

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MILES CHRISTI RELIGIOUS ORDER,
FATHER CESAR BERTOLACCI, and
BROTHER FRANCISCO CONTE-GRAND,

Plaintiffs,

Case No.: 07-14003
HON: PAUL D. BORMAN

-vs-

NORTHVILLE TOWNSHIP; CHIP SNIDER,
individually and in his official capacity as
Northville Township Manager; JENNIFER
FREY, individually and in her official
capacity as the Director of Community
Development for Northville Township; and
JOSEPH BAUER, individually and in his
official capacity as Ordinance Enforcement
Officer for Northville Township,

Defendants.

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**DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER
JURISDICTION BASED ON THE RIPENESS DOCTRINE**

Defendants, NORTHVILLE TOWNSHIP, CHIP SNIDER, JENNIFER FREY, and JOSEPH BAUER, through their attorneys, JOHNSON, ROSATI, LaBARGE, ASELTINE & FIELD, P.C., move this Court pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6) and 12(c) to grant their Motion to Dismiss for Lack of Subject Matter Jurisdiction Based on the Ripeness Doctrine, and in support Defendants state the following:

1. This lawsuit arises out of Defendant Charter Township of Northville's attempt to have Plaintiff Miles Christi Religious Order follow the Township's site plan review and variance procedures in response to evidence that Miles Christi had changed the use of its Property from a purely residential use to a more intensive non-residential use resembling a small church or place of worship. Plaintiffs allege that the Township Defendants' actions violated several provisions of RLUIPA and their rights to free religious exercise, free speech, free assembly and expressive association, due process, and equal protection under the United States and Michigan Constitutions.

2. This Court lacks subject matter jurisdiction over Plaintiffs' claims because Plaintiffs' claims are not yet ripe for adjudication.

3. In their First Amended Complaint, Plaintiffs' attempt to assert various federal and state claims which arise of out of land use issues.

4. First Amendment and other constitutional challenges to land use decisions are subject to the ripeness requirements, specifically including the requirement that Plaintiffs obtain a final definitive decision from the Township regarding how the Township's zoning ordinances pertaining to changes in use, site plan review, off-street parking, landscaping, and setbacks are applied to the Miles Christi Property located at 49744 Seven Mile Road, Northville Township, Michigan.

5. Plaintiffs have not yet ripened their claims because they have not satisfied the *Williamson* ripeness requirements. Specifically, Plaintiffs have not yet obtained a final decision from the Township regarding how Plaintiffs will be permitted to use their Property or how the Township's ordinances apply to the Property.

6. Despite their disagreement with the Township's, specifically Jennifer Frey's, determination that the use of the Miles Christi Property changed from a residential use to a more intensive non-residential use resembling a small church or place of worship as demonstrated by complaints and evidence of an increased need for parking, an increase in vehicle traffic at the Property, noise and other similar impacts, Plaintiffs have never appealed this decision to the Township's Zoning Board of Appeals. A ZBA appeal is a non-constitutional avenue for resolving this dispute which Plaintiffs have refused to utilize.

7. Plaintiffs are not exempt or immune from having to follow the Township's site plan review procedures or from having to obtain necessary variances simply because they disagree with the Township's designation of the Miles Christi Property as a small church or place of worship or because of their religious beliefs.

8. Plaintiffs have not yet suffered a sufficiently concrete injury to ripen their claims. Plaintiffs' uses of the Property are permitted under the Township's Zoning Ordinances, and Plaintiffs continue to celebrate Mass daily with up to 18 "friends" and to host six weekly Bible study groups at the Property.

9. Plaintiffs are required to follow the available Township procedures to establish a concrete injury and ripen their claims by obtaining a final definitive decision from the Township regarding the nature and extent of the regulation on the Property which will determine what, if any, modifications must be made to the Property and how the Property can be used.

10. Because Plaintiffs refused to submit a site plan as required under the Township's site plan review procedures contained in Township Zoning Ordinance Section 170-33.3 (which was triggered by the change in use as determined by the criteria in Zoning Ordinance §170-33.2), the Township issued a civil infraction ticket to Plaintiff Miles Christi for failure to follow the Township's site plan review procedures.

11. The civil infraction ticket is still pending in the 35th District Court following Wayne County Circuit Court Judge Wendy Baxter's reversal of 35th District Court Judge Michael Gerou's earlier entry of a directed verdict in favor of Miles Christi and order remanding the case for further proceedings. Judge Baxter's Opinion found that the Township presented ample evidence that the use of the Property changed from a residential use to a use resembling a place of assembly or a church and reversed the directed verdict. Judge Baxter's Opinion also found that §170-33.2 was not unconstitutionally vague.

12. The remanded civil infraction ticket proceeding will determine whether Plaintiff violated the Township's Zoning Ordinance when it refused to submit a site plan as required and whether Miles Christi is required to follow the Township's site plan review procedures in Article 33 of the Township's Zoning Ordinance. Until the 35th District Court fully adjudicates the civil infraction ticket, the question of whether Miles Christi is required to submit a site plan remains undecided and Plaintiffs have not yet suffered a sufficiently concrete injury or otherwise fully explored the nature and extent of their alleged injuries.

