Agudath Israel of America
אגודת ישראל באמריקה

Daniel I. Kaminetsky
General Counsel

July 24, 2023

VIA EMAIL
dgabel@northplainfieldnj.gov

Borough of North Plainfield
Planning Board
263 Somerset Street
North Plainfield, New Jersey 07060
Attn: Thomas Fagan

Re: Yeshiva Tiferes Boruch, Inc.

Dear Mr. Fagan:

I am general counsel to Agudath Israel of America, a national Orthodox Jewish advocacy organization that serves the needs of the Orthodox Jewish population of some thirty states. I write in connection with the site plan (the "Plan") and requests for a parking waiver and fence variance (collectively, the "Variances") submitted by Yeshiva Tiferes Boruch, Inc. (the "Yeshiva") in connection with the planned expansion of their facilities located in North Plainfield. We understand that the Planning Board (the "Board") voted to deny the Plan and requests for Variances (the "Project") and is preparing a resolution to that effect.

It is our legal opinion that the Planning Board's denial of the Project was unfounded and in violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). Agudath Israel actually participated in the drafting of this statue. (See 145 Congressional Record H 5580) and has regularly intervened on behalf of religious institutions who were unfairly discriminated against by virtue of zoning regulations throughout the country.

Before turning to the requisite analysis under RLUIPA, the record itself is devoid of any legitimate basis for the denial of the Project. The primary issues identified at the hearings in opposition to the Project concerned off-site parking and traffic concerns. The Yeshiva presented unrefuted expert testimony that the proposed parking lot was sufficient for the intended use of the building to be constructed. The only plausible explanation for the denial of

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the Plan and parking waiver is the great weight the Board gave the testimony from neighbors concerning the parking shortage in the area of the Yeshiva and their fears that large gatherings will be held at the Yeshiva on a constant basis in the future. Significantly, no testimony or proof was offered that there exists a parking shortage at the Yeshiva. Indeed, the opposite is true - the Yeshiva rarely utilizes all of the parking spots it has on site. It should be readily evident that the concerns expressed are not substitutes for actual evidence that can form the basis for the Board's denial of the Project. "An agency acts in an arbitrary or unreasonable manner if the record lacks substantial evidence to support the findings [of the agency]." Van Holten Grp. V. Elizabethtown Water. Co., 121 N.J. 48 at 66-67 (1990) (quotation marks and citations omitted). Moreover, these claims are unfounded as the testimony at the hearings established that the facility is not being used for weddings of any size or as a traditional synagogue that might otherwise draw crowds to the building. Rather, the site will be used as an institution of learning and the vast majority of people utilizing the building are students who live on site. Thus, the surrounding area will not be significantly affected (if it is affected at all) from a parking or traffic perspective.

With respect to the fencing, again, the Yeshiva's witnesses testified that the variance requested is necessary for the yeshiva to obtain security grants that are crucial for openly religious institutions such as the Yeshiva[1]. To deny the Yeshiva and thereby prevent it from receiving this important form of protection is clearly arbitrary and capricious.

Moreover, to require a ratio of one (1) parking space per two hundred (200) square feet would effectively impose a burden on the Yeshiva that does not exists with respect to other religious entities in the immediate area. I am informed that the Church of the Holy Cross down the street from the Yeshiva has no on-site parking despite servicing several distinct congregations, hosting a school and holding large gatherings such as weddings and funerals. See Transcript of Proceedings, dated May 31, 2023, pp. 92 through 92 and 167 through 168, annexed hereto. Other Churches in the area similarly do not have the requisite ratio of parking spaces per square feet. The North Plainfield School district has approximately five hundred thousand (500,000) square feet of space, thousands of students and only two hundred (200) to two hundred

[1] The Anti-Defamation League reports that antisemitic incidents in New Jersey increased by 10% between 2021 and 2022 and are currently at the highest levels ever recorded.

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fifty (250) parking spaces collectively. According to the criteria being applied to the Yeshiva, the schools would need to have two thousand five hundred (2,500) parking spaces.

The Plan and Variances should be approved under RLUIPA as well. That statute provides:

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

42 U.S.C.S. § 2000cc. RLUIPA applies what is known as "strict scrutiny", the highest form of judicial review, to government actions that substantially burden the land usage of a religious assembly or institution. The courts must apply strict scrutiny even if the burden results from a rule of general applicability, i.e. a rule that burdens all citizens equally. Accordingly, a municipality, which chooses to deny a congregation's zoning application, must demonstrate that the imposition of the burden on the institution: (1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest.

