JOHN J. SANSONE, County Counsel
County of San Diego
By THOMAS D. BUNTON, Senior Deputy (State Bar No. 193560)
1600 Pacific Highway, Room 355
San Diego, California 92101
Telephone: (619) 531-6456

Attorneys for Defendant County of San Diego

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

GUATAY CHRISTIAN FELLOWSHIP, Plaintiff, v. COUNTY OF SAN DIEGO, Defendant.	Case No. 08 CV 1406 JM CAB **DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** Date: August 13, 2009 Time: 3:30 p.m. Courtroom: 16, Fifth Floor The Honorable Jeffrey T. Miller

TOPICAL INDEX

TABLE OF AUTHORITIES

PAGE

CASES

REGULATORY AND STATUTORY AUTHORITY

PAGE

OTHER

I. INTRODUCTION

Plaintiff Guatay Christian Fellowship, Inc. has known since at least 1988 that it needs a Major Use Permit (or a modification of an existing Major Use Permit)[1] from the County of San Diego (the "County") in order to operate a church at a former recreation building that it rents from the owner of a recreational vehicle ("RV") Park. John O'Flynn, the owner of the RV Park, has also known since 1988 that plaintiff needs a Major Use Permit from the County. Indeed, Mr. O'Flynn wrote a letter to the County in which he admitted that in 1988 a County employee learned that plaintiff was using the approved recreational building for religious assemblies during an inspection of the property that was triggered by Mr. O'Flynn's application for an unrelated permit. The owner admits in the letter that the County official told him that plaintiff needed to obtain a Major Use Permit to legalize the illegal use of the recreation building as a church.

After the inspection, a meeting was held on April 25, 1988 where two aides to then County Supervisor George Bailey told Mr. O'Flynn, plaintiff's current pastor Stanley Peterson and plaintiff's then Secretary and current Board Member Cheryl Rice that plaintiff needed to obtain a modification of the existing Major Use Permit in order to use the recreation building for religious assemblies. Mr. O'Flynn and plaintiff greed to submit an application for a modification of the existing Major Use Permit, but never did so.

Plaintiff continued to use the recreation building in violation of the Zoning Ordinance for approximately 20 years, when the County received a complaint regarding the property. As a result of that complaint, the County preformed an inspection and learned that plaintiff was still using the recreation building in violation of the Zoning Ordinance. The County issued a Notice of Violation informing Mr. O'Flynn that plaintiff could not use the recreation building for religious assemblies without obtaining a Major Use Permit. Eight weeks after the Notice of Violation was issued, plaintiff stopped using the Building for religious assemblies. At no time prior to the filing of this lawsuit did plaintiff file an application for a Major Use Permit or suggest that it would apply for such a permit if the County would allow it to continue operating while its permit application was pending. Plaintiff also did

[1] There is no procedural or substantive difference between obtaining a new use permit and a modification of an existing use permit.

not request the Director of the County's Department of Planning and Land Use ("DPLU") to issue a decision regarding whether the County was properly applying its Zoning Ordinance to plaintiff.

The County is entitled to summary judgment on all of plaintiff's claims for violation of the First Amendment, the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), and the Due Process Clause.[2] The County is entitled to judgment in its favor because plaintiff's claims are not ripe. Plaintiff applied for a Major Use Permit as required by the Court's Preliminary Injunction order. However, plaintiff has not obtained the permit and now claims it cannot afford to do so. Moreover, plaintiff did not challenge the Notice of Violation with the County prior to filing this lawsuit. Therefore, plaintiff's claims are not ripe.

Plaintiff has not pled an equitable estoppel claim in its complaint, but there is no basis for equitable estoppel here. The County told plaintiff shortly after it started using the recreation building that it needed to obtain a Major Use Permit to continue using the building for religious assemblies. However, plaintiff never did so. Since plaintiff knew it needed to obtain a Major Use Permit, there is no basis for estoppel. Under California law, the fact that the County delayed enforcement of the Zoning Ordinance for several years is not the basis for an estoppel claim. Moreover, estoppel cannot be used offensively to obtain damages.

Plaintiff's First Amendment and RLUIPA claims also fail because the County has not imposed a substantial burden on plaintiff's religious activities within the meaning of RLUIPA or the First Amendment. The County may legally require plaintiff to obtain a Major Use Permit and plaintiff's inability to obtain that permit for economic reasons does not impose a substantial burden on plaintiff. Indeed, plaintiff could relocate to a zone where religious assemblies are allowed under the County's Zoning Ordinance as a matter of right.

II. UNDISPUTED FACTS.

A. Historical Uses Of The Building.

The building that plaintiff currently rents (the "Building" or the "Recreation Building") was built

[2] Plaintiff's complaint contains nine causes of action. In its Motion for Summary Judgment, plaintiff asks the Court to dismiss its second, third and eighth causes of action. The first cause of action is for violation of RLUIPA. The fourth, fifth, sixth and seventh causes of action allege violations of the First Amendment (free exercise of religion, freedom of speech, freedom of assembly). The Ninth Cause of action alleges a violation of the Due Process Clause.

in 1940 and was remodeled in 1941. (Ex. 1.)[3] The Building is located at 27521 Old Highway 80, Guatay, California, which is within the unincorporated portion of the County. The Building is located on a large parcel (the "Property" or "Premises") that is used as an RV park. An addition to the Building was constructed in 1945. (Ex. 1.)[4] The Building was originally used as a store and post office. (Ex. 1.) On August 13, 1958, a County appraiser with the last name of Wilder appraised the Building. (Ex. 1.) He indicated that the Building was "90% good." (Ex. 1.) He valued the "Replacement Cost Less Normal Depreciation" as $13,631.[5] (Ex. 1.) On March 25, 1966, a County appraiser named JM Early appraised the Building. In his "remarks" from the appraisal, Mr. Early indicated that the Building was "[a]ll open, vacant, in bad condition as to useability without extensive remod. % good per appraiser to reflect condition." (Ex. 1, at p. 2.) Mr. Early decreased the "% good" to 50%. (Ex. 1.) That decreased the Replacement Cost Less Normal Depreciation[6] to $7,573. (Ex. 1.) On February 26, 1970, an appraiser named W. Christman performed another appraisal. (Ex. 1.) Mr. Christman left the "% good" at 50% and also kept the Replacement Cost Less Normal Depreciation at $7,573. (Ex. 1.) This strongly suggests that the Building was also vacant on February 26, 1970.[7]

On February 19, 1971, the then owner of the Property submitted an application to the County seeking a "special use permit for recreational campground." (Ex. 5.) Under "description of proposed use," the applicant stated that "[t]he property is to be used as a Recreational Campground hiring out

---

[3] Plaintiff holds services for adults at the former Recreation Building that is part of the RV Park. However, plaintiff rents another building on the Property that it refers to as the "Children's Church." (Ex. 2, at 49:13 - 50:15.) Plaintiff's experts do not contend that the County approved use of this building for religious activities. (Ex. 3, at 43:20 - 44:3.)

[4] All exhibits are attached to the Notice of Lodgment of Exhibits filed herewith.

[5] The figure was computed my multiplying the total cost ($15,146) by the percentage good (90%).

[6] This term was identified as "R.C.L.N.D."

[7] Plaintiff notes that on Ex. 1 under the heading "name," there are three entries. The bottom entry is "Guatay Variety Store and PO" and this entry has a line through it. The next entry is "Church/Recr. Hall" and it also has a line through it. The top entry is "Church." Plaintiff asserts that this shows that the Building was being used as a Church as early as 1958. However, this form was altered long after the date of the last appraisal shown (2/26/70). On page 2, there is a reference to "Mountain Christian Center, P.O. Box. 147, Guatay, CA 92031." That is the name and address that plaintiff used beginning in 1986. (Decl. of Todd McCracken, at ¶ 5, Ex. 4.) Thus, Ex. 1 does not show that the Building was being used as a church anytime prior to 1986.

spaces by the day, week and month . . . ." (Ex. 5.) The application stated that "an existing building will be used as a recreation Hall for use by campers." (Ex. 5.) In support of the application, the owner apparently submitted three pages of maps. (Ex. 6.) The maps were prepared by "The Barbour Company," and are dated February 3, 1971. (Ex. 6.) Only the second and third sheets were found in the County's records. (Declaration of Pam Elias, at ¶ 9.) Sheet two is labeled "PROPERTY MAP." (Ex. 6.) On sheet two, the Building is referred to as an "EXIST. REC. HALL." Sheet three is labeled "PROPOSED PLOT PLAN." (Ex. 6.) On sheet three, the Building is referred to as an "EXIST BLDG. REC HALL & CHAPEL." (Ex. 6.) Neither of these sheets contains any stamp or other mark indicating that the maps were approved by the County. (Ex. 6.) On March 27, 1971, the County's Planning Commission approved the Special Use Permit application. (Ex. 7.) The decision grants "a special use permit for a recreational campground." (Ex. 7, at p. 1.) The decision states that the recreational campground will include a "recreation building." (Ex. 7, at p. 1.) Under the "reasons for decision" section it states that "[t]he property . . . is . . . undeveloped except for an existing storage building, two existing automobile garages in connection with three existing cabins." (Ex. 7, at p. 3.) Nowhere in the Planning Commission decision does it state that an existing building was being used as a church or chapel. Nowhere in the Planning Commission decision does it state that the Commission approved use of an existing building as a church. Nowhere does the Planning Commission make any findings that use of an existing building for a church would be appropriate under the Zoning Ordinance.

On September 20, 1978, one of the new owners of the property, La France L. Bragg, submitted an application for a minor deviation from the 1971 special use permit which the County had granted. (Ex. 8.) Mr. Bragg sought to "[d]elete a 4 acre portion . . . and also the addition of a 200' x 180' sec." governed by the existing special use permit. (Ex. 8.) In the application, Mr. Bragg stated that he "would like to sell 4 acre parcel . . . and now has new ownership of 1 acre parcel." (Ex. 8.) In support of this application, Mr. Bragg submitted three pages of maps. (Ex. 9.) The first sheet was labeled "TITLE SHEET & SITE PLAN." The second sheet was labeled "PROPERTY MAP." (Ex. 9.) The third sheet was labeled "PROPOSED PLOT PLAN." (Ex. 9.) The Property Map refers to the Building as an "EXIST. CHURCH." (Ex. 9.) The Proposed Plot Plan refers to the Building as "EXIST. BLDG. CHURCH." (Ex. 9.) On the Title Sheet & Site Plan, there is a stamp stating that the "Plot Plan" was

approved by James J. Gilshian, the Director of the County's Department of Land Use and Environmental Regulation on September 20, 1978 through a "deputy." (Ex. 9.) However, the deputy's signature has been crossed out. (Ex. 9, at p. 1.) On October 4, 1978, Mr. Gilshian wrote Mr. Bragg a letter explaining that "[t]he application for minor deviation for Special Use Permit P71-104 cannot be approved. An increase or decrease in total area of a special use permit cannot be accomplished through the minor deviation process (section 720, Zoning Ordinance) . . . . The Decision of the Director of LUER pursuant to this section of The Zoning Ordinance is final; however an application for modification of the special use permit may be accepted to initiate the appropriate procedure for accomplishing your expressed goal."[8] (Ex. 10.)