13. However, a resolution of the 35th District Court proceeding will not be a final decision regarding the extent of the regulation on Plaintiffs' Property. If the 35th District Court finds that Miles Christi violated §170-33.3 of the Township's Zoning Ordinance and requires Miles Christi to submit a site plan, then Miles Christi must obtain a final definitive decision from the Township after completing the Township's site plan review procedures and requesting the

necessary variances. Until Plaintiffs complete the site plan review and variance processes, Plaintiffs' claims are not ripe for review by this Court.

14. Plaintiffs' challenge the Township's authority to determine that its Zoning Ordinances and other land use regulations apply to the Miles Christi Property; they claim that simply having to go through the Township's site plan review process violates their rights under the First and Fourteenth Amendments. Plaintiffs should not be allowed to circumvent the Township's procedures simply because they disagree with the Township's application of its ordinances to the Property.

15. Plaintiffs have not yet allowed the Township the opportunity to determine precisely how the Township's Zoning Ordinances and land use regulations will be applied to the Miles Christi Property. Because Plaintiffs have not yet obtained a final decision from the Township regarding the extent of the regulation on the Property or pursued their available local and state law remedies to completion, their claims are not yet ripe and this Court lacks subject matter jurisdiction and Plaintiffs' First Amended Complaint should be dismissed.

16. Concurrence in this Motion was sought and refused thus making the filing of this Motion necessary.

Defendants, NORTHVILLE TOWNSHIP, CHIP SNIDER, JENNIFER FREY, and JOSEPH BAUER, respectfully request that this Court grant their Motion to Dismiss for Lack of Subject Matter Jurisdiction Based on the Ripeness Doctrine, and award costs and attorney fees.

Respectfully submitted,

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DATED: October 7, 2008

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ISSUES PRESENTED

I. HAVE PLAINTIFFS OBTAINED A FINAL AND DEFINITIVE DECISION FROM THE TOWNSHIP REGARDING THE NATURE AND EXTENT OF THE REGULATION ON THE PROPERTY, WHAT MODIFICATIONS ARE REQUIRED, AND HOW THE PROPERTY CAN BE USED?

Defendants: NO
Plaintiffs: YES

II. HAVE PLAINTIFFS PURSUED THEIR AVAILABLE LOCAL AND STATE LAW REMEDIES TO COMPLETION?

Defendants: NO
Plaintiffs: YES

III. ARE PLAINTIFFS' CLAIMS RIPE FOR ADJUDICATION BY THIS COURT?

Defendants: NO
Plaintiffs: YES

IV. DOES THIS COURT HAVE SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS?

Defendants: NO
Plaintiffs: YES

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Williamson County Regional Planning Commission v Hamilton Bank of Johnson City, 473 US 172, 105 S Ct 3108, 87 L Ed 2d 126 (1985).

Insomnia Inc v City of Memphis, 2008 WL 2121053, pp 4-6 (6th Cir unpublished).

Murphy v New Milford Zoning Com'n, 402 F3d 342, 349-351 (2nd Cir 2005).

STATEMENT OF FACTS

The Property which is the subject of this lawsuit is an approximately one-acre parcel located at 49744 Seven Mile Road in Northville Township (the "Property"). The Property contains a two-story frame house and is zoned R-2, One Family Residential, under the Township's Zoning Ordinance. (Ex A - Survey; Ex B - Zoning Map). All surrounding parcels have residential zoning and are used for single-family residential purposes. (Zoning Map). Gerald and Gail LeVan (the "LeVans") own the property surrounding the Plaintiffs' Property. (Ex C - location map; Ex I - Gail LeVan, Tr Vol 1, p 109).¹ Miles Christi is an international Catholic order composed of priests and brothers who devote themselves to the spiritual growth of people through retreats and conferences and which is incorporated under the laws of Michigan and designated as a 501(c)(3) organization by the IRS. (1st Am Cplnt, ¶6). According to Plaintiffs, they received the Property in 2002 when the Daughters of Our Lady of Providence donated the Property to them. (1st Am Cplnt, ¶¶7-8). On August 8, 2002, the Archdiocese of Detroit authorized the establishment of an oratory of Miles Christi Institute in the house on the Property and authorized the limited celebration of the Holy Eucharist and Sacrament of Penance in the chapel. (1st Am Cplnt, ¶25; Ex D - Cardinal Maida letter 8/8/02).

Starting as early as February 24, 2003, the LeVans and other neighboring residents inquired whether Miles Christi had permits for the work being performed on the Property, and they began complaining about Miles Christi's use of the Property and the number of vehicles parked on the Property at times. (Ex E - Resident complaint letters; but see, Ex X - Gerald LeVan Dep, p 224). Although the Township investigated and no problems were initially noted, the neighbors continued to complain about Miles Christi's activities, and in response to these

¹ References to the transcripts of the 35th District formal hearing held on September 12 and 24, 2007 are cited in the following format throughout the Brief: "[Witness name], Tr Vol __, p __." Volume 1 contains a transcript of the September 12th proceedings and Volume 2 contains a transcript of the September 24th proceedings.

complaints the Township's Ordinance Enforcement Official, Joseph Bauer, occasionally observed the Property when driving by the Property in the performance of his other duties. (1st Am Cplnt, ¶¶40-51; Ex S2 - Bauer, Tr Vol 1, pp 60-65, 85-86; Ex F - Field notes).

