment. Specifically, the Court found the City's zoning requirements did not "preclude [plaintiff] from fulfilling its religious mission through worship as a whole, or through its various other activities, in other locations throughout the city." *Id.* at 704. *See also Lakewood*, *supra*, at 307.

The rule of what constitutes a substantial burden can be synthesized as an imposition of severe, life threatening economic[22] or criminal sanctions[23] that "require [a plaintiff] to choose between [its] religious beliefs and receiving a governmental benefit,"[24] where the plaintiff has no other feasible practical alternatives;[25] but incidental effects or "mere inconvenience is not enough."[26] As the Supreme Court stated, a "'substantial burden' is something that 'coerce[s] individuals into acting contrary to their religious beliefs ...'"[27]

Here, Grace Community has characterized the CDC as a classroom environment that would not be used for drug and alcohol counseling (**R. 28 at Ex. A; J.A. pp. 63-64**). Like the plaintiff in *The Greater Bible Way*, Grace has offered no evidence other than an affidavit (**R. 28 at Ex. N; J.A. pp. 127-129**). In fact, Rev. Pacey described the "religious exercise" conducted at Plaintiff's other locations, which is nothing more than four or five individuals housed in a mobile home who receive spiritual guidance ("group therapy") for a total of 90 minutes per week, plus transportation to local jobs. For this "religious exercise," Plaintiff is paid a fee of $100 - $200 per week from each individual. (**R. 28 at Ex. Q,**

[22] *Locke v. Davey*, 540 U.S. 712; 124 S. Ct. 1307, 1308; 158 L. Ed. 2d 1 (2004).
[23] *Lakewood, supra* at 307.
[24] *Locke*, *supra* at 1308.
[25] *Canterbury*, *supra* at 705.
[26] *Shepherd*, *supra* at 330 (citation omitted).
[27] *The Greater Bible Way*, *supra* at , *quoting Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439, 450; 108 S. Ct. 1319; 99 L. Ed. 2d 534 (1988).

Pacey Dep., pp. 37-39; J.A. pp. 170-172). This is insufficient, especially when Grace could provide education, counseling and spiritual guidance at the property pursuant to the Church SUP, and could also provide overnight accommodations (at a price) at any of its other locations.

As such, the Township's revocation of the CDC SUP did not create a "substantial burden" on a "religious exercise" under RLUIPA, as (1) Grace could provide spiritual counseling, education, and worship on the property pursuant to the Church SUP; (2) it had the option to continue to house individuals at its six other locations, which would provide them with revenue and would be a practical alternative that would provide merely an inconvenience. *See Canterbury, supra* at 704 ("there is no indication that [plaintiff] is precluded from fulfilling its religious mission through worship as a whole, or through its various other activities, in other [nearby] locations"); *see also Lakewood, supra* at 307.

Based on this undisputed evidence and case law, it is without question that the Township's actions do not rise to the level of a substantial burden as defined by the United States Supreme Court and the Sixth Circuit. Like the plaintiffs in *Canterbury* and *Lakewood,* any effects felt by Grace amount to nothing more than a mere inconvenience or an incidental effect. *Living Water,* at 1133; *Canterbury,* at 330.

2. Grace Failed To Establish An Equal Protection Violation.

Grace has also failed to establish an equal protection claim.

"An inference of religious discrimination based upon disparate treatment requires evidence that a party was treated differently from a similarly situated party with a different religious affiliation." *Prater v. City of Burnside*, 289 F.3d 417, 429 (6th Cir. 2002), *quoting Vandiver v. Hardin County Bd. of Educ.*, 925 F.2d 927, 934 (6th Cir. 1991). Grace Community asserted that it is (1) similarly situated to the Archdiocese of Detroit, apparently a previous owner of the property, and (2) that it was treated differently than the Archdioceses. "Discrimination may not be inferred, however, simply because a public program is incompatible with a religious organization's spiritual priorities." *Prater*, *supra* at 428-429.

In *Prater*, plaintiff-church alleged an equal protection violation when the city chose to improve a road rather than close it, which plaintiff asserted favored a Mason organization over plaintiff. In affirming summary judgment in favor of the defendant, this Court stated:

> Discrimination may not be inferred, however, simply because a public program is incompatible with a religious organization's spiritual priorities ... **The Church, therefore, must show more than disparate impact in order to prove discriminatory animus on the part of the City.**

Id. at 429 (citations omitted) (emphasis added).