Mr. Bragg testified that during the entire time he owned the Property (between 1977 and 1980), the Building was used as a recreation hall and office, not as a church. (Ex. 12, at 15:15 - 16:2.) In addition, Mr. Bragg testified that the three pages of maps that were submitted to the County in 1978 were copies of the original maps from 1971, with some changes. (Ex. 12, at 28:16 - 29:5; 29:12-25.) Mr. Bragg testified that the reference to an existing church was left on the maps in error. (Ex. 12, at 39:21 - 40:6.) Mr. Bragg testified that in 1978, the Building was being used as recreation hall and office, not a church. (Ex. 12, at 28:16 - 29:5; 29:12-25.)

On December 15, 1978, Mr. Bragg submitted an application for a modification of the 1971 special use permit.[9] (Ex. 13.) The application requested the same change that was requested in the prior application for a minor deviation. (Ex. 13.) Mr. Bragg sought to "delete a 4 acre portion . . . and also the addition of a 200' x 180' sec." from the existing property map. (Ex. 13.) Under the section labeled "Description of Proposed Use," Mr. Bragg stated that "[t]his is a recreational campground, spaces rent for day, week or month but less than 90 consecutive days. Existing cabins leased also less than 90 consecutive days. A restroom facility supposedly erected. ***An existing building used as recreation hall***

[8] Under the Zoning Ordinance, a minor deviation from a use permit can be approved by the Director of the Department. (Ex. 11, at § 7609(b).) A modification of a use permit can only approved by the Planning Commission. (Ex. 11, at §§ 7378; 7366(a)(1).)

[9] Prior to December 19, 1978, the County utilized a Zoning Ordinance that is significantly different than today's Ordinance. However, beginning in 1963, the County would have required a "special use permit" to operate a church on the Property. Beginning December 19, 1978, the County changed the name from Special Use Permit to Major Use Permit.

by campers." (Ex. 13) (emphasis added). In support of this application, Mr. Bragg submitted three pages of maps. (Ex. 14.) The first sheet was labeled "TITLE SHEET & SITE PLAN." (Ex. 14.) The second sheet was labeled "PROPERTY MAP." (Ex. 14.) The third sheet was labeled "PROPOSED PLOT PLAN." (Ex. 14.) The Property Map refers to the Building as an "EXIST. CHURCH." (Ex. 14.) The Proposed Plot Plan refers to the Building as "EXIST. BLDG. CHURCH." (Ex. 14.)

Mr. Bragg testified that the three pages of maps that were submitted to the County in 1978 were copies of the original maps from 1971, with some changes. (Ex. 12, at 36:14-21.) Mr. Bragg also testified that the reference to an existing church was left on the maps in error. (Ex. 12, at 39:21 - 40:6.) Mr. Bragg testified that in 1978 and 1979, the Building was being used as a recreation hall, not a church. (Ex. 12, at 28:16 - 29:5; 29:12-25.)

On February 2, 1979, the Planning Commission approved Mr. Bragg's application for "modification of Major Use Permit." (Ex. 15.) The Planning Commission's decision makes no mention of the Recreation Building and does not approve its use as a church. (Ex. 15.) Nowhere does the Planning Commission make any findings that use of the Recreation Building by a church would be appropriate under the Zoning Ordinance. (Ex. 15.) The three maps were stamped as being approved by the Planning Commission in 1979. (Ex. 14.)

On November 5, 1981, one of the new owners of the Property, Robert O. Schmid, submitted an application for modification of the Major Use Permit. (Ex. 16.) In the application, the owner indicated that he wanted to "expand use of building shown in yellow on enclosed plot plans to allow serving and On & Off Sale of Beer and Wine and expand entertainment and recreation to provide RV occupants with live country western music as well as the general public." (Ex. 16.) Under the "description of proposed use," the owner stated that the "SERVICES CURRENTLY PROVIDED AND TO BE PROVIDED" were "Recreation and Entertainment including 3 pinball machines, dart game, Juke-box, Ping Pong, & Billiard tables, Snack Vending Machine, service of coffee, beer & wine on & off-sale, and live music." (Ex. 16, at p. 2.)

In support of this application, Mr. Schmid submitted two maps that were received by the County on November 3, 1981. (Ex. 17.) The "property map" shows the Building being used as an "EXISTING REC. HALL." (Ex. 17.) On July 16, 1982, the County approved Mr. Schmid's application to modify

the Major Use Permit. (Ex. 18.) The Planning Commission's decision stated that it was "allow[ing] the conversion of the existing recreational hall for on and off site sale of beer and wine, and allow live music and entertainment." (Ex. 18.) Of course, there are no findings approving use of the Recreation Building as a church.

B. Plaintiff's Use Begins.

In October 1986, plaintiff, under the name Mountain Christian Center, began renting the Building for religious assemblies. (Ex. 19, at 13:21-24.) On December 31, 1986, the Property was purchased by its current owner, John O'Flynn. (Ex. 20, at 11:1-2.) Pastor Peterson, Associate Pastor Chuck Rice and Board Member Cheryl Rice all testified that the Building was vacant at the time plaintiff began renting the Building and had been vacant for some time. (Ex. 2, at 15:18 - 16:16; Ex. 19, at 13:25 - 14:4; Ex. 21, at 19:19-21.) For the first five years, plaintiff was allowed to use the Building rent free in exchange for making repairs to the Building. (Ex. 2, at 20:23 - 21:14.) Plaintiff has never had a written lease. (Ex. 2, at 22:4-9.) Currently, plaintiff pays $1,100 in monthly rent for the Building. (Ex. 22, at pp. 8-9.) Plaintiff has the exclusive right to use the Building. (Ex. 20, at 14:13-25.) The residents of RV Park do not have access to the Building. (Ex. 20, at 14:13 - 25.)

As early as spring of 1987, plaintiff realized that it needed to obtain a Major User Permit from the County in order to use the Building for religious assemblies. (Ex. 19.) Then Secretary and board member Cheryl Rice spearheaded plaintiff's effort to obtain a Major Use Permit. (Ex. 19.) Ms. Rice testified at her deposition that in 1987, she attempted to turn in a completed application for a Major Use Permit, but the County refused to accept the application:[10]

> Q. How far along in the use permit process did the Mountain Christian Center get?
>
> A. All the way.
>
> Q. So they obtained a major use permit?
>
> A. No.
>
> Q. Okay. So what do you mean by "all the way"?
>
> A. Completed the paperwork, tried to turn it in.

[10] In its Preliminary Injunction papers, plaintiff did not inform the Court that it had attempted to obtain a Major Use Permit from the County in 1987.

Q. Okay. And who did you try to turn it in through? Did you personally try to turn it in?

A. Yes.

Q. And who did you try to turn it in to?

A. County offices.

* * *

Q. And who did you try to turn it in to?

A. More than one person.

Q. Okay. And what were you told?

A. To go to the next person.

* * *

Q. And was this -- you said you went to one person, and then they told you to go to another person. Did this all happen in one day?

A. Yes.

Q. How long did it take you going from person to person, do you recall?

A. Several hours.

Q. And were you successful in turning in the application with anybody?

A. No.

Q. Okay. Did you follow up in writing?

A. No.

Q. So after that one day, what happened to the completed application?

A. I don't recall.

Q. How many different individuals from the County did you talk to that day, do you know?

A. Minimum of five.

Q. And other than telling you that you need to talk to somebody else, did they offer you any explanation or any other information?

A. Yes.

Q. What did they tell you?

A. The last person I talked to said to take my paperwork back, that things are too confusing out there, don't worry about it.

Q. Did they say anything else?

A. No.

(Ex. 19, 19:12-25; 20:5-8; 20:15 - 21:17.)

In response to a request for production of documents, Ms. Rice produced numerous documents related to the 1987 Major Use Permit application including hand written notes, logs of telephone calls and a draft application. (Ex. 23.) However, Ms. Rice did not produce the completed Major Use Permit application that she testified she attempted to turn in to the County. (Ex. 23.) She testified that she does not know what happened to the completed application. (Ex. 19, at 20:10-14.) Ms. Rice also did not produce any documents (notes, follow-up letters, etc.), which collaborates her testimony that the County refused to accept plaintiff's completed application for a Major Use Permit. (Ex. 23.) Moreover, Pastor Peterson testified that he never saw the application that Ms. Rice claims she completed. (Ex. 2, at 25:11-13.)

On March 10, 1988, the RV Park Owner, Mr. O'Flynn, submitted an application for a "minor deviation" from the approved Major Use Permit.[11] (Ex. 24, p. 2.) Mr. O'Flynn had previously changed the location of six RV trailer sites from that shown on the original approved plot plan and this change was discovered by a County inspector. (Ex. 24, at p. 2.) Mr. O'Flynn sought the County's approval for relocation of the trailers through the minor deviation process. (Ex. 24.) In support of his application, Mr. O'Flynn submitted a plot plan that was received by the County on March 10, 1988. (Ex. 25.) ***The plot plan states that the Building that the church rented at the time was a "REC. HALL."*** (Ex. 25.) ***Mr. O'Flynn did not inform the County that the Building was being used as a Church.*** (Ex. 25.)

On March 22, 1988, the County informed Mr. O'Flynn that his application for a minor deviation could not be approved and that he would have to file an application for a modification of the Major Use Permit. (Ex. 26.)[12]

On April 25, 1988, a meeting was held at the County's Regional Center in El Cajon. (Ex. 27.)

[11] George P. Hatton was listed as the applicant and Mr. O'Flynn was listed as the owner.

[12] The letter states that the date was March 22, 1989, but this was a typographical error.

The meeting was attended by Marcie Findley and Bob Stuart, two aides to then County Supervisor George Bailey. (Ex. 27.) Also in attendance were Pastor Peterson and Ms. Rice as well as Mr. O'Flynn, his manager, Peggy Ashby, and his maintenance engineer, George Hatton. (Ex. 27.) Mr. O'Flynn prepared notes of the meeting. (Ex. 27.)

During the meeting, Mr. "O'Flynn explained to County personnel that he had requested the meeting for two (2) reasons: 1. ***[t]o legalize the relocation of six trailer spaces within Oak Crest Resort [and] 2. [t]o investigate procurement of a use permit for Mountain Christian Fellowship Church.***" (Ex. 27, at p. 1) (emphasis added). According to Mr. O'Flynn's minutes, "George Hatton explained that he had submitted a plot plan showing the relocation of trailer spaces to Ben Graeme [sic], Senior Planner in the Department of Planning and Land Use. After plan submission, Ben Graeme [sic] visited Oak Crest with George and physically investigated the relocated spaces. Ben Graeme [sic] informed George that he was in favor of the relocation and would recommend for approval to his supervisors. Subsequent to that, he informed George that his supervisors had disapproved the plan because 1) the prior bad history of the Resort and 2) ***the fact that the building was originally designated as a Rec Hall and was now being used as a church.*** George explained to the meeting that the building designated to be a Rec Hall had, in fact, never been used as a Rec Hall and was a dilapidated building used only as a storeroom." (Ex. 27, at pp. 1-2) (emphasis added).

According to Mr. O'Flynn's minutes "***Bob Stewart*** [sic] ***[the County employee] stated that it seemed to him that the Church would probably require a major use permit***. Stan Peterson stated that the Church had enough funds to proceed with a major use permit, and was very willing to proceed – they just needed to know how to get it done." (Ex. 27, at pp. 2-3) (emphasis added). (Declaration of Bob Stuart, at ¶¶ 2-6.) Under the heading "[t]he use of the building as the meeting hall for the Mountain Christian Fellowship Church," Mr. O'Flynn wrote, "[s]ince this apparently needed a major use permit, ***apply for a major use permit with John O'Flynn supplying a percentage of the funds needed for the application***." (Ex. 27, at p. 3) (emphasis added).