On March 10, 2003, Plaintiff Father Cesar Bertolacci, Miles Christi Superior, wrote a letter to the Township Clerk introducing the Miles Christi Religious Order and describing its activities. (Ex G - Miles Christi letter 3/10/03). Father Bertolacci stated that the Property was meant to be the private residence for the Priests and Brothers of Miles Christi, and he stated that the house was not to function as a parish, but that Mass would be held daily in the chapel which could seat 10 people and that only family and close friends would attend. (Ex G). He also informed the Township that occasionally there would be other small unspecified activities held at the Property for up to 10 friends and supporters of Miles Christi but that these events were not open to the public and not held on a regular basis. (Ex G). Following receipt of this introduction letter, the Township advised neighboring residents that Miles Christi's use of the Property as a private residence was permitted under the Zoning Ordinance. (Ex H - Twp letter to residents 3/18/03; Ex CC - Osiecki Dep, pp 11-15, 98, 108-109, 113-116).

Throughout the latter part of 2006 and January 2007, the LeVans renewed their complaints about the number of cars parked at the Property and the amount and frequency of vehicles entering and leaving the Property and claimed that outwardly visible activity at the Property had intensified. (Ex T - Gail LeVan, Tr Vol 1, pp 112, 130-136; Ex X - Gerald LeVan Dep, pp 117-125, 224-239, 251-254 and dep exs 7, 32). The LeVans complained of seeing children being dropped off at the Property at various times throughout the day, and they also questioned whether the Property was still be used as a residence. (Gail LeVan, Tr Vol 1, pp 114-115, 135; Ex X - Gerald LeVan Dep, pp 224-239, 251-254; Ex AA - Bauer Dep, p 246 and dep exs 19-20). The LeVans complained that the Priests were no longer living at the Property, and

that the Property was being used only during the day. (*Id.*). On February 7, 2007, Joe Bauer went to the Property and met with representatives of Miles Christi, including Father Bertolacci and Brother Conte-Grand. (1st Am Cplnt, ¶154; Ex Y - Conte-Grand Dep, pp 43-47). He advised them of the neighbors' complaints regarding the number of vehicles parked at the Property, the frequency of traffic entering and leaving the Property, and the hours of operation. (Conte-Grand Dep, pp 43-47; Bauer Dep, pp 254-260, 266-267). While in the house, he picked up fliers announcing regularly scheduled boys' and girls' Bible study groups at the Property. (Exs S1 and S2 - Bauer, Tr Vol 1, pp18-25, 39-40, 76; Bauer Dep, pp 138, 255-260, 311-316; Ex I - Bible Study Fliers).

On February 27, 2007, Mr. Bauer wrote a letter to Father Bertolacci, confirming his February 7th visit which stated, in part:

The Planning Department was advised of my findings, and recommended monitoring the parking situation to determine if compliance with the parking ordinance during Sunday Mass, and other events, was sufficient to comply with the ordinance.

Follow-up observations of the parking conditions revealed during Sunday Mass, vehicles were parked on grassy areas, in violation of the ordinance that regulates this matter.

Therefore, I am requesting from you a letter that describes the measurements of the St. Ignatius Chapel (room size, pew measurements and seating capacity). Additionally, an operations plan describing activities is needed to determine if the present amount of parking is sufficient so vehicles do not park on grassy areas. (Ex J - Bauer letter 2/27/07).

Father Bertolacci responded with correspondence dated March 1, 2007, in which he advised that the chapel was 20 feet by 15 feet, with six pews each, at 36 inches in length, and had a capacity of 18 people. (Ex K - Bertolacci letter 3/1/07; 1st Am Cplnt, ¶158). He stated that faith-based groups met regularly during the week, that volunteer opportunities also took place during the week, and that "generally" there were no more than 10 people at the house at one time with the volunteer activities, including the members of Miles Christi. (Ex K). The

information Father Bertolacci provided regarding the uses, activities, and number of people involved in the religious activities was inconsistent with the information he had previously provided to the Township (e.g., increase in the capacity of the chapel from 10 people to 18 people between 2003 and 2007), and the new information indicated a change to a more intensive non-residential use. (Compare Ex G - Miles Christi letter 3/10/03 to Ex K - Bertolacci letter 3/1/07).

On March 23, 2007, the three individually named Defendants, Township Manager, Chip Snider, Community Planning Director Jennifer Frey, and Ordinance Enforcement Official Joseph Bauer, met with Father Bertolacci and Brother Conte-Grand to discuss the situation including the neighbors' complaints, potential ordinance violations, and possible resolutions. (1st Am Cplnt, ¶¶59-62). During this meeting, the Township advised Plaintiffs that the uses of the Property as described in Father Bertolacci's letter resembled a small church or place of worship as defined in the Township's Zoning Ordinance and that these religious activities were permitted uses under the Property's zoning. (Ex V2 - J Frey, Tr Vol 2, p 54; Ex BB - Frey Dep, pp 152-176 and dep exs 19, 20, 21; Ex Y - Conte-Grand Dep, pp 7-10; Ex L - Frey Memo; Ex HH - Zoning Ord §170-33.2 and 33.3). Father Bertolacci disagreed with Ms. Frey's characterization of their Property as a church or place of worship despite their acknowledgement that the house on the Property contained a chapel and Plaintiffs' used the Property for celebrating Mass daily and hosting six (6) regularly scheduled Bible study groups each week as well as volunteer activities to benefit the Miles Christi Religious Order. (*Id.*; Frey Dep, p 167; Ex Z - Bertolacci Dep, pp 30-43; Ex JJ - Zoning Ord Art 44 - definition of church, temple or other place of worship; Ex R). Notwithstanding the disagreement as to the character of Plaintiffs' use of the Property, the parties discussed the size of the chapel, the type and frequency of activities occurring on the Property, and the number of people involved in the activities at the Property. (Ex Z - Bertolacci