Grace and the Archdioceses are not similarly situated. According to Grace,

the Archdioceses used the subject land to house monks and priests, and to teach the Catholic faith (**R. 1, Complaint, ¶24; J.A. p. 14**). Here, Grace was also permitted to house individuals at the CDC for purposes of spiritual guidance. Assuming that the Archdioceses used the land as Plaintiff contends, it did so under an approved SUP. There is no evidence that the Archdioceses housed individuals for drug or alcohol treatment or received court referrals for such purposes. The CDC SUP was only revoked due to the good faith belief that Grace was using the premises for drug and alcohol treatment and Grace's failure to correct that good faith belief, despite given the opportunity. Accordingly, even assuming Grace was similarly situated to the Archdioceses, the revocation was based on Grace's failure to adhere to the CDC SUP – conditions that certainly make Grace not similarly situated to the Archodioceses.

Further, to establish a "class of one" claim, a plaintiff has the burden of proving that: (1) the plaintiff was intentionally treated differently from others similarly situated; (2) there was no rational basis related to a legitimate governmental interest for the difference in treatment; and (3) the different treatment was the result of acts or decisions made or ratified by one of the defendants who had the authority to set the policy with respect to that treatment. *Willowbrook v. Olech,* 528 U.S. 562; 120 S.Ct. 1073; 145 L.Ed.2d 1060 (2000).

Here, (1) the Township approved the Church SUP within 3 months of

application; (2) the Township approved the CDC SUP with the agreed upon conditions, including permitting Plaintiff to house fifteen (15) residents with the possibility of increasing that number by two (2) at six-month intervals; (3) the Township received information that Grace was violating some of the conditions; (4) Plaintiff refused to show cause why the CDC SUP should not be revoked; (5) faced with un-rebutted evidence of violations, the CDC SUP was revoked;[28] and (6) Grace did not appeal or pursue the available administrative remedies it had in an effort to rescind the revocation until after the instant lawsuit was dismissed.

3. Grace's Money Claims Also Fail.[29]

Grace Community has conceded that it failed to state a viable state claim (**R. 26, Motion To Amend**). Nonetheless, even without this concession, the Township is entitled to summary judgment with regard to the state claims.

First, Michigan, like federal courts, require finality before bringing a lawsuit regarding a land use dispute.

In the present case, plaintiffs allege that as a result of the licensing

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[28] Based on the un-rebutted facts known to the Township at the time of the revocation, Grace cannot prove that the revocation of the DTC SUP was arbitrary and capricious. In a zoning context, "arbitrary and capricious" is akin to the "shock the conscience" test applied in use of force cases. *McDonald's Corp. v. City of Norton Shores,* 102 F.Supp.2d 431, 437 (W.D. Mich. 2000); *see also Berger v. City of Mayfield Heights*, 154 F.3d 621, 624 (6th Cir. 1998); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1215-1216 (6th Cir. 1992).

[29] As discussed *supra* at n. 1, Grace failed to raise this issues below or on appeal and therefore the Township respectfully argues that these claims have been waived, forfeited or abandoned.

> process, plaintiffs suffered constitutional violations. However, it is significant that plaintiffs never pursued any licensing determination to finality. Consequently, the board never denied plaintiffs any license. . . . Thus, the board was not afforded the opportunity to correct any errors that may have occurred in the preliminary proceedings. **It is presumed that an administrative agency will correct its errors if given a chance to do so. We therefore conclude that plaintiffs were required to exhaust administrative remedies notwithstanding their claims of constitutional violations.**

Papas v. Mich. Gaming Control Bd., 257 Mich. App. 647, 664-65; 669 N.W.2d 326 (2003) (Internal citations omitted) (emphasis added).

Similarly, in *Paragon Properties Co. v. Novi*, 452 Mich. 568, 571 n. 12 - 581; 550 N.W.2d 772 (1996), the Michigan Supreme Court noted the importance of ripeness in land use disputes.

> In land use challenges, the doctrine of ripeness is intended to avoid premature adjudication or review of administrative action. It rests upon the idea that courts should not decide the impact of regulation until the full extent of the regulation has been finally fixed and the harm caused by it is measurable.
>
> The City of Novi's denial of Paragon's rezoning request is not a final decision because, absent a request for a variance, there is no information regarding the potential uses of the property that might have been permitted, nor, therefore, is there information regarding the extent of the injury Paragon may have suffered as a result of the ordinance. **While, the city council's denial of rezoning is certainly a decision, it is not a final decision under *Electro-Tech*[30] because had Paragon petitioned for a land use variance, Paragon might have been eligible for alternative relief for the provisions of the ordinance.**

[Emphasis added].

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[30] *Electro-Tech, Inc. v. HF Campbell Co.*, 433 Mich. 57, 81-91; 445 N.W.2d 61 (1989).