At some point during the meeting, "Bob Stewart [sic] suggested that he telephone Ben Graeme [sic] to map out a plan of action. He reported to the meeting that Ben suggested ***we needed to apply for a major modification to the existing use permit which would include: 1. [r]elocation of the spaces,***

and 2. [u]se of the hall as a church." (Ex. 27, at p. 3) (emphasis added). Mr. O'Flynn "thanked the County personnel for attending the meeting and for their helpful suggestions." (Ex. 27, at p. 4.) Ms. Rice produced notes from this meeting, which are consistent with Mr. O'Flynn's minutes. (Ex. 28.)

On September 30, 1988, Mr. O'Flynn wrote a letter to John Melbourne of the County's Department of Health Services. (Ex. 29.) In that letter, Mr. O'Flynn explained that he was "in the process of getting a permit for seven (7) trailer spaces which were relocated at Oak Crest Resort." (Ex. 29.) According to Mr. O'Flynn, ***"[d]uring the early stage of the permit application, Ben Graeme [sic], from the planning department, came out to inspect the overall trailer park. During his inspection he discovered that an existing building, originally designated for use as a recreation hall, but never used as such, was in fact being used as a community church. Because of this, what started out as a minor modification of the existing use permit, now became a major modification of the existing use permit.***" (Ex. 29) (emphasis added). (Declaration of Benjamin F. Grame, Jr., at ¶¶ 2-4.) According to Mr. O'Flynn, "we . . . were prepared to ante up the four thousand dollars which the County required for the application. All went well until we requested a sign off from your department. At that time, we received a note signed by Dave Besquist and Mary Lou White stating that there would be no sign off until we had presented an engineering report on the water system for Oak Crest." (Ex. 29.) Mr. O'Flynn explained that "[i]n the case of the relocated trailer spaces ***and the church, we are attempting to legalize an existing situation.*** We are not adding any hookups to the water system or increasing water usage. Accordingly, I feel a study of the water system is pointless at this time, and has no bearing on the project at hand." (Ex. 29, at p. 2) (emphasis added).

On November 30, 1988, Mr. Melbourn responded to Mr. O'Flynn's September 30, 1988 letter. (Ex. 30.) According to Mr. Melbourn, Mr. O'Flynn's letter "in effect was an appeal to this Department of a requirement for an engineering report on the domestic water system." (Ex. 30.) Mr. Melbourne granted the appeal, stating that "[t]he conclusion is that the existing wells and reservoir, are adequate for current domestic needs which include the use of the recreation building for a 200 person church and relocation of 7 recreational vehicle sites." (Ex. 30.) Mr. Melbourn sent a copy of his letter to Benjamin Grame. (Ex. 30, at p. 2.) It is apparent that Mr. O'Flynn needed the Department of Health Services' agreement that the water supply was adequate in order to proceed with an application for modification of

the Major Use Permit to legalize (1) use of the Building for Religious Assembly and (2) relocation of the RV spaces.

On March 31, 1989, Mr. Grame signed a "Decision of the Director of Planning and Land Use on a Minor Deviation from Plot Plan." (Ex. 26.) In this letter, the Director rejected the March 10, 1988 application for a minor deviation that Mr. O'Flynn had submitted for relocation of the trailer spaces. (Ex. 26.) Mr. Grame explained that the Director "hereby finds that the proposed minor deviation constitute[s] a substantial change in the major use permit and that said deviation will adversely affect adjacent property or adjacent property owners, and [therefore] DENIES said minor deviation." (Ex. 26.) Mr. Grame also explained that Mr. O'Flynn was informed of this decision previously and was "given time to apply for a modification of your major use permit. You choose not to use that option to date." (Ex. 26.)

The County has no record that either Mr. O'Flynn or plaintiff filed an application for a modification to the Major Use Permit that was discussed during the April 25, 1988 meeting. (Elias Decl., at ¶ 4-5.) Mr. O'Flynn never sought to legalize relocation of the RV spaces and neither Mr. O'Flynn nor plaintiff sought to legalize use of the Recreation Building for religious assemblies. Pastor Peterson agrees that no Major Use Permit application was submitted:

> Q. Was there any follow-up? Did the church ever, after 1988, attempt to get together a major use permit application? And we're not talking about the current pending major use permit that was ordered by the Court.
>
> A. No.

(Ex. 2, at 45:22 - 46:1.) This is also consistent with Ms. Rice's deposition testimony. (Ex. 19, at 25:10-23.)

C. Zoning For The Property.

The Property is zoned for rural residential ("RR") use under the Zoning Ordinance. (Ex. 31.) In an area zoned RR, "Family Residential," "Essential Services," "Fire Protection Services," "Horticulture (all types)," "Tree Crops," and "Row and Field Crops" are allowed as a matter of right. (Ex. 32.)

"Minor" use permits are required for "Farm Labor Camps," "Minor Impact Utilities," "Small Schools" and "Cottage Industries." (Ex. 32, at § 2184.)

"Major" use permits are required for "Group Residential," "Administrative Services," "Ambulance Services," "Child Care Services," "Clinic Services," "Community Recreation," "Cultural Exhibits And Library Services," "Group Care," "Law Enforcement Services," "Lodge, Fraternal And Civic Assembly," "Major Impact Services And Utilities," "Parking Services," "Postal Services," "***Religious Assembly,***"[13] "Participant Sports And Recreation: Outdoor," "Transient Habitation: Campground," "Transient Habitation: Resort," "Wholesaling Storage and Distribution: Mini-Warehouses," "Packing and Processing: Limited," "Packing and Processing: Winery," and "Mining and Processing." (Ex. 32, at § 2185) (emphasis added).

Under the Zoning Ordinance, "[b]efore any use permit [major or minor] . . . may be granted or modified, it shall be found:

> a. That the location, size, design, and operating characteristics of the proposed use will be compatible with adjacent uses, residents, buildings, or structures, with consideration given to:
>
> 1. Harmony in scale, bulk, coverage and density;
>
> 2. The availability of public facilities, services and utilities;
>
> 3. The harmful effect, if any, upon desirable neighborhood character;
>
> 4. The generation of traffic and the capacity and physical character of surrounding streets;
>
> 5. The suitability of the site for the type and intensity of use or development which is proposed; and to
>
> 6. Any other relevant impact of the proposed use; and
>
> b. That the impacts, as described in paragraph "a" of this section, and the location of the proposed use will be consistent with the San Diego County General Plan.
>
> c. That the requirements of the California Environmental Quality Act have been complied with."

(Ex. 34, at § 7358.) [14]

Religious Assembly is permitted as a matter of right in many areas within the County, including many commercial zones and the Residential-Commercial Zone. Specifically, Religious Assembly is

[13] "The Religious Assembly use type refers to religious services involving public assembly such as customarily occurs in synagogues, temples, and churches." (Ex. 33, at § 1370.)

permitted as a matter of right in 5 of the County's 12 commercial zones and in 1 of the County's residential zones. (Ex. 35, County Zoning Ordinance Matrix.)

D. The Current Enforcement Action.

On April 16, 2008, County Code Enforcement Coordinator Steve Murray sent a "Notice of Violation" to Mr. O'Flynn, the owner of the RV Park, informing him that Religious Assembly was not allowed on the Property without obtaining a Major Use Permit from the County. (Ex. 36.) Mr. Murray directed Mr. O'Flynn to inform plaintiff that it should stop using the former Recreation Building for religious assemblies within 30 days of the date of the letter. (Ex. 36, at p.3.)

On May 1, 2008, Mr. O'Flynn's attorney wrote a letter to Mr. Murray, asserting that Religious Assembly use of the Building was within the uses contemplated by the 1982 modification of the Major Use Permit to allow for live music and entertainment and the on and off-site sale of beer and wine. (Ex. 37, at pp. 2-3.) Plaintiff's experts now contend that the 1982 modification expired and has no effect. (Ex. 3, at 70:13 - 72:19.)

On May 16, 2008, Mr. O'Flynn's attorney wrote Pastor Peterson a letter stating that "any religious assembly in the recreation hall after today could ultimately result in County fines to Mr. O'Flynn and/or the Fellowship." (Ex. 38.)

On May 30, 2008, Senior Deputy County Counsel Eliot Alazraki wrote Pastor Peterson a letter explaining why the Notice of Violation had been issued and why plaintiff needed to obtain a Major Use Permit from the County. (Ex. 39.) Mr. Alazraki explained that if plaintiff did not comply, the County would have "no choice other than to take legal action against you. This would mean filing for an injunction and daily penalties for violating the Zoning Ordinance." (Ex. 39, at p. 2.)

On June 8, 2009 – 54 days after the April 16, 2008 Notice of Violation – plaintiff stopped using the former Recreation Building for Religious Assembly. (Ex. 22, at p. 10.)

Nearly two months later, on August 4, 2008, plaintiff filed this lawsuit against the County. At no time before filing this lawsuit did plaintiff indicate to the County that plaintiff intended to file an application for a Major Use Permit and to ask the County to allow plaintiff to continue holding services while that application was pending. (Elias Decl., at ¶ 5.) At no time prior to the filing of this lawsuit

[14] Section 7358 of the County Zoning Ordinance is part of Exhibit 34.

did plaintiff file an application for a Major Use Permit or file an application for a change of zone, which would allow plaintiff to operate a church on the Property as a matter of right. (Elias Decl., at ¶ 5.) At no time did plaintiff inform the County that it believed that in 1971, 1978 or 1979 that the County had approved the Recreation Building for use by a church by stamping plot plans submitted by the applicant – the argument that plaintiff is apparently making here. (Elias Decl., at ¶ 5.) At no time prior to the filing of this lawsuit, did plaintiff ask the Director of DPLU to issue a decision under section 1008 of the Zoning Ordinance stating whether the County was properly applying the Zoning Ordinance to plaintiff. (Elias Decl., at ¶ 5.)

On August 6, 2008, plaintiff's attorney sent the County's attorneys a letter requesting that plaintiff be allowed to continue using the Building while this lawsuit was pending. (Ex. 40, a p. 2.) On August 7, 2008, County attorney Thomas Bunton telephoned plaintiff's attorney, Peter Lepiscopo, and told him that before the County could consider plaintiff's request, the County would need to do an inspection of the Building in order to make sure that it was safe for use. (Declaration of Thomas D. Bunton, at 2.) Mr. Lepiscopo agreed that the County could perform the inspection on August 12, 2008, and did not suggest that there were any conditions on plaintiff's agreement to the inspection. (Declaration of Thomas D. Bunton, at 2.)

On August 8, 2008, Mr. Lepiscopo sent Mr. Bunton a proposed stipulation placing severe restrictions on the inspection, including a provision that would have made the results of the inspection inadmissible in this case. (Ex. 41.) The same day, County attorney Eliot J. Alazraki wrote Mr. Lepiscopo a letter explaining why the County needed to perform the inspection. (Ex. 42.) On August 11, 2008, Mr. Bunton sent Mr. Lepiscopo a redlined version of the stipulation specifying the conditions on the inspection to which the County could agree. (Ex. 43.) Later the same day Mr. Lepiscopo sent Mr. Bunton a letter stating that the redlined version of the stipulation submitted by the County was unacceptable. Mr. Lepiscopo refused to allow the scheduled inspection to proceed. (Ex. 44.)