Dep, pp 30-43; Ex L - Frey Memo). Father Bertolacci indicated that there could be up to 20-22 people at the house, but this was not frequent. (Frey Memo).²

Ms. Frey informed Plaintiffs that she believed the use of the Property had changed from a purely residential use to a more intensive non-residential use resembling a small church or place of worship and that Miles Christi would have to comply with the Zoning Ordinance and provide enough parking spaces to accommodate the maximum number of people that could be on the Property at one time. (Ex L - Frey Memo; Ex N - Frey Afft, ¶¶7-8; Ex BB - Frey Dep, pp 152-176). Ms. Frey also informed Plaintiffs that the Zoning Ordinance required parking for a "church, temple or other place of worship" to be located in the rear yard. (Frey Afft, ¶9; Frey Dep, pp 152-176; Frey Memo). Except that the Planning Commission could allow up to 25% of the parking to be located in the front yard under certain conditions. However, parking in the front yard is limited to drop off activities and parking for seniors and handicapped persons. (Frey Afft, ¶9; Ex DD - Zoning Ord §170-6.2(J)). When Father Bertolacci stated that this was not feasible because the septic field for the house was located in the rear yard, she suggested that Miles Christi should request a variance from the ZBA. (Frey Memo; Frey Afft, ¶9; Frey Dep, pp 152-176). Ms. Frey also informed Plaintiffs that a landscape buffer was required to screen their parking area from adjacent residential uses pursuant to Section 170-26.3(J) and 170-24.6. (Frey Memo; Frey Afft, ¶10; Frey Dep, pp 152-176; Ex FF - Zoning Ord Art 24; Ex GG - Zoning Ord Art 26).

She advised that because the use of the Property had changed to a more intensive non-residential use, Miles Christi was required to submit a site plan for review showing the parking and landscaping in compliance with the Zoning Ordinance. (Frey Afft, ¶¶7, 11; 1st Am Cplnt,

² Father Bertolacci's 3/1/07 letter indicating that the St. Ignatius chapel can seat 18 people and his representation during the 3/23/07 meeting that there might be 20-22 friends at the Property exceeded his previous representation in the 3/10/03, letter that there would never be more than 10 guests at the house for any reason.

¶¶60-66). Father Bertolacci objected to Miles Christi having to incur the expenses related to a site plan and variance application. (1st Am Cplnt, ¶160; Ex N - Frey Afft, ¶12; Ex Z - Bertolacci Dep, pp 34-43). He also expressed concerns that if Miles Christi submitted a site plan, the Township would then require them to comply with building codes and force Miles Christi to make additional changes to the interior of the house, and he stated that Miles Christi did not want to incur costs for modifying the interior of the Property either. (1st Am Cplnt, ¶¶60-66; Frey Afft, ¶13; Bertolacci Dep, pp 34-43). Ms. Frey indicated that she was only concerned with exterior site plan issues and that building code issues were handled by a different department. (Frey Afft, ¶13; Frey Dep, pp 152-176; Bertolacci Dep, pp 34-43).

At the conclusion of this meeting Father Bertolacci stated Miles Christi would retain a planning consultant and review its options. (Frey Afft, ¶14). Jennifer Frey asked Father Bertolacci to advise Joe Bauer within 30 days regarding how they intended to proceed. (Frey Afft, ¶14; Frey Dep, pp 152-176; Bertolacci Dep, p 38). She also advised Father Bertolacci that Miles Christi would need to file a ZBA application or a site plan within 60 days which provided Miles Christi with a grace period on the upcoming submission deadlines to allow their planner some additional time to prepare and submit a ZBA application and/or a site plan. (Ex V2 - Frey, Tr Vol 2, p 59; Frey Afft, ¶14; Frey Dep, pp 152-176; Bertolacci Dep, pp 30-43).

Following the March 23rd meeting, Miles Christi's planning consultant, Chris Doozan of McKenna & Associates, came to the Planning Department and purchased a copy of the Zoning Ordinance, and he spoke with Ms. Frey. (Frey Afft, ¶15; Ex MM - McKenna Docs; Bertolacci Dep, pp 39-41; Conte-Grand Dep, pp 5-7, 12-14). He stated he was working on an application for Miles Christi, and they discussed the applicability and interpretation of various zoning provisions (e.g., offstreet parking, landscape buffering, and setbacks) as well as the relevant ZBA and Planning Commission submission deadlines. (Frey Afft, ¶15; Frey Dep, pp 182-185).

Although Miles Christi did not submit a ZBA application or a site plan by the first submission deadline following the March 23rd meeting, Jennifer Frey believed Plaintiffs were working toward submitting by the next set of deadlines for the following month's meetings. (Frey Afft, ¶¶15-16).