Second, notwithstanding the issues of abandonment, waiver, forfeiture, ripeness and finality, Grace's state law claims were appropriately dismissed because Grace cannot prove that the Township's decision "preclude[d] [Grace's property's] use for any purpose to which it is reasonably adapted," *Belle River Assoc v. China Township*, 223 Mich. App. 124, 133; 565 N.W.2d 695 (1997) or "that the ordinance is unreasonable because it comprises an arbitrary, capricious, and unfounded exclusion of other types of valid land use from the subject area." *Bevan v. Brandon Twp.*, 438 Mich. 385, 402-403; 475 N.W.2d 37 (1991). In addition, governmental immunity bars Grace's tortious interference with an economic advantage claim.[31]

Accordingly, the District Court appropriately dismissed Grace's state law claims.

[31] MCL 691.1407(1) ("Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function."); *Rochester Hills v. Six Star*, 167 Mich. App. 703, 708; 423 N.W.2d 322 (1988) (City was entitled to summary disposition based on governmental immunity because the "enforcement of its zoning ordinance was a governmental function for which it was immune").

CONCLUSION AND RELIEF SOUGHT

The District Court properly held that Grace Community's claims were unripe. Thus, the District Court appropriately dismissed Grace Community's case in its entirety.

The District Court also properly held that the Township did not waive attorney-client privilege through the inadvertent disclosure of five letters by Township officials.

Alternatively, even assuming Grace Community's claims were ripe for review, dismissal was still appropriate as there was no genuine issue of material fact and Grace failed to establish a prima facie case with regard to any of its claims.

Accordingly, the Township respectfully requests that this Court affirm the decisions of the District Court.

Respectfully submitted:

KUPELIAN ORMOND & MAGY, P.C.

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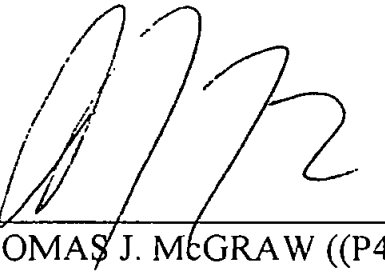
CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(7)(B) & (C) and 6 Cir. R. 32(a), I hereby certify that the foregoing Proof Brief meets the type volume requirements. It was processed in Microsoft Word using 14 pt. Times New Roman font. The brief contains 13,427 words.



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Dated: April 25, 2008

APPELLEE'S DESIGNATION OF JOINT APPENDIX DOCUMENTS

Appellee, pursuant to 6. Cir. R. 30(b), hereby designates the following filings in the District Court as items to be included in the joint appendix:

DESCRIPTION OF ITEM	RECORD NUMBER	FILE DATE
Docket Entries		
Complaint	1	08/07/06
Township's Motion for Summary Judgment with Exhibits A-Q	28	07/23/07
Grace Community's Motion for Partial Summary Judgment With All Referenced Exhibits	29	07/23/07
Township's Response to Grace Community's Motion for Partial Summary Judgment with All Reference Exhibits	31	07/30/07
Township's Reply Brief In Support of Motion for Summary Judgment with All Referenced Exhibits	33	08/02/07
Affidavit of Rev. William Pacey	35	08/02/07
Motion to Compel Waived Attorney Client Documents With All Referenced Exhibits	42	08/13/07
Grace's Motion To Supplement It's Brief In Support of Its Motion To Compel With All Referenced Exhibits	48	08/18/07

Township's Response To Motion To Compel Waived Attorney Client Documents	50	08/31/07
Opinion and Order Denying Motion To Compel	51	08/31/07
Opinion and Order Granting Summary Judgment to Defendants and Denying Plaintiff's Motion to Amend her Complaint	52	11/21/2006
Transcript of Motion Hearing Held on 8/24/07	54	8/31/2007
Transcript of Motion Hearing Held On 8/28/07	55	09/11/07
Grace's Motion For Reconsideration On Summary Judgment	56	09/14/07
Grace's Motion For Reconsideration Re: The Attorney-Client Privileged Documents	57	09/17/07
Township's Response To Grace's Motion For Reconsideration With All Referenced Exhibits	58	09/19/07
9/24/07 Planning Commission Transcript	60	09/24/07
Opinion and Order Motions for Reconsideration	61	11/02/07
10/22/07 Planning Commission Public Hearing Transcript	66	04/07/08
11/26/07 Planning Commission Meeting Transcript	66	04/07/08

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2008, I mailed by U.S. First Class Mail to the Clerk's Office of the United States Court of Appeals for the Sixth Circuit the required copies of this FINAL BRIEF OF APPELLEE LENOX TOWNSHP, ORAL ARGUMENT REQUESTED, and this CERTIFICATE OF SERVICE and further certify that I served a copy of same on the below-listed persons and counsel of record:

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by U.S. Mail by placing same in envelopes so addressed, sealed and depositing with the United States Mail in Southfield, Michigan.

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Dated: April 25, 2008

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