After the County received Mr. Lepiscopo's letter refusing to proceed with the inspection, Mr. Alazraki sent Mr. Lepiscopo an e-mail asking him to reconsider his position and to allow the inspection to continue. (Ex. 45.) Mr. Alazraki explained that the County did not want to obtain an inspection warrant, but would do so if necessary. (Ex. 45.)

On the morning of August 12, 2008, the County obtained a warrant from San Diego County Superior Court Judge Laura W. Halgren authorizing an inspection the Building. (Ex. 46.) Later that day, Mr. Alaraki sent a letter asking Mr. Lepiscopo whether he wanted the inspection warrant to be served on him or his client. (Ex. 47.) Later the same day plaintiff filed an application for a Temporary Restraining Order ("TRO") in this Court, seeking, in part, to stop the inspection warrant from being executed.[15] (Ex. 48.) Later the same day Mr. Lepiscopo sent a letter to Mr. Alazraki asking the County to agree not to execute the warrant until the Court held a hearing on plaintiff's TRO application. (Ex. 48.) Mr. Alazraki responded to Mr. Lepiscopo's letter the same day, stating that the County was prepared to execute the inspection warrant on August 14, 2008. (Ex. 49.)

At no time did plaintiff ask Judge Halgren to rescind issuance of the inspection warrant. (Bunton Decl., at ¶ 3.) This Court held a hearing on plaintiff's TRO application on August 13, 2009. The Court denied plaintiff's application, concluded that the Court should not interfere with an inspection warrant issued by a state court judge. The inspection of the building took place as scheduled on August 14, 2009. On August 15, 2008, Mr. Alazraki wrote Mr. Lepiscopo a letter explaining that during the inspection, "[t]he inspectors found numerous violations including many serious violations that justify prohibiting occupancy of the building while the violations exist." (Ex. 50.) Based on the inspection, the County's Building Official revoked the certificate of occupancy and directed plaintiff to "cease holding assembly of any kind in the building."[16] (Ex. 50, at p. 1.) Mr. Alazraki identified the eight most serious

---

[15] Plaintiff also requested a Preliminary Injunction prohibiting the County from enforcing the Zoning Ordinance against plaintiff. The Court decided that plaintiff would have to obtain a hearing date for this motion.

[16] In its motion for summary judgment, plaintiff asserts that the County violated plaintiff's due process rights by revoking the certificate of occupancy without a hearing. However, section 109.6 of the California Building Code (Ex. 52; Cal. Code Regs., tit. 24, § 109.6) gives the County building official authority to revoke the certificate of occupancy without a hearing. That section provides that "[t]he building official may, in writing, suspend or revoke a certificate of occupancy issued under the provisions of this code . . . when it is determined that ***the building or structure or portion thereof is in violation*** of any ordinance or regulation or ***any provisions of this code***." (emphasis added). Moreover, plaintiff could have appealed that decision to the Board of Appeals and had a hearing, but chose not to do so. Section 105.1 of the California Building Code provides that "[i]n order to hear and decide appeals of orders, decisions or determinations made by the building official relative to the application and interpretation of this code, there shall be and is hereby created a board of appeals . . . ." (Ex. 52.) Section 91.1.112.1 of the County's Code of Regulatory Ordinances similarly provides that "[a] person may appeal an order, decision or determination made by the building official that relates to the application or interpretation of this chapter by filing a written appeal to the Building Construction Advisory Board of Appeals within 30 days of the building official's decision." (Ex. 53.) Since plaintiff

violations discovered during the inspection. (Ex. 50, at pp. 1-2.) In the letter, Mr. Alazraki stated that the County would provide a complete list of the building code violations discovered during the inspection at a later date. (Ex. 50, at p. 1.) Thereafter, the County provided the complete list of the building code violations discovered during the inspection to plaintiff. (Ex. 51.)

Following the hearing on the application for a TRO, plaintiff obtained a September 25, 2008 hearing date for its Motion for Preliminary Injunction. On August 29, 2008, plaintiff filed a new brief and materials in support of its motion. On September 23, 2008, the Court on its own motion, vacated "[p]laintiff's hearing date on its motion for preliminary injunction because Plaintiff failed to submit courtesy copies of its motion to chambers as required by Electronic Case Filing Administrative Policies and Procedures Section 2(e)." (Ex. 54.) A new hearing date was set for November 14, 2008. (Ex. 54.) On November 7, 2008, the Court issued an order changing the hearing date on the motion to November 13, 2008. (Ex. 55.)

On November 13, 2008, the Court held oral argument on plaintiff's motion. On November 18, 2008, the Court granted plaintiff's motion, in part, and denied the motion in part. (Ex. 56.) The Court found that the County could require plaintiff to obtain a Major Use Permit to operate a church on the Property and ordered plaintiff to submit an application for a Major Use Permit. (Ex. 56.) The Court also ordered the County to allow plaintiff to use the Property for Religious Assembly "only upon remedying the eight most serious code violations" identified by Mr. Alazraki in his August 15, 2008 letter. (Ex. 56.) The Court also ordered plaintiff to "remedy to the extent practicable the remaining violations identified" by the County "within a reasonable time not to exceed a period of 90 days after religious activities recommence on the site." (Ex. 56.)

On November 21, 2008, the County again inspected the Building and determined that plaintiff had remedied the eight most serious violations, with one exception. (Bunton Decl., at 5.) Plaintiff's contractor promised to remedy the remaining violation before services on Sunday, November 23, 2008. Based upon that assurance and the Court's order, the County indicated that it would not object to

---

failed to appeal, it cannot state a procedural due process claim. *Raditch v. United States*, 929 F.2d 478, 482 (9th Cir. Cal. 1991) ("This postdeprivation procedure would have compensated Mr. Raditch for any loss of property to which he was entitled. However, Mr. Raditch refused to cooperate. He cannot now argue that he was denied procedural due process.").

plaintiff using the Building for Religious Assembly on November 23, 2008.

Plaintiff did submit an application for a Major Use Permit to the County and supplied the initial deposit requested by the County. However, plaintiff has refused to submit the additional deposit requested by the County and to provide any of the additional information requested in the County's subsequent "scoping letter," contending that it cannot afford to process the application to completion. (Ex. 57.) Plaintiff's expert admits that plaintiff needs a Major Use Permit to engage in Religious Assembly on the Property because the Property is zoned RR. (Ex. 58, at 130:6-8.)

Plaintiff's Sunday services last 1 and ½ hours and occur at 10:00 a.m. (Ex. 2, at 87:18-19.) Plaintiff did not use the Building for Religious Assembly from June 8, 2008 through November 19, 2008, with the exception of August 10, 2008. (Ex. 22, at pp. 10-11.) During the period that plaintiff did not use the Building, Mr. O'Flynn did not charge plaintiff rent. (Ex. 2, at 123:09 - 124:08; Ex. 20, at 54:1-12.) During this period, plaintiff held Sunday services in the homes of church attendees.

Pastor Peterson testified that during this period, he contacted other churches in the area to see if plaintiff could use their buildings to hold Sunday services. According to Pastor Peterson, all of them said yes. (Ex. 2, at 85:2-6.) However, plaintiff would have to hold its services after those churches held their own services. (Ex. 2, at 85:8-9; 86:13-15.) Under these circumstances, Pastor Peterson testified that the members would not attend church:

> Q. Is the significance of the time -- what is the significance of the time?
>
> A. Nobody could come. When you're used to doing something at a certain hour, you're gonna lose your people.
>
> Q. Because they've got other things going on in their lives?
>
> A. Absolutely.

(Ex. 2, at 87:10-17.)

III. PLAINTIFF'S RLUIPA AND FIRST AMENDMENT CLAIMS ARE NOT RIPE.

On April 16, 2008, the County issued a Notice of Violation to Mr. O'Flynn, the owner of the RV Park, advising him that "[r]eligious assembly is not allowed in an RR-1 Zone without an MUP." (Ex. 36, at 3.) The County asked Mr. O'Flynn to "notify the church staff to cease using the building for religious assembly within 30 days of the notice." (Ex. 36, at 3.) In response to this letter, on May 1,

2009, the owner's attorney wrote a letter Steve Murray, one of the authors of the Notice of Violation. The attorney noted that in 1982, the County had authorized the conversion of the Recreation Building into a Country and Western Bar, offering live music and the on and off site sale of beer and wine. (Ex. 37, at 2.) The County allowed this conversion though a modification of the existing Major Use Permit. The attorney argued that plaintiff's use of the Property was covered by the 1982 modification. (Ex. 37, at pp. 2-3.) Now, however, plaintiff's expert takes a different position, arguing that the modification expired on July 16, 1984 and therefore cannot be utilized by plaintiff or anyone else. (Ex. 3, at 70:13 - 72:19.)

Thereafter, Mr. O'Flynn informed plaintiff through Pastor Peterson of the Notice of Violation and the request to stop using the Property for Religious Assembly. On May 30, 2008, County attorney Eliot Alazraki wrote Pastor Peterson a letter explaining why the Notice of Violation had been issued. (Ex. 39.) Those two had a telephone conversation shortly thereafter regarding the Notice of Violation. On August 4, 2008, plaintiff filed this lawsuit against the County.

At no time before filing this lawsuit did plaintiff indicate to the County it intended to file an application for a Major Use Permit and to ask the County to allow plaintiff to continue holding services while that application was pending.[17] At no time prior to the filing of this lawsuit did plaintiff file an application for a Major Use Permit or file an application for a change of zone, which would allow plaintiff to operate a church on the Property as a matter of right. At no time did plaintiff inform the County that it believed that in 1971, 1978 or 1979 that the County had approved the Recreation Building for use as a church by stamping plot plans submitted by the applicant – the argument that plaintiff is apparently making here.

Moreover, plaintiff failed to ask the Director of DPLU to determine whether, in the Notice of Violation, Mr. Murray had correctly applied the Zoning Ordinance and determined that plaintiff needed to obtain a Major Use Permit.[18] Had plaintiff done so, this matter may have been resolved without the

[17] Plaintiff's Pastor testified that he was not going to apply for a Major Use Permit until ordered to do so by the Court. (Ex. 2, at 141:9-11.)

[18] Section 1008 provides that "[i]f ambiguity arises concerning . . . application of The Zoning Ordinance, it shall be the duty of the Director to ascertain all pertinent facts, render a decision on the interpretation, set forth findings and notify concerned persons. This decision may be appealed pursuant to the Administrative Appeal Procedure commencing at Section 7200." (Ex. 60.)

need for litigation.

In response to plaintiff's motion for a preliminary injunction, the Court ordered plaintiff to apply for a Major Use Permit. Plaintiff admits that the County has not granted or denied plaintiff's application. Indeed, plaintiff admits that it has not supplied the additional monies and information that the County needs in order to act on that application. According to plaintiff, it cannot afford to obtain a Major Use Permit.

Under these circumstances, plaintiff's RLUIPA and First Amendment claims are not ripe. The Notice of Violation was not a "final" decision by the County. Plaintiff never attempted to get the County to agree to the approach adopted by this Court in ruling on the Preliminary Injunction motion – plaintiff would apply for a Major Use Permit and the County would allow plaintiff to continue using the Building while the application was pending. Moreover, plaintiff never asked the County to rescind the Notice of Violation based on the argument that it is apparently making here -- that in 1971, 1978 or 1979 the County approved church use of the Building by stamping plot plans that were submitted by the applicants.