On June 5, 2007, after being advised that Miles Christi had not submitted a site plan or variance application as requested, Joe Bauer issued a civil infraction ticket to Miles Christi for failure to follow the site plan procedures in violation of Zoning Ordinance Section 170-33.3. (Ex M - civil infraction ticket; Ex S1 - Bauer, Tr Vol 1, pp 13-15). The civil infraction ticket commenced legal proceedings to enforce the Township's site plan review procedures based on the conclusion that, under §170-33.2, Miles Christi had changed the use of the Property from a mere residence to a more intensive non-residential use resembling a small church or place of worship. The change in use under §170-33.2 was based on the information obtained during the Township's investigation in response to the LeVan's complaints about the number of cars parked on the Property on a regular basis, the increased frequency and volume of vehicles entering, leaving and parking on the Property as well as information disclosed in Father Bertolacci's letter dated March 1, 2007 and during the March 23, 2007 meeting. (Ex N - Frey Afft, ¶¶4-5).

On September 12 and 24, 2007, the Honorable Judge Michael J. Gerou of the 35th District Court conducted a formal hearing on the civil infraction ticket issued to Miles Christi, and the Court heard testimony from Joe Bauer, Gail LeVan, Gerald LeVan, and Jennifer Frey. At the conclusion of the proofs on September 24th, Judge Gerou ruled that the Township failed to carry its burden of proof and dismissed the civil infraction on the merits, and he also found that §170-33.2 was unconstitutionally vague. (Ex W - Tr Vol 2, pp 99-105). The Township filed a Motion for Reconsideration which the Court denied. (Ex Q - Opinion 10/18/07).

The Township then filed a motion for leave to file a delayed appeal to the Wayne County Circuit Court which was heard on May 9, 2008. On August 11, 2008, Judge Wendy Baxter issued an Opinion and Order reversing Judge Gerou's directed verdict and remanding the case to the 35th District Court. (Ex P - Judge Baxter Opinion 8/11/08). This Opinion held that, *inter alia*, that "there was ample evidence presented to establish a change in use of the property from residential to a more intensive use similar to that of a public assembly or church" and that Section 170-33.2 of the Township's Zoning Ordinance was not unconstitutionally vague. (Ex P).

Prior to the conclusion of the formal hearing and Judge Gerou's grant of a directed verdict in favor of Miles Christi, Plaintiffs filed this lawsuit, but before serving it Plaintiffs filed their First Amended Complaint containing nine separate claims. Count I alleges the Township's attempt to force Plaintiffs to comply with neutral site plan review procedures imposed a substantial burden on their religious exercise in violation of the Religious Land Use and Institutionalized Persons Act of 2000, 42 USC §2000cc et seq (RLUIPA). Count I also alleges violations of the "equal terms," "nondiscrimination," and "unreasonable restriction" provisions of RLUIPA. Counts II, III, and IV allege respectively that Plaintiffs' First Amendment rights to free exercise, free speech, and free expressive association were violated. Count V alleges that Plaintiffs' equal protection rights were violated in that the Township discriminated against Plaintiffs in their application of the Zoning Ordinance on account of the Plaintiffs' exercise of their religious rights. Count VI asserts that the Plaintiffs' due process rights were violated by denying the Plaintiffs the rightful use of their Property. Counts VII, VIII, and IX allege that Plaintiffs' religious and equal protection rights, right to expressive assembly and association and right to free exercise of religion under the Michigan Constitution respectively were violated. Plaintiffs seek declaratory relief and an injunction enjoining the Township from applying its zoning laws to Plaintiffs, as long as Plaintiffs continue to use the Property for religious and

residential purposes. Plaintiffs also seek nominal and compensatory damages for violation of RLUIPA and 42 USC §1983, and also costs and attorney fees.

For the reasons stated below, Defendants' claims are not yet ripe for adjudication by this Court because Plaintiffs have not obtained a final definitive decision from the Township regarding the manner in which the Township's ordinances are applied to the Miles Christi Property, and thus, this Court lacks subject matter jurisdiction over all of Plaintiffs' claims and they must be dismissed pursuant to Fed R Civ P 12(b)(1), 12(b)(6) and 12(c).

DISCUSSION

I. PLAINTIFFS' CLAIMS ARE NOT YET RIPE FOR ADJUDICATION.

The ripeness doctrine was first defined by the United States Supreme Court in the landmark decision of *Williamson County Regional Planning Commission v Hamilton Bank of Johnson City*, 473 US 172, 105 S Ct 3108, 87 L Ed 2d 126 (1985). The ripeness doctrine prohibits courts from exercising their jurisdiction until a case or controversy involving a sufficiently concrete injury or threat of injury is presented. *See*, US Const, art III, §2, cl 1. "Ripeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, the courts lack subject matter jurisdiction and the complaint must be dismissed." *Seiler v Charter Twp of Northville*, 53 FSupp2d 957, 961 (ED Mich 1999) (quoting *Bigelow v Michigan Dept of Nat'l Resources*, 970 F2d 154, 157 (6th Cir 1992)). The underlying rationale for the ripeness doctrine is "to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v Union Carbide Agricultural Products Co*, 473 US 568, 580; 105 S Ct 3325 (1985); *Abbott Laboratories v Gardner*, 387 US 136, 87 S Ct 1507 (1967).

The ripeness doctrine has two distinct prongs. In order to ripen a constitutional challenge to a land use regulation or decision and to vest a federal court with subject matter

jurisdiction a plaintiff must: (1) obtain a final authoritative decision from the governmental entity regarding the type and intensity of development or use that will be permitted on the property; and (2) pursue the available state remedies to completion. *Williamson*, supra. Both prongs of the ripeness doctrine must be satisfied to assert federal constitutional claims in federal court.