The substantial burden provision reflects decades of Supreme Court precedent, originally outlined in Sherbert v. Verner, 374 U.S. 398 (1963), and later reaffirmed in Employment Div. v. Smith, 494 U.S. 872 (1990), and Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), that government-imposed burdens on religious exercise must be subjected to the strictest form of judicial scrutiny when they are imposed by systems of "individualized assessments." In other words, pursuant to both the First Amendment and

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RLUIPA, strict scrutiny applies where burdens are applied on a discretionary, case-by-case basis, as is practically unavoidable in the zoning context.

A denial of the Plan and Variances would substantially burden the "religious exercise" of the Yeshiva. The statute defines "religious exercise" as "The use, building, or conversion of real property for the purpose of religious exercise." 42 U.S.C.S. § 2000cc-5. This definition has been interpreted to include the expansion of a Jewish private school Westchester Day School v. Village of Mamaroneck, 504 F.3d 338 (2nd Cir., 2007). Thus, there is no question that the protections of RLUIPA are applicable to this case.

Courts have repeatedly held that "in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" Sherbert v. Verner, 374 U.S. 398, 406 (1963); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."). The challenges raised by the Board in opposition to the Project fail to advance any legitimate detriment that the Yeshiva would cause the town of North Plainfield, let alone grave abuse. The *gravamen* of the objections to the Plan is a concern over parking. However, in decision after decision, courts have concluded that traffic, though understandably legitimate concerns for a municipality, does not meet the high threshold of a "compelling" government interest[2]. The Board's other unproven concerns

[2] See, e.g., Whitton v. City of Gladstone, 54 F.3d 1400, 1408 (8th Cir. 1995) ("[A] municipality's asserted interests in traffic safety and aesthetics, while significant, have never been held to be compelling."); Curry v. Prince George's County, Md., 33 F. Supp. 2d 447, 452 (D. Md. 1999) ("Again, while recognizing aesthetics and traffic safety to be 'significant government interests,' none of these courts found those interests sufficiently compelling to pass the applicable strict scrutiny test."); McCormack v. Township of Clinton, 872 F. Supp. 1320, 1325 n.2 (D.N.J.1994) ("[N]o court has ever held that [aesthetics and traffic safety] form a compelling justification for a content-based restriction on political speech"); Village of Schaumburg v. Jeep Eagle Sales Corp., 676 N.E.2d 200, 204 (Ill. App. 1996) (finding that "[t]raffic safety and visual aesthetics are not the sort of compelling state interest required to justify a content-based restriction on expression"); National Advertising Co. v. City of Orange, 861 F.2d 246, 249 (9th Cir. 1988) ("interests in traffic safety and aesthetics, while 'substantial,' fell shy of 'compelling.'"); Loftus v. Township of Lawrence Park, 764 F. Supp. 354, 361 (W.D. Pa. 1991) ("we doubt that aesthetics or residential quietude is sufficiently compelling to ever justify a content-based restriction . . . on freedom of expression"); Love Church v. Evanston, 671 F. Supp. 515, 519 (N.D. Ill. 1987), vacated based on standing, 896 F.2d 1082 (7th Cir. 1990) ("While traffic concerns are legitimate, we could hardly call them compelling."); American Friends of Soc'y of St. Pius v. Schwab, 417 N.Y.S.2d 991, 993 (N.Y.A.D. 1979) ("[C]onsiderations of the surrounding area and potential traffic hazards . . . are outweighed by the constitutional prohibition against the abridgement of the free

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regarding noise that might emanate from the Yeshiva or large gatherings that might occur there are similarly not significant enough to meet the high threshold the Board must meet to justify its intended rejection of the Plan and Variances.

Accordingly, for all the foregoing reasons, we urge the Board to pass a motion of reconsideration of the denial of the Project and to approve same.

Very truly yours,

Daniel I. Kaminetsky

Daniel I. Kaminetsky

cc: Brian Schwartz, Esq.
Mayor Lawrence La Ronde
Peter Wolfson, Esq.
(all via email)

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exercise of religion and by the public benefit and welfare which is itself an attribute of religious worship in a community."); State ex rel. Tampa Company of Jehovah's Witnesses, etc. v. Tampa, 48 So. 2d 78, 79 (Fla. 1950) ("The contention that people congregating for religious purposes cause such congestion as to create a traffic hazard has very little in substance to support it. Religious services are normally for brief periods two or three days in the week and this at hours when traffic is at its lightest."); New Hope Baptist Church v. City of Hackensack, No. L-2873- 03, at 35-36 (Super. Ct., Bergen Co. N.J. Oct. 22, 2003) (asserted interests concerning traffic and parking - as a basis for denying church permit - are not compelling under RLUIPA).