Murphy v. New Milford Zoning, 402 F. 3d 342 (2d Cir. 2005) is directly on point. In that case, the plaintiffs were holding "Sunday afternoon prayer group meetings" in their home and had being doing so since 1994. *Id.* at 345. In 2000, the City of New Milford received a complaint about the meetings and based upon that complaint instituted an investigation conducted by the Zoning Enforcement Officer. The Zoning Enforcement Officer presented the results of her investigation to the Zoning Commission, "which in turn issued an opinion concluding that the weekly, sizable prayer meetings were not a customary accessory use in a single-family residential area." *Id.* On November 29, 2000, the Zoning Enforcement Officer sent a letter to the plaintiffs "advising them that their meetings violated zoning regulations." *Id.* Two days later, the plaintiffs filed a lawsuit against the city. On December 19, 2000, the Zoning Enforcement Officer "issued a formal cease and desist order charging the [plaintiffs] with violating New Milford's single-family zoning regulations." *Id.* After receiving the cease and desist order, the plaintiffs did not seek a variance from the Zoning Board of Appeals. *Id.* If a variance were granted, it would have allowed the plaintiffs to continue holding religious services at their home.

On appeal, the City of New Milford argued that the plaintiffs' First Amendment and RLUIPA claims were not ripe. The Second Circuit agreed and reversed the district court's judgment in favor of the plaintiffs. The court began its inquiry by citing the Ninth Circuit's decision in *Hoehne v. County of San Benito*, 870 F. 2d 529, 533 (9th Cir. 1989) for the proposition that "to establish jurisdiction in this zoning dispute the [plaintiffs] have the 'high burden' of proving that we can look to a final, definitive position from a local authority to assess precisely how they can use their property." *Murphy*, 402 F. 3d at 347.

The Second Circuit held that the first prong of the Supreme Court's ripeness test governing takings claims announced in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985),[19] applies to cases alleging First Amendment and RLUIPA violations based on local land use regulations. *Murphy*, 402 F.3d at 352 ("[W]e conclude that it is appropriate to apply *Williamson County's* prong-one finality requirement to each of the Murphys' claims. Thus, the Murphys may not proceed in federal court until they have obtained a final, definitive position from local authorities as to how their property may be used. Because such a decision has not yet been rendered, we lack jurisdiction.").

The Court found that finality requirement was necessary for four reasons. First, "the *Williamson County* Court reasoned that requiring a claimant to obtain a final decision from a local land use authority aids in the development of a full record." *Id.*, at 348. Second, "only if a property owner has exhausted the variance process will a court know precisely how a regulation will be applied to a particular parcel." *Id.* Third, "a variance might provide the relief the property owner seeks without requiring judicial entanglement in constitutional disputes. Thus, requiring a meaningful variance application as a pre-requisite to federal litigation enforces the long-standing principle that disputes should be decided on non-constitutional grounds whenever possible." *Id.* Fourth, "courts have recognized that federalism principles also buttress the finality requirement. Requiring a property owner to obtain a final, definitive

[19] In *Williamson County*, the Supreme Court held that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186. The Supreme Court stated that a takings claim is not ripe if "the property owners [have] not yet submitted a plan for development of their property." *Id.* at 187. The Supreme Court also held that a claim is not ripe unless the plaintiff has filed an application for a variance to the land use regulations being challenged. *Id.* at 188-91.

position from zoning authorities evinces the judiciary's appreciation that land use disputes are uniquely matters of local concern more aptly suited for local resolution." *Id.* (citations omitted).

The plaintiffs also argued that they should not be required to seek a variance because the cease and desist order would "inflict an immediate injury." *Id.*, at 351. To support their argument, the plaintiffs "assert that New Milford could have enforced the cease and desist order through civil fines and imprisonment." *Id.* The court noted, however, that New Milford did not have any "arresting or fining power." *Id.* Further, "the award of fines and imprisonment can occur only after a legal proceeding is filed (a step never taken here), zoning violations are proven and the trial court—in exercising its discretion—believes that penalties are necessary to deter future violations." *Id.* (citations omitted).[20]

The court rejected the plaintiffs' First Amendment and RLUIPA challenges, determining that they were not ripe because the plaintiffs had failed to request a variance of the municipality's zoning ordinance provision preventing use of the residence for prayer group meetings. *Id.* at 353-54.

In *Grace Community Church v. Lenox Township*, 544 F. 3d 609 (6th Cir. 2008), the Sixth Circuit agreed with the Second Circuit that a RLUIPA claim is not ripe unless the plaintiff can satisfy the "finality" prong of the *Williamson County* test. According to the Court "after emphasizing that ripeness requires finality, not necessarily exhaustion, the Church alternatively argues that even finality is not required in this context. The Church observes that the finality requirement imposed in *Murphy II* . . . is an expansion of the ripeness analysis applied to an unconstitutional 'taking' of property claim in *Williamson County*. The Sixth Circuit, unlike the Second Circuit, the Church contends, has construed *Williamson County* finality as applying only to taking claims, not to other kinds of land use disputes." *Id.*, at 617-18 (citation omitted). The Sixth Circuit rejected that argument, concluding that "the finality requirement is an important element of the ripeness inquiry in this case." *Id.*

In *Grace Community Church*, the Planning Commission had revoked a special land use permit.

[20] The County informed Mr. O'Flynn, the owner of the RV Park, that it could seek civil penalties against his limited partnership. (Ex. 36, at p. 3.) However, the County told Mr. O'Flynn that "[i]f you provide us with proof that a proper notice was sent and that you are diligently taking appropriate legal action in the event the operators of the church do not comply, we will not hold you liable for the church's failure to comply." (Ex. 36, at p. 3.) Further, the County would have had to file a lawsuit against plaintiff seeking civil penalties and a court would have to determine that such penalties were warranted. Indeed, it is undisputed that the County never filed a lawsuit seeking civil penalties against either Mr. O'Flynn's partnership or plaintiff.

The Sixth Circuit found that the RLUIPA claim was not ripe because the church "made no attempt to obtain reconsideration of the revocation decision, did not apply for reinstatement of the special use permit, and did not appeal the revocation decision to the Zoning Board of Appeals" before filing its lawsuit. *Id.* at 612.

In *Congregation Etz Chaim v. City of Los Angeles*, 2009 U.S. Dist. LEXIS 42345 (C.D. Cal. 2009), the district court also agreed that *Williamson County*'s finality requirement applies to RLUIPA claims. Indeed, the district court cited this Court's order on the Preliminary Injunction motion in support of its decision. *Id.*, at *22. In *Congregation Etz. Chaim*, the plaintiff had submitted an application for a conditional use permit ("CUP"), which the City of Los Angeles denied. At the time of the district court's decision, the plaintiff had filed a second application for a CUP. The city had not made a decision whether to grant that application. The district court held that the RLUIPA claim was not ripe because the second CUP application was still pending. The district court reasoned as follows:

> The Court concludes that the Congregation's RLUIPA claim is not prudentially ripe for judicial decision. . . . Over ten years have passed since the City denied plaintiff's CUP application, and the Congregation has recently filed a second application, which the City is currently considering. This second CUP application presents the first opportunity for the City to consider the Congregation's request in light of RLUIPA. The record before the Court is therefore incomplete, and it is difficult for the Court to determine the extent of the Congregation's injury without a final disposition of the second CUP application. Furthermore, withholding consideration of the Congregation's RLUIPA claim until the City reaches a final decision is warranted, given that the granting of the second CUP application would moot the instant action.

Id., at *30-*31.

In this case, plaintiff's RLUIPA challenge is not ripe for the reasons discussed above. Plaintiff did nothing to challenge the Notice of Violation and its application for a Major Use Permit has not been decided by the County.

Because plaintiff's claims are not ripe, the County is entitled to summary judgment for this reason alone.

IV. ALL OF PLAINTIFF'S CLAIMS FAIL BECAUSE THE COUNTY CAN REQUIRE PLAINTIFF TO OBTAIN A MAJOR USE PERMIT.

The Building is located on a parcel that is zoned RR. (Ex. 31.) Under the Zoning Ordinance, a

Major Use Permit is required to engage in Religious Assembly[21] on a property zoned RR. Plaintiff's expert admits that plaintiff needs to obtain a Major Use Permit in order to use the Building for Religious Assembly. (Ex. 58, at 180:6-8.) Moreover, this Court correctly recognized in ruling on the motion for a preliminary injunction that RLUIPA "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 or unfair delay." (Ex. 56, at pp. 6-7) (*quoting* 146 Cong. Rec. S7774-1.) *Accord San Jose Christian College v. City of Morgan Hill*, 360 F. 3d 1024, 1035 (9th Cir. 2004) ("[I]t appears that College is simply adverse to complying with the [zoning ordinance] requirements. The City's ordinance imposes no restriction whatsoever on College's religious exercise; it merely requires College to submit a complete application, as is required of all applicants. Should College comply with this request, it is not at all apparent that its re-zoning application will be denied.").

Despite the admission of its own expert and the settled state of the law, plaintiff appears to claim that requiring it comply with the County's Zoning Ordinance by either obtaining a Major Use Permit or stopping use of the Building for Religious Assembly imposes a "substantial burden" on its ability to practice its religion in violation of the First Amendment and RLUIPA. Plaintiff is mistaken.

Plaintiff "bears the burden of persuasion on whether the zoning laws, or the City's application of those laws . . . , 'substantially burdens' its 'exercise of religion.'" *Id.* at 1034 (citation omitted). "The Supreme Court's free exercise jurisprudence is instructive in defining a substantial burden under RLUIPA." *Guru Nanak Sikh Society v. County of Sutter*, 456 F. 3d 978, 988 (9th Cir. 2006). "[T]he burdens imposed by facially neutral regulations of ***general applicability***, which were adopted for purposes unrelated to religion, are considered ***incidental burdens*** that must be borne by religious organizations and by non-religious organizations alike. Zoning regulations, absent abuse or arbitrary application, generally ***fall within the 'generally applicable' category of regulation***." *International Church of the Foursquare Gospel v. City of San Leandro*, 2008 U.S. Dist. LEXIS 105525, *25 (N.D. Cal. 2008) (emphasis added) (citing *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*,

[21] The County Zoning Ordinance defines "Religious Assembly" as follows: "The Religious Assembly use type refers to religious services involving public assembly such as customarily occurs in synagogues, temples, and churches." (Ex. 33, at § 1370.)

510 F. 3d 253, 275-76 (3d Cir. 2007)). "Because incidental burdens do not trigger strict scrutiny, 'courts confronting free exercise challenges to zoning restrictions rarely find the substantial burden test satisfied even when the resulting effect ***is to completely prohibit a religious congregation from building a church on its own property***.'" *Id.* at *26 (*quoting Westchester Day School v. Village of Mamaroneck*, 504 F. 3d 338, 350 (2d Cir. 2007) (emphasis added)).

In this case, it is undisputed that the County would require a Major Use Permit (or modification) for virtually any non-residential use. Thus, there can be no question that the Zoning Ordinance requirement that is being enforced against plaintiff is one of general applicability that imposes only incidental burdens on plaintiff. Therefore, there is no substantial burden in violation of either the First Amendment or RLUIPA even if plaintiff must rent a building at a different location to hold its services.

A. The County Did Not Approve Use Of The Building For Religious Assembly.

In ruling on plaintiff's motion for a preliminary injunction, the Court rejected plaintiff's argument that it did not need to obtain a Major Use Permit (or a modification of the existing Major Use Permit) because the County had "approved" plot plans that showed an "EXIST. CHURCH" on the plans. However, plaintiff is making this argument once again. This argument fairs no better this time around.