A. PLAINTIFFS' CLAIMS ARE SUBJECT TO THE RIPENESS REQUIREMENTS.

In *Williamson* the United States Supreme Court set forth clear statements regarding the concept of finality as a threshold condition for federal jurisdiction and the ripeness requirements for as applied constitutional challenges to land use regulations or decisions whether based on a takings theory or other constitutional theories (including due process, equal protection, etc). See, e.g., *River City Capital v Clermont County*, 491 F3d 301 (6th Cir 2007); *Warren v City of Athens, Ohio*, 411 F3d 697, 708 (6th Cir 2005); see also, *Insomnia Inc v City of Memphis*, 278 Fed Appx 609, 613, 2008 WL 2121053 (6th Cir unpublished - Ex KK). The Sixth Circuit recently clarified that the ripeness doctrine, particularly the finality requirement, applies to First Amendment challenges to land use decisions, and that a final decision from the local governmental entity is a prerequisite for federal jurisdiction and review. *Insomnia Inc v City of Memphis*, supra at 613-616. In *Insomnia*, the plaintiff property owners alleged that the city illegally denied their request to subdivide their property based on irrational hostility to one of the owners' involvement in the adult entertainment industry. Relying on the Second Circuit's analysis in *Murphy v New Milford Zoning Com'n*, 402 F3d 342, 349-351 (2nd Cir 2005) the Sixth Circuit held that the plaintiffs' First Amendment challenges to the City's denial in a land use context was subject to the ripeness requirement and that the plaintiffs had to obtain a final decision from the City by submitting further applications for relief. *Insomnia*, supra at p 613-614.

The Sixth Circuit's reliance on *Murphy* is instructive because the facts in *Murphy* are analogous to the facts in the case at hand. In *Murphy*, the Town of New Milford received complaints about the plaintiffs' prayer meetings at their residence from neighbors; particularly about the large number of cars parked at and entering and leaving the plaintiffs' property. The Town's zoning enforcement officer investigated and reported to the Zoning Commission which then concluded that the "weekly, sizable prayer meetings were not a customary accessory use in a single-family residential area." *Id* at 345. The Town advised the plaintiffs that their prayer meetings violated the zoning ordinance, and in response the plaintiffs filed their federal lawsuit. The Town then issued plaintiffs a formal cease and desist order for violating Town zoning regulations. The plaintiffs did not appeal the cease and desist order. The plaintiffs amended their federal claims to allege violations of their First Amendment rights to freedom of assembly and religious exercise as well as violations of RLUIPA and other state law claims. *Murphy*, *supra* at 345-346.

Ultimately, the Second Circuit in *Murphy* found that the plaintiffs' First Amendment challenges to the Town's land use or zoning decisions were subject to and failed to satisfy the *Williamson* prong-one finality requirement and dismissed the claims. *Murphy*, *supra* at 350. The Second Circuit also held that it did not need to distinguish between First Amendment claims and RLUIPA claims for purposes of its ripeness analysis citing to RLUIPA's legislative history which arguably attempted to codify pre-existing Free Exercise jurisprudence. *Id* at 350. The Second Circuit also cited to the Joint Statement of Senators Hatch and Kennedy, which stated that RLUIPA was not intended to "relieve religious institutions from applying for variances, special permits or exceptions" which appears consistent with the prong-one ripeness finality requirement. Ex Q - 146 Cong Rec S7774, S7776 (daily ed July 27, 2000). Based on the legislative history of RLUIPA, claims under RLUIPA or for free exercise violations are subject to

ripeness and finality requirements. See, *Insomnia*, supra; *Murphy*, supra. A First Amendment as applied challenge to a local government's land use procedure (as opposed to the results of the procedure) is not ripe until the plaintiff goes through the disputed procedure and obtains a final authoritative decision from the local government. *Id.*; see also, *Grace Comm'y Church v Lenox Twp*, 2007 WL 2533884, p 5 (ED Mich unpublished - Ex LL).

This is particularly important in the case at hand because the Plaintiffs claim the Township's decision to require Miles Christi to follow the site plan review procedure violates their constitutional rights, which is directly contrary to federal case law holding that a federal court lacks subject matter jurisdiction over a First Amendment as applied challenge to a local land use procedure³ until the plaintiff utilizes the challenged procedure and obtains a final decision thus ripening its challenge to the procedure. In other words, for purposes of ripeness in the context of a First Amendment challenge to a land use regulation, the challenged procedure cannot be separated from the substantive result of the procedure.⁴ Thus, in this case, the Plaintiffs are required to go through the site plan procedure (which they baldly claim violates their constitutional rights), and they must obtain a final definitive decision before their constitutional claims are ripe for review. *Grace Comm'y*, supra at 6. "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 relief or to make policy decisions which might abate the alleged taking." *Id.* quoting *Comm'y Treatment Centers v City of Westland*, 970 F Supp 1197, 1210 (ED Mich 1997). Plaintiffs cannot side-step Northville Township's site plan review

³ In this case, the Township's site plan review procedure is not a substantive land use regulation. It is not until the site plan review process is completed that a substantive decision is reached.

⁴ The site plan review procedure is simply the procedural means of obtaining a final decision from the planning commission on whether the land use complies with the Township's Zoning Ordinances.

procedures, variance process, or the ZBA appeal procedure as they are attempting to do with this lawsuit.