In 1971, the owner of Building submitted an application to the County seeking a "special use permit for recreational campground." (Ex. 5.) The application stated that "an existing building will be used ***as a recreation Hall*** for use by campers." (Ex. 5) (emphasis added). In support of the application, the owner apparently submitted three sheets of maps. (Ex. 6.) The maps were prepared by The Barbour Company, and are dated February 3, 1971. Only the second and third sheets were found in the County's records. Sheet two is labeled "PROPERTY MAP." On sheet two, the Building is referred to as an "EXIST. REC. HALL." Sheet three is labeled a "PROPOSED PLOT PLAN." On sheet three, the Building is called an "EXIST. BLDG. REC. HALL & CHAPEL." On the proposed plot plan, it does not state that the applicant was proposing to use the Building as a chapel in the future. Neither of these sheets contains any stamp or other mark showing that they were approved by the County.

On March 27, 1971, the County's Planning Commission approved the Special Use Permit application. The decision grants "a special use permit for a recreational campground." (Ex. 7.) The

decision states that the recreational campground will include a "recreation building." Under the "reasons for decision" section it is stated that "the property . . . is . . . undeveloped except for an existing storage building, two existing automobile garages in connection with three existing cabins." Nowhere in the Planning Commission decision does it state that an existing building was being used as a church or chapel. Nowhere in the Planning Commission decision does it state that the Commission approved use of an existing building as a church. Nowhere does the Planning Commission make any findings that use of an existing building for a church would be appropriate under the Zoning Ordinance.

Since there is no evidence that the proposed plot plan upon which plaintiff relies was ever approved by the County, it is clear that in 1971 the County did not grant a Special Use Permit for plaintiff to use the Building for Religious Assembly. Moreover, the applicant did not request permission in the application to use the Building as a church. To the contrary, the applicant asked for permission to use the Building "as a recreation Hall for use by campers." (Ex. 5.) Further, the Planning Commission approved use of the Building as a "recreation building." Indeed, the Planning Commission's decision made no mention of approving use of the Building for Religious Assembly and makes none of the findings that are required to approve the Building for use as a church.

On September 20, 1978, La France Bragg, one of the new owners of the Property, submitted an application for a minor deviation to the existing Special Use Permit. This application had absolutely nothing to do with use of the Building. Rather, the application sought to delete approximately four acres from the land governed by the Special Use Permit and to add another small amount of land to the area governed by the Special Use Permit. In the application, Mr. Bragg stated that he "would like to sell 4 acre parcel . . . and now has new ownership of 1 acre parcel." (Ex. 8.) In support of this application, Mr. Bragg submitted three pages of maps. The first sheet was labeled "TITLE SHEET & SITE PLAN." The second sheet was labeled "PROPERTY MAP." (Ex. 9.) The third sheet was labeled "PROPOSED PLOT PLAN." The Property Map refers to the Building as an "EXIST. CHURCH." The Proposed Plot Plan refers to the Building as "EXIST. BLDG. CHURCH." (Ex. 9.)

On the Title Sheet & Site Plan, there is a stamp stating that the "Plot Plan" was approved by the Director of Land Use and Environmental Regulation James J. Gilshian on September 20, 1978 through a "deputy." However, the deputy's signature has been crossed out. (Ex. 9, at p. 1.) On October 4, 1978,

the Mr. Gilshian wrote Mr. Bragg a letter explaining that "[t]he application for minor deviation for Special Use Permit P71-104 cannot be approved. An increase or decrease in total area of a special use permit cannot be accomplished through the minor deviation process (section 720, Zoning Ordinance) . . . The Decision of the Director of LUER pursuant to this section of The Zoning Ordinance is final; ***however an application for modification of the special use permit may be accepted to initiate the appropriate procedure for accomplishing your expressed goal***." (Ex. 10) (emphasis added).

Since it is apparent that the County did not actually approve the plot plan that was submitted, plaintiff cannot rely on this plot plan. Moreover, since this application had absolutely nothing to do with use of the Building, it is apparent that the County could not have approved use of the Building as a Church.

Mr. Bragg followed the advice that Mr. Gilshian gave in his October 4, 1978 letter. On December 15, 1978, Mr. Bragg submitted an application for a modification of the 1971 Special Use Permit. (Ex. 13.) Mr. Bragg sought the same addition and deletion of property that was sought in the minor deviation. Under the section of the application titled "Description of Proposed Use," Mr. Bragg stated that "[t]his is a recreational campground, spaces rent for day, week or month but less than 90 consecutive days. Existing cabins leased also less than 90 consecutive days. A restroom facility supposedly erected. ***An existing building used as a recreation hall by campers***." (Ex. 13) (emphasis added). In support of this application, Mr. Bragg submitted the same three pages of maps that he had submitted in support of the earlier minor deviation application. (Ex. 14.) This time, those maps were approved by the County on February 2, 1979.

Since this application had absolutely nothing to do with use of the Building, it is apparent that the County could not have approved use of the Building as a Church. Moreover, Mr. Bragg did not request permission in the application to use the Building as a church. To the contrary, he stated that the Building was being "used as a recreation hall by campers." (Ex. 13.) Indeed, the Planning Commission's decision made no mention of approving use of the Building for Religious Assembly and makes none of the findings that are required to approve the Building for use as a church. (Ex. 15.)

Moreover, Mr. Bragg testified that the Building was not being used as a church in 1978 when he submitted the application for a minor deviation and the application for a modification of the Special Use

Permit. (Ex. 12, at 15:15 - 16:12.) He testified that he used the "base" maps that were prepared in 1971 to support the original application for a Special Use Permit. (Ex. 12, at 28:16 - 29:5; 29:12-25.) He submitted these maps to the County in 1978, making some changes to the base maps, but failing to delete the references to an existing church. (Ex. 12, at 39:21 - 40:06.)

There is no caselaw that supports plaintiff's contention that the plot plan controls over the application and the Planning Commission decision. This is especially true when the application in question has absolutely nothing to do with the use that was supposedly approved by stamping the plot plan.

Moreover, if the County did "approve" church use in 1978 or 1979 this approval was obviously done in error based upon false information supplied by the applicant. While the maps indicated that the Building was being used as Church, this information was not true. The Building was being used as a recreational hall and office. Therefore, the County is entitled to revoke the permit approval. *Smith v. Kraintz*, 201 Cal. App. 2d 696, 699 (1962) (County of Contra Costa was entitled to revoke a building permit, where application contained a "false statement, although not a fraudulent one"); *Stokes v. Board of Permit Appeals*, 52 Cal. App. 4th 1348, 1357 (1997) ("The trial court found that Stokes misrepresented the current use of the property when he should have disclosed it was vacant and the City was misled into issuing the building permits based solely on this misrepresentation. . . . On this record, he did not act in good faith reliance on the building permits and has no vested right to complete construction.").

Moreover, if plaintiff's argument were accepted, the consequences could be disastrous. If an applicant could sneak a use onto a plot plan, that use would be allowed even if the use was not discussed in the application and even if the government agency did not consider that use in making its decision. Indeed, plaintiff's expert aptly demonstrated the potential consequences if plaintiff's argument were accepted:

> Q. Let's assume for a moment there's an application submitted for a zoo, and the application talks all about zoos and how there ought to be approval of a zoo. And let's assume as part of that application there comes in with a plot plan, and it has all that zoo on there, and it refers to a -- within the area of the use permit an existing dynamite storage facility. And then you've got a Planning Commission that says approve as per plot plan dated blah, blah, blah, and then you've got findings related to a zoo, and it mentions

> nothing about the dynamite storage facility. Is it your view that the dynamite storage facility became an approved use?
>
> A. If it was on the plot plan and said "dynamite storage facility existing" or whatever, if it's on the plot plan, it's an approved use.

(Ex. 3, at 81:13 - 82:04.)

Moreover, even if plaintiff's argument were accepted, this is not a First Amendment or RLUIPA violation. At most, plaintiff could prove that the County violated its Zoning Ordinance by failing to recognize that it had already "approved" use of the Building for Religious Assembly. However, plaintiff did not bring this issue to the County's attention prior to filing its motion for a Preliminary Injunction. The County did not review these maps prior to issuance of the Notice of Violation.[22] (Declaration of Steve Murray, at ¶ 2.) In addition, the Court rejected plaintiff's argument in ruling on the motion for a Preliminary Injunction because it ordered plaintiff to file an application for a Major Use Permit. Further, Pastor Peterson had not even seen these maps prior to the filing of this lawsuit. Given these circumstances, there is no evidence that the County chose to apply the Zoning Ordinance against plaintiff in an unfair manner. At a minimum, any violation of RLUIPA was unintentional. Therefore, damages could not be awarded against the County. *Redwood Christian Schools v. County of Alameda*, 2007 U.S. Dist. LEXIS 8287, *16-*18 (N.D. Cal. 2007) (since RLUIPA does not specifically provide a damages remedy, violations must be intentional in order for damages to be awarded).

B. The Fact That Plaintiff Cannot Afford To Obtain A Major Use Permit Is Not A Substantial Burden And Does Not Excuse Plaintiff From Obtaining A Permit.

Pursuant to the Court's Preliminary Injunction order, plaintiff applied to the County for a Major Use Permit. As is its normal practice, the County issued a "scoping letter" to plaintiff identifying the environmental issues that need to be addressed in order for the County to grant plaintiff's Major Use Permit application. Plaintiff's expert has examined the "scoping letter" and states that it will cost

///

///

///

[22] These plot plans were not reviewed by the County until after plaintiff filed its motion for a preliminary injunction. (Bunton Decl., at ¶ 4.)

plaintiff between $214,250 and $314,250 to obtain the Major Use Permit from the County.[23] (Declaration of Bud Gray in Support of Plaintiff's Motion for Summary Judgment, at ¶ 39.) Plaintiff asserts in its motion for summary judgment that "[t]he Church will be required to disband and cease to exist because of the substantial burden upon religious exercise imposed upon it by the County and because of the financial impossibility of paying the County's fees and the fees and costs associated with obtaining a major use permit . . ." (Plaintiff's Motion, at p. 23.)

Plaintiff is apparently arguing that under RLUIPA and the First Amendment, it is excused from complying with the Zoning Ordinance if it cannot afford to do so. As discussed below, courts have consistently rejected this argument.

Moreover, plaintiff's expert admits that the County is treating plaintiff the same way it would treat any other applicant who needed to obtain a Major Use Permit to use the Building:

> Q. Okay. If this was the Elks Club that was proposing to get the major use permit here in this building, would it be any different?
>
> A. No.
>
> Q. It would be the same?
>
> A. It would be exactly the same.
>
> Q. It would be costly?
>
> A. The environment – the environmental studies are blind to – if it's a church, Elks Club, Microsoft. Environmental studies really don't care. They require that those impacts be identified, evaluated, and mitigated so . . .
>
> Q. And you testified previously that almost every jurisdiction requires major use permits for churches?
>
> A. That's right.
>
> Q. And so churches all over California are going to be having to pay these amounts of money if they want to locate within those jurisdiction if they require a use permit?
>
> A. That's correct.

[23] Some of these costs are County charges, other costs are related to work that will most likely be done by environmental consultants. California Government Code section 66014 authorizes local governments to charge fees for "use permits" as long as those fees do "not exceed the estimated reasonable cost of providing the service for which the fee[s are] charged . . . ." *See also Barratt American, Inc. v. City of Rancho Cucamonga*, 37 Cal. 4th 685, 694 (2005).