The Plaintiffs want this Court to rule that they are not required to follow the neutral and generally applicable zoning ordinances pertaining to changes in use of land, site plan review, variances, and ZBA appeals (which every other resident is required to follow) simply because they disagree with the Township's decision or on the basis that Plaintiffs' are "religious." Plaintiffs are improperly attempting to use their religious beliefs as both a sword and a shield. Granting Plaintiffs their requested relief would be to grant every religious institution immunity from local zoning laws. Plaintiff must be required to ripen their claims like every other plaintiff by establishing a concrete injury recognizable under Article III and by obtaining a final definitive decision from the Township regarding the nature and extent of the regulation on the Property and defining what, if anything, Plaintiffs must do to bring the Property into compliance with the Township's Zoning Ordinances. In the absence of a final decision, Plaintiffs' claims are not ripe and this Court lacks subject matter jurisdiction.

B. PLAINTIFFS HAVE NOT OBTAINED A FINAL DECISION FROM THE TOWNSHIP.

In the present case, Plaintiffs have not satisfied the *Williamson* prong-one finality requirement because they have not obtained a final decision from the Township regarding the nature and extent of the regulation on the Property. See, *Murphy*, supra (holding that RLUIPA and First Amendment claims arising from cease and desist order prohibiting regularly scheduled prayer meetings in residential home were unripe). Because Miles Christi refused to go through the site plan process, the Township never had the opportunity to determine if the use of the Property had changed, the number of parking spaces required, where those parking spaces could be located, the type and extent of landscape buffering required, and whether the

Property complied with setback requirements.⁵ In concluding that it was appropriate to apply the *Williamson* finality requirement to the Murphys' First Amendment and RLUIPA claims, the Second Circuit looked at two (2) additional issues: **a)** whether the plaintiff suffered an immediate injury; and **b)** whether requiring further local land use proceedings would help define the plaintiffs' alleged injuries suffered. *Murphy*, supra at 351.

In the case at hand, Plaintiffs did not suffer an immediate injury. According to the rationale in *Murphy*, the civil infraction ticket issued to Miles Christi Religious Order did not constitute an immediate injury. See, *Murphy*, supra at 351 (plaintiffs' receipt of cease and desist order was not an immediate injury). Further, there is no legal authority to support the argument that simply being required to follow a local land use procedure is an immediate injury which could ripen a First Amendment land use claim. (See, Ex Q - Joint Stmt of Senators Hatch and Kennedy clarifying that RLUIPA does not provide religious institutions with immunity from land use regulations). Like, the Murphys' right to appeal the cease and desist order, Plaintiffs could have (and could still) appeal Jennifer Frey's decisions which would stay the civil infraction proceeding; thus, Miles Christi has not suffered an immediate injury. (Ex II - Zoning Ord Art 41). Plaintiffs, Father Bertolacci and Brother Conte-Grand, have not alleged any specific injury, and their use of and activities at the Property have not changed. Plaintiffs want this Court to look at the merits of their First Amendment and other constitutional challenges to the Township's regulation of the Property before Plaintiffs go through the required procedures which might alleviate their alleged injury. This puts the cart before the horse, and Plaintiffs' claims are not ripe because they have not obtained a final definitive decision from the Township. *Insomnia*, supra at 613-616; *Grace Comm'y*, supra.

⁵ Ironically, in early 2006, Miles Christi voluntarily submitted without objection a request for site plan review and special land use approval for its \$8.2 Million chapel and family center to Lyon Township and paid all required review fees. (Ex Z - Bertolacci Dep, pp 15-30, 84-86 and dep ex 6 - letter to Lyon Twp Clerk dated 4/19/06).

Requiring Plaintiffs to follow the Township's site plan review procedure and obtain the necessary variances, will help define the nature and scope of the regulation on the Property, determine how many parking spaces are required, and evaluate the landscaping and other site plan requirements. Without a decision from the Planning Commission after a full site plan review and a final approval or denial of an application for a variance from the rear yard parking requirement, the Township's position regarding these issues and the extent of regulation on the Property remains unknown, and this Court cannot even determine whether Plaintiffs have been injured (or substantially burdened) or, if so, to what extent. *Murphy*, supra at 352-354. For example, in *Insomnia* the Sixth Circuit stated that because the plaintiffs had the opportunity to resubmit (and had been requested to resubmit) a renewed plan which could allow the plaintiffs to accomplish their land division and avoid the constitutional issue, the Court ruled that the plaintiffs had not suffered an immediate injury and could not until they resubmitted a renewed plan as requested and it had been denied. 278 Fed Appx at 615.

In *Murphy* the court identified alternative parking restrictions as a specific example of an issue that, if fully explored through the administrative proceedings, would assist in defining the alleged injury and thus must be completed before a claim can be ripened. 402 F3d at 352. In this case, number of parking spaces, their location, and configuration are particularly central to the dispute. For example, §170-6.2(J) allows the Planning Commission to permit up to 25% of the required rear yard parking to be located in the front yard for drop off activities and parking for seniors and handicapped persons. (Ex DD - Zoning Ord §6.2(J)(5)). Similarly, Plaintiffs could present evidence that the driveway can accommodate all their friends' cars, and that the religious activities at the Property do not usually occur simultaneously which could reduce the number of required parking spaces. These are facts that, if considered during the site plan review and variance process, may allow the Township to minimize the regulation on the

Property. But, without going through the process, no one (including Plaintiffs, the Township and this Court) knows the full extent of how the ordinances will be applied to Plaintiffs' Property and whether Plaintiffs have been injured or to what degree. *Murphy*, supra at 352 ("Bypassing the Zoning Board of Appeals and its hearing processes, which were statutorily designed for exploration and development of these sorts of issues, leaves the Murphys' alleged injuries ill-defined").