(Ex. 58, at 179-19 - 180:14.) [24]

Courts have consistently held that the cost to obtain a permit is not a "substantial burden" on religion in violation of either RLUIPA or the First Amendment. In *City of Morgan Hill*, the Ninth Circuit cited favorably to the Seventh Circuit's decision in *Civil Liberties for Urban Believers v. City of Chicago*, 342 F. 3d 752 (7th Cir. 2003). In that case, the City of Chicago's zoning ordinance required churches to obtain a special use permit in order to operate in business and commercial zones. *City of Morgan Hill*, 360 F. 3d at 1035. "The local churches repeatedly applied for—and were denied—special use permits." *Id.* The churches sued, asserting that the city violated RLUIPA, as well as their rights under the Free Exercise Clause of the First Amendment. *Id.* The Seventh Circuit rejected these arguments, asserting that "'the ***costs***, ***procedural requirements***, ***and inherent political aspects'*** of the ***permit approval process*** were 'incidental to any high-density urban land use' and thus ***'[did] not amount to a substantial burden on religious exercise.***' 'While they may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city, they do not render impracticable the use of real property in Chicago for religious exercise, much less discourage churches from locating or attempting to locate in Chicago." *Id.* at 1035 (citation omitted) (emphasis added).

Other cases hold that the expense religious institutions have to incur in order to comply with local zoning laws does not impose a "substantial burden" on religion in violation of either RLUIPA or the First Amendment. *Christian Gospel Church v. San Francisco*, 896 F. 2d 1221, 1224 (9th Cir. 1990) ("The government action in this case did not prevent all home worship. Rather, it involved the denial of a permit to worship in this specific home. The burdens imposed by this action are therefore of convenience and expense, requiring appellant to find another home or another forum for worship. We find that the burden on religious practice in this zoning scheme is minimal."); *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 987 (N.D. Ill. 2003) ("additional expense imposed by zoning ordinances are generally not substantial burdens under the First

[24] The County also charges non-religious institutions for the time spent by County employees processing permit applications. If the County were to exempt religious institutions from paying these charges, this arrangement would run afoul of the Establishment Clause. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (sales tax exemption granted by state for religious publications violated the Establishment Clause because the exemption provided financial support to religious institutions).

Amendment") (citation omitted); *The Episcopal Student Foundation v. City of Ann Arbor*, 341 F. Supp. 2d 691 (E.D. Mich. 2004) ("[A]lthough Canterbury House may incur additional financial burdens, such as rental expenses to accommodate its entire congregation on occasion, or if it seeks additional growth, such financial burdens are not substantial under the RLUIPA.") *Id.* at 706 (citations omitted); *Church v. Gill*, 671 F. Supp. 508, 513 (N.D. Ill. 1987) ("Economic burdens do not rise to a constitutionally impermissible infringement of freedom to worship.") (citation omitted).

Accordingly, the cost of obtaining a Major Use Permit does not impose a substantial burden on plaintiff in violation of either the First Amendment or RLUIPA. If plaintiff cannot afford to obtain a Major Use Permit it must find another suitable location to rent.

V. EQUITABLE ESTOPPEL IS NOT A VIABLE CLAIM.

In its order on the Preliminary Injunction motion, the Court found that "Guatay has demonstrated a fair chance of prevailing under the estoppel argument." (Ex. 56, at p. 5.) Additional evidence has been uncovered that demonstrates plaintiff's estoppel argument fails.

A. No Equitable Estoppel Claim Was Pled In The Complaint.

Plaintiff does not plead the theory of estoppel in its complaint. The County pointed out this fact in its opposition to plaintiff's motion for a Preliminary Injunction. In the Preliminary Injunction order, the Court did not specifically address the County's argument that plaintiff had not pled equitable estoppel in its complaint. Given these facts, the County expected plaintiff to seek leave to amend its complaint to plead equitable estoppel. However, plaintiff did not do so. Indeed, the Case Management Conference Order Regulating Discovery and Other Pretrial Proceedings ("Case Management Conference"), filed January 15, 2009, specifically provides that "[a]ny motion to join other parties, to amend the pleadings, or to file additional pleadings shall be filed on or before February 17, 2009." (Ex. 59.) Plaintiff did not file a motion seeking leave to file an amended complaint.

"It is, of course, well settled that a party who has an opportunity to plead estoppel on which his cause of action or defense is premised must do so, and that an eventual failure to so plead constitutes a waiver of estoppel." *Green v. Travelers Indemnity Co.*, 185 Cal. App. 3d 544, 555 (1986) (citing cases).

Since plaintiff had not pled the theory of estoppel in its complaint, it has waived this claim.

///

B. Plaintiff Is Trying To Use Equitable Estoppel Offensively.

"[A]xiomatic is also the rule that the theory of estoppel is invoked ***as a defensive matter*** to prevent the party estopped ***from alleging or relying upon some fact or theory that would otherwise permit him to recover something from the party asserting estoppel.*** Or as frequently stated: The doctrine acts defensively only. . . . Appellants here purport to use the doctrine offensively." *Id.* (citations and internal quotation marks omitted) (emphasis added). *Accord The Money Store Investment Corp. v. Southern California Bank*, 98 Cal. App. 4th 722, 732 (2002) ("The Money Store's cause of action for equitable estoppel fails as well. . . . The doctrine acts defensively only. . . . The Money Store pleaded equitable estoppel as a separate cause of action. It cannot stand as such.") (internal quotation marks and citation omitted); *Nahas v. City of Mountain View*, 2005 U.S. Dist. LEXIS 34718 (N.D. Cal. 2005) ("Plaintiffs' Fifth Claim is for estoppel. Equitable estoppel acts defensively only. It cannot be asserted as an independent claim.") (internal citations and internal quotation marks omitted).

In *Pacific Gas and Electric Company v. Zuckerman*, 189 Cal. App. 3d 1113 (1987), the cross-complainant alleged an equitable estoppel claim, asserting that Pacific Gas and Electric ("PGandE") was estopped from refusing to continue to pay royalties on gas that it had injected into a well that it owned, which migrated into a well owned by the cross-complainants. The court of appeal rejected this use of estoppel. According to the court, "[d]efendants contended, and the trial court found, that PGandE is estopped from denying that it must pay defendants a perpetual royalty on injected gas which can be extracted through the Zuckerman-Henning well. The record does not support the application of estoppel in that manner. . . . The doctrine acts defensively only. Defendants argue that from 1967 to 1980 PGandE extracted gas from the Zuckerman-Henning well and paid royalties upon it although it was aware the deposit was connected to the storage reservoir and that a least some of the gas extracted was injected rather than native gas. Defendants conclude from this that PGand E should be estopped from refusing to continue to pay royalties on injected gas in perpetuity. This is not a defensive use of the estoppel doctrine." *Id.* at 1144.

Here, plaintiff is attempting to use the doctrine of estoppel offensively to obtain damages from the County and to obtain an injunction authorizing plaintiff to continue using the Building forever without the required Major Use Permit. Therefore, even if plaintiff had pled equitable estoppel, that

theory would fail as a matter of law.

C. Plaintiff Cannot Satisfy The Elements Of Equitable Estoppel.

"The required elements for an equitable estoppel are: (1) the party to be estopped must be apprised of the facts; (2) the party to be estopped must intend his or her conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) the other party must rely upon the conduct to his or her injury." *Munoz v. State of California*, 33 Cal. App. 4th 1767, 1785 (1995) (citation omitted).

Plaintiff cannot satisfy these elements. Plaintiff has known since at least 1988 that it needed to obtain a Major Use Permit from the County. Thus, plaintiff was not "ignorant of the true state of facts." Moreover, plaintiff does not contend, and the undisputed evidence establishes, that plaintiff did not rely on the County's conduct and thereby suffer injury. Further, the County did not intend for plaintiff to rely on its conduct and plaintiff has no basis for asserting that it had a right to believe that the County intended for plaintiff to rely on the County's conduct.

Golden Gate Water Ski Club v. County of Contra Costa, 165 Cal. App. 4th 249 (2008) is similar to this case. There, the plaintiff, golden Gate Water Ski Club (the "Club") purchased Golden Isle (a 5-acre island in the San Joaquin Delta) in 1966. *Id.*, at 254. "By 1970, without obtaining any land use or related permits, the Club had built or installed at least 15 residential dwelling units on the island in the form of cabins and/or travel trailers, plus decks, docks and other related structures." *Id.* "On July 1, 1970, the County's building inspection department notified the Club its use of the island violated the County's land use requirements and was not permitted." *Id.* "The Club did not cease its use of the island nor did it remove the dwelling units and other structures. To the contrary, still without obtaining any land use or related permits, the Club added to the development, so that by 2003 the development on Golden Isle had grown to 28 residential dwelling units, 28 docks and various outbuildings." *Id.*

"In 2003, after conducting a site inspection of Golden Isle, the County posted a notice of violation at the site." *Id.* For the next two years, the Club made various proposals to Contra Costa County that the county deemed unacceptable. *Id.* "On February 23, 2005, the county abatement officer issued a notice and order to abate a public nuisance by demolishing and removing all structures from Golden Isle. The Club appealed the notice to the [Contra Costa County's Board of Supervisors], which

affirmed the abatement officer's determination and ordered the Club to abate the public nuisance by demolishing and removing all structures within 90 days of the Board's order." *Id.* The Club then filed a petition for a writ of mandate with the superior court. The petition was denied. The California Court of Appeal affirmed.

On appeal, the Club argued that the County was equitably estopped from requiring it to remove all of the structures. The Club's argument was based on the fact that Contra Costa County did not enforce its land use regulations between 1970 and 2003 and the Club's contention that "a County employee informed the Club's attorney in 1974 that the County would not 'hassle' the Club over its violations." *Id.*, at 257. The Court of Appeal rejected these arguments. According to the court, "[o]n these facts the Club could not reasonably have assumed its development complied with the County's ordinances. To the contrary, the County at all times maintained that the development was illegal. At the most, the County's inaction for several years, together with the representation of a single employee in 1974, might have led the Club to believe the amount of development existing in the early 1970's would be tolerated, at least during the administration in place at that time. ***Nothing in the employee's representation or the County's inaction reasonably could lead the Club to believe the County never would enforce its land use requirements.***" *Id.*, at 257 (emphasis added). The court reasoned that ***"[f]or the most part the Club's reliance simply was to continue its illegal use of the island until it finally was compelled to desist.*** That is not an injury allowing the defense of equitable estoppel." *Id.* (emphasis added). *Accord Feduniak v. California Coastal Comm.*, 148 Cal. App. 4th 1346, 1369 (2007) ("[W]e observe that if it were reasonable for the Feduniaks to think that the restrictions would never be enforced because they had not been enforced for many years, then more generally, one could argue against the enforcement of a law that had not been enforced for many years and seek estoppel on that ground. However, courts have never accepted such reasoning.")

Plaintiff's estoppel claim is based on the fact that the County Treasurer/Tax Collector issued property tax bills to plaintiff between 1996 and 2007. [25] (Ex. 61.) First, the Treasurer/Tax Collector did

[25] Plaintiff's estoppel claim is also apparently based on the November 30, 1998 letter Mr. Melbourn of the County's Department of Environmental Health Services sent to Mr. O'Flynn. (Ex. 30.) Mr. Melbourne's letter was written in response to Mr. O'Flynn's September 30, 1988 letter. (Ex. 29.) Mr. Melbourn stated that the water supply was adequate for a church – a statement Mr. O'Flynn had requested to support his proposed application for a modification of the Major Use Permit to "legalize"

not intend for plaintiff to rely on its actions (issuing tax bills).[26] While the Treasurer/Tax Collector apparently knew that entities called Mountain Christian Center/Guatay Christian Fellowship were using a portion of the Property, the Treasurer/Tax Collector did not represent that use of Property by plaintiff was authorized under the Zoning Ordinance. Indeed, the sole purpose of the Treasurer/Tax Collector is to collect taxes, not to make determinations whether property is being used legally under applicable zoning regulations.[27] Second, plaintiff obviously did not rely on the tax bills because they were issued long after plaintiff began using the Building for Religious Assembly on October 5, 1986. (Ex. 61.)[28]

Moreover, plaintiff was not ignorant of the true state of facts. In 1988, the County told Mr. O'Flynn, Pastor Peterson and Ms. Rice that plaintiff needed to obtain a modification of the Major Use Permit in order to engage in Religious Assembly in the Building. Plaintiff knew that it had not obtained the required modification of the Major Use Permit from the County. Therefore, plaintiff was not ignorant of the fact that it needed a modification of the Major Use Permit, which it knew it had never obtained.

Plaintiff's reliance on *Congregation Etz Chaim v. City of Los Angeles*, 371 F. 3d 1122 (9th Cir. 2004) is misplaced. In that case, the plaintiff applied for a building permit to expand an existing home from 3,400 square feet to 8,150 square feet. *Id.*, at 1123. The plaintiff did not supply any false

---

use of the Building by plaintiff. However, neither Mr. O'Flynn nor plaintiff ultimately submitted any such application to the County. The November 30, 1988 letter merely states that the adequacy of the water supply would not be an obstacle to plaintiff's application for a modification of the Major Use Permit. The letter does not indicate that plaintiff was authorized to use the Building for Religious Assembly without obtaining the modification. Pastor Peterson also admitted that he had not seen the November 30, 1988 letter prior to the filing of this case and therefore plaintiff could not have relied on that document to its detriment. (Ex. 2, at 99:10-19.) Under these circumstances the letter does not support an estoppel theory.

[26] It is not clear whether plaintiff's estoppel claim is based on the plot plans from 1971 or 1978. However, plaintiff was not using the Property at that time and Pastor Peterson admitted that he had seen those plot plans before this litigation. (Ex. 2, at 51:25 - 52:11.) Thus, plaintiff did not rely on those plot plans.

[27] Indeed, the Treasurer/Tax Collector is responsible for collecting taxes in the incorporated cities and the County has no say in enforcing the cities' zoning regulations. *See Neecke v. City of Mill Valley*, 39 Cal. App. 4th 946, 950 (1995).

[28] Plaintiff's estoppel claim may also be based on a July, 2000 entry in the County's internal "KIVA" computer system. (Ex. 62.) Under the "scope of work," it states "upgrade Elec. To 200A for existing church." There is no indication that plaintiff reviewed this entry prior to the filing of this lawsuit. Moreover, the entry does not indicate in anyway that church use was allowed under the County's Zoning Ordinance. Moreover, plaintiff could not have relied on this document because it began using the Building in 1986.

information in the permit application. *Id.*, at 1125. Once the permit was issued, the plaintiff "promptly began work as specified in the plans." *Id.*, at 1124. The plaintiff "performed substantial work and incurred substantial liabilities in reliance on the permits." *Id.*, at 1125. Under these circumstances, the court held that the city could not revoke the building permit. Here, however, the County never issued a Major Use Permit to plaintiff. Moreover, as discussed above, plaintiff did not rely on the issuance of the tax bills.

For this additional reason, plaintiff's estoppel claim would fail as a matter of law.

D. The County Cannot Be Estopped From Enforcing Its Zoning Ordinance.

Even if plaintiff could establish the required elements, an estoppel claim would still fail. A party "faces daunting odds in establishing estoppel against a governmental entity in a land use case." *Toigo v. Town of Ross*, 70 Cal. App. 4th 309, 321 (1998). "[E]stoppel will not be applied against the government if to do so would effectively nullify a strong rule of policy, adopted for the benefit of the public." *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 493 (1970) (citations and internal quotation marks and ellipses omitted). Accordingly, "[t]he government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present ***and***, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." *Id.* at 496-97 (emphasis added). Indeed, the "vast majority of cases . . . hold that a governmental entity is not estopped from enforcing the law." *Smith v. County of Santa Barbara*, 7 Cal App. 4th 770, 776 (1992) (citations omitted).

The County's interest in advancing the purposes of its Zoning Ordinance serves a public purpose and therefore the County cannot be estopped from advancing that purpose. In *Pettitt v. City of Fresno*, 34 Cal. App. 3d 813 (1973), the court specifically held that zoning laws serve the interests of the public and therefore a local government cannot be estopped from enforcing its zoning ordinance:

> In the field of zoning laws, we are dealing with a vital public interest – not one that is strictly between the municipality and the individual litigant. All the residents of the community have a protectable property and personal interest in maintaining the character of the area as established by comprehensive and carefully considered zoning plans in order to promote the orderly physical development of the district and the city and to prevent the property of one person from being damaged by the use of neighboring property in a manner not compatible with the general

> location of the two parcels. These protectable interests further manifest themselves in the preservation of land values, in esthetic considerations and in the desire to increase safety by lowering traffic volume. To hold that the City can be estopped would not punish the City but it would assuredly injure the area residents, who in no way can be held responsible for the City's mistake. Thus, permitting the violation to continue gives no consideration to the interest of the public in the area nor to the strong public policy in favor of eliminating nonconforming uses and against expansion of such uses.

Id., at 822-23 (citations omitted). *See also Smith*, 7 Cal. App. 4th at 775 (county that erroneously issued a permit to build a telephone microwave station on a piece of property was not prohibited from revoking the permit on the ground of estoppel because "public policy may be adversely affected by the creation of precedent where estoppel can too easily replace the legally established substantive and procedural requirements for obtaining permits"); *Chaplis v. County of Monterey*, 97 Cal. App. 3d 249, 260 (1979) (county was not estopped from revoking a septic permit that it erroneously issued because "[i]f the county in the light of its findings were estopped to assert the invalidity of the septic tank permit and upon that finding to revoke it, the public health would be jeopardized").

In *County of Contra Costa*, 165 Cal. App. 4th 249, the court also determined that the county's interest in enforcing its land use regulations served a public purpose and outweighed any injustice to the property owner from having to remove all of the structures that had been built illegally. According to the court, "[w]e see little injustice in compelling the Club to remove structures constructed or installed without a permit either before contacting the County or after the County informed it the development was illegal, and without even attempting to comply with the law. In sum, what little injustice might result from abating the Club's illegal use presents no grounds for overriding the significant interest in open space and other land use limitations benefitting the public interest." *Id.*, at 262.

Since the County's Zoning Ordinance serves a public purpose, plaintiff's estoppel claim would fail for this additional reason.

VI. COUNTY HAS RIGHT TO ENFORCE THE ZONING ORDINANCE.

Since plaintiff did not have the Major Use Permit it needed under the County's Zoning Ordinance, the County had the right to enforce its Ordinance against plaintiff. Eight weeks passed between the time that the County issued the Notice of Violation and plaintiff stopped using the Building for Religious Assembly. At no time did plaintiff ever suggest that it was willing to apply for a Major

Use Permit and request that it be allowed to use the Building while its application was pending. Indeed, plaintiff never offered to apply for a Major Use Permit before being ordered to do so by the Court. Without an offer to apply for a Major User Permit, the County was justified in asking plaintiff to stop using the Building for Religious Assembly.[29]

Indeed, neither the First Amendment nor RLUIPA requires the County to allow plaintiff to continue using the Property illegally – in violation of the County's Zoning Ordinance. *See Gill*, 671 F. Supp. 2d at 513 ("While plaintiffs could face penalties if they assembled as a church without a permit, the penalties have a secular purpose and effect and do not impinge on plaintiffs' fee exercise of religion.") (citation omitted).

Further, eight weeks was a sufficient period of time for plaintiff to obtain an alternative location to hold its services. Indeed, plaintiff had more than sixteen weeks to find an alternative location before filing this lawsuit. Plaintiff chose to hold services in private homes. However, other churches offered to allow plaintiff to hold services in their buildings. Plaintiff would have needed to change the time of its services, but this slight inconvenience does not violate either the First Amendment or RLUIPA. *County of Sutter*, 456 F. 3d at 988 ("a substantial burden must place must place more than an inconvenience on religious exercise") (internal quotations marks and citation omitted); *City of Ann Arbor*, 341 F. Supp. 2d at 705 ("Nothing in the record suggests that Canterbury House could not lease or sublease an existing church or meeting hall to facilitate its worship as whole, or its other religious endeavors. Although these alternatives may be less appealing or more costly, neither the RLUIPA, nor the Constitution requires Ann Arbor to subsidize the real estate market.") (internal quotation marks and citations omitted); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F. 3d 1214 (11th Cir. 2004) (requiring members to walk further (religion prohibited members from driving) to a new synagogue location did not impose a substantial burden on religion in violation of RLUIPA); *Gill*, 671 F. Supp. at 513-14.

VII. NO DAMAGES COULD BE AWARDED FOR PERIOD WHEN PLAINTIFF DID NOT USE THE BUILDING.

Plaintiff is apparently seeking damages for the period between June 8, 2008 and November 19,

[29] There is nothing in the Zoning Ordinance that requires the County to allow an applicant to use property while its Major Use Permit application is pending.

2008 (other than August 10, 2008) when it did not use the Building for Religious Assembly.

The County is entitled to Summary Judgment on this claim for several reasons. First, as discussed in detail above, the County was entitled to enforce its Zoning Ordinance even if plaintiff had been violating the Ordinance for a long period of time. The undisputed evidence establishes that in 1988 the County informed plaintiff and Mr. O'Flynn that a modification of the existing Major Use Permit was needed in order for plaintiff to use the Building for Religious Assembly. Mr. O'Flynn and plaintiff agreed to apply for the modification of the Major Use Permit, but never did so. The fact that plaintiff violated the County's Zoning Ordinance for a long period of time does not prevent the County from enforcing the Ordinance.

Further, plaintiff could have held its religious services at other churches in the area and plaintiff had an adequate amount of time to locate another facility to rent.

Moreover, the August 14, 2008 inspection revealed that the Building had serious Code violations which could have caused serious injuries or death. (Declaration of Clay Westling, at ¶¶ 2-5; Exs. 50 & 51.) Because of these Building Code violations, plaintiff should not have been using the Building prior to November 19, 2008, irrespective of the zoning issue.

In addition, plaintiff now asserts that it will not be able to obtain a Major Use Permit (or modification of the existing Major Use Permit) from the County because it is too costly to do so. If plaintiff never obtains a Major Use Permit, there would be no reason for plaintiff to have been allowed to use the Building from June 8, 2008 through November 19, 2008 (other than August 10, 2008).

For these reasons, plaintiff is not entitled to damages for the period between June and November 2008 when it did not use the Building.

VIII. CONCLUSION

For these reasons, the County's motion for summary judgment should be granted in its entirety.

DATED: July 10, 2009

JOHN J. SANSONE, County Counsel

By S/ Thomas D. Bunton
THOMAS D. BUNTON, Senior Deputy
Attorneys for Defendant County of San Diego