Additionally, Plaintiffs refused to avail themselves of the Township's appeal procedures.

Section 170-41.4 provides:

An appeal may be taken to the Zoning Board of Appeals by any person, firm or corporation, or by any officer, department, board or bureau **affected by a decision of the** Chief Building Official, **Director of Community Development**, Zoning Administrator, **Zoning Enforcement Officer, Planning Commission** or other administrative body authorized by this chapter. (Ex II) (emphasis added).

Plaintiffs could have appealed Jennifer Frey's determination that the use of the Property had changed from a purely residential use to a more intensive use resembling a small church or place of worship to the ZBA. Likewise, Plaintiffs could have appealed the Township's request that Miles Christi submit a full site plan for review to the ZBA. The ZBA had the discretion to decide an appeal of any of these issues in a way that could have averted the entire dispute. But, Plaintiffs never utilized the ZBA appeal process provided for in Article 41. Until Plaintiffs submit a site plan for review, submit a variance application, or appeal to the ZBA and obtain a final decision from the Township regarding the extent of the regulation on the Property, their claims are not yet ripe and this Court lacks subject matter jurisdiction.

The *Murphy* court also identified four (4) policy considerations that influenced its decision to dismiss for lack of ripeness:

1. Will requiring a final decision from the local land use authority aid in the development of a full record.

2. Will requiring exhaustion of local land use procedures and remedies eliminate uncertainty regarding the application of the local land use regulations and let the court know precisely how the land use regulations are applied to the property in question.
3. Will requiring further local proceedings to obtain a final decision avoid unnecessary judicial entanglement in constitutional issues.
4. Will requiring further local proceedings to obtain a final decision promote principles of federalism and avoid having the federal court become a super zoning board of appeals. *Id* at 348-349.

In the present case, dismissing Plaintiffs' claims for lack of subject matter jurisdiction based on ripeness will advance the policy considerations identified by the court in *Murphy*. The available procedures must be completed because it will allow the Township to analyze the specific facts and circumstances related to the Property and Plaintiffs' activities and reach a conclusion regarding precisely what modifications, if any, are required to bring the Property into compliance with the Township's Zoning Ordinances. But, no one will know what the Township's planning commission or zoning board of appeal will do until Miles Christi is required to utilize those processes and obtain a final decision and ripen their claims.

Dismissing Plaintiffs' claims and requiring them to obtain a final decision through the Township's site plan review procedures will promote federalism principles and comity between the federal and state courts and avoid the federal court preempting the authority of the Township and the 35th District Court. *Insomnia*, supra at 616 (district court's dismissal of First Amendment claims for lack of ripeness "evinced its respect for 'federalism principles' by recognizing that 'land use disputes are uniquely matters of local concern more aptly suited for local resolution.'" (citing *Murphy*, supra).

The ripeness doctrine is designed to prevent precisely the situation involved in this case where a plaintiff runs prematurely to the federal court without first availing themselves of available remedies and without affording the local government any opportunity to grant other relief that might resolve the dispute. Allowing Plaintiffs to proceed while refusing to follow the

Township's procedures would result in the federal court usurping the Township's zoning authority and sitting as a super-zoning board of appeals which would damage the relationship between local municipalities, state courts and federal courts.

Plaintiffs' allegations regarding potential future injuries highlight how and why Plaintiffs' constitutional claims are unripe. For instance, Plaintiffs' allege that the Township would have required Plaintiffs to modify the Property if Plaintiffs had submitted a site plan for review. (1st Am Cplnt, ¶¶65-69). Plaintiffs' allegations are nothing more than unsupported conjecture and raise questions of whether a concrete case and controversy exists here. The Constitution prohibits a court from providing a remedy for injuries that never occurred. US Const, art III, §2, cl 1. To the extent Plaintiffs seeks relief from the "other zoning requirements" or future enforcement of the Zoning Ordinance (as opposed to past enforcement actions), their claims are premature and should be dismissed.

CONCLUSION

For the reasons stated above, Defendants, NORTHVILLE TOWNSHIP, CHIP SNIDER, JENNIFER FREY, and JOSEPH BAUER, respectfully request that this Court grant their Motion to Dismiss for Lack of Subject Matter Jurisdiction Based on the Ripeness Doctrine, and award costs and attorney fees.

Respectfully submitted,

JOHNSON, ROSATI, LaBARGE,
ASELTINE & FIELD, P.C.

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Dated: October 7, 2008

NOTICE OF HEARING

TO: ALL COUNSEL

PLEASE TAKE NOTICE that Defendants' Motion to Dismiss For Lack of Subject Matter Jurisdiction Based On The Ripeness Doctrine will be brought on for hearing before the Honorable Paul D. Borman at a date and time to be set by this Honorable Court.

Respectfully submitted,

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Dated: October 7, 2008

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2008, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Robert J. Muise, and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participants: None.

Respectfully submitted,

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Dated: October 7, 2008