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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

GUATAY CHRISTIAN FELLOWSHIP. Plaintiff, v. COUNTY OF SAN DIEGO, Defendant.	Case No. 08 CV 1406 JM CAB DEFENDANT COUNTY OF SAN DIEGO'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION Date: September 25, 2008 Time: 3:30 p.m. Courtroom: 16 Judge: Honorable Jeffrey T. Miller

Defendant County of San Diego (the "County") submits the follow opposition to Guatay Christian Fellowship's Motion for a Preliminary Injunction.

I.
INTRODUCTION

Plaintiff holds religious services at a former "recreation center" that is part of a recreational vehicle ("RV") park. Plaintiff rents the former recreation center from the owner of the RV park. It is undisputed that the former recreation center is located on property that is zoned "rural residential" under the County's zoning ordinance. Under the zoning ordinance, virtually no use of "rural residential" property that is not residential or agricultural is allowed without obtaining a use permit from the County. Indeed, the County's zoning ordinance specifically requires a major use permit to use the Property for Religious Assembly. It is undisputed that plaintiff has not requested or obtained the necessary major use permit from the County.

Plaintiff seeks a preliminary injunction preventing the County from enforcing its zoning ordinance while this lawsuit is pending. Plaintiff apparently believes that under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), it is exempt from applying for or obtaining a major use permit from the County. Plaintiff's request for a preliminary injunction should be denied because it has no chance of prevailing on the merits of its claim. First, plaintiff's claim is not ripe because it has not applied for a major use permit. Second, under controlling Ninth Circuit precedent, the requirement that a church obtain a conditional use permit does not constitute a "substantial burden" on religion in violation of RLUIPA.

Further, plaintiff has not shown that the County treats religious entities any differently than it treats other entities. As mentioned, the County would require a major use permit from any entity wishing to use the former recreation center for any purpose other than for residential use. Plaintiff makes much of the fact that in 1982, the County granted the owner of the RV park a modification of the existing use permit to convert the recreation center into a place where beer and wine could be sold and live entertainment featured. Under the County's zoning ordinance, however, that modification was terminated as a matter of law because the use for which it was granted (sale of beer/wine and live

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entertainment) has been discontinued for more than one year.[1] Therefore, any entity wishing to use the former recreation center for a non-residential purpose (including the sale of beer/wine and live entertainment) would need to obtain a major use permit. Further, even if the modification had not expired, anyone wishing to use the former recreation building ***for any purpose*** not covered by the modified use permit would need to obtain a modified major use permit from the County. The County does not discriminate against religious institutions. The County treats religious institutions exactly the same as it treats any entity that would want to use the recreation center for a non-residential purpose.

Plaintiff's assertion that it is entitled to use the former recreation building because it qualifies as a legal conforming use is without merit. The undisputed evidence establishes that a church has never legally operated at the former recreation building.

II.

FACTS

Plaintiff Guatay Christian Fellowship rents the former "Recreation Center of the Pine Valley Trailer Park" and uses the former recreation center for Religious Assembly. (Complaint, at ¶¶ 14, 15). The former recreation center is located at 27521 Old Highway 80, Guatay, California, which is within the unincorporated portion of the County (the "Property" or "Premises"). (*Id.* at 14.)

The Property is zoned for rural residential ("RR") use under the County's zoning ordinance. (Ex. 1.)[2] 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.[3] (Ex. 2, at § 2182.)

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

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[1] Plaintiff does not explain why it is being treated differently than the owner of the RV park. The County required the RV park owner to obtain a major use permit modification in order to convert the recreation building into an establishment selling beer/wine and providing live entertainment. The County is also requiring plaintiff to obtain a major use permit or major use permit modification to engage in Religious Assembly at the former recreation building. The County is not discriminating against plaintiff.

[2] Unless otherwise indicated, all exhibits are attached to the Declaration of Pam Elias, filed herewith.

[3] Sections 2180 through 2185 of the zoning ordinance, which regulate areas zoned RR, are contained in Exhibit 2.

"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***,"[4] "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." (*Id.*, at § 2185) (emphasis added).

"Before 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:
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> 1. Harmony in scale, bulk, coverage and density;
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> 2. The availability of public facilities, services and utilities;
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> 3. The harmful effect, if any, upon desirable neighborhood character;
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> 4. The generation of traffic and the capacity and physical character of surrounding streets;
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> 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
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> 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.
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> c. That the requirements of the California Environmental Quality Act have been complied with."

(Zoning Ordinance § 7358.) [5]

Religious Assembly is permitted as a matter of right in many areas within the County, including most commercial zones and the Residential-Commercial Zone. Specifically, Religious Assembly is permitted as a matter of right in 5 of the County's 12 commercial zones and in 1 of the County's

[4] "The Religious Assembly use type refers to religious services involving public assembly such as customarily occurs in synagogues, temples, and churches." (Zoning Ordinance, § 1370, Ex. 3.)

residential zones. (County Zoning Ordinance Matrix, Ex. 5.)

III.

LEGAL STANDARD APPLICABLE TO PREMILINARY INJUNCTION MOTIONS

In the Ninth Circuit, "preliminary injunctive relief is available to a party who demonstrates either (1) a combination of probable success and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardship tips in its favor. These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. ***If the plaintiff shows no chance of success on the merits, however, the injunction should not issue.***" (citations and internal quotation marks omitted). *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987) (emphasis added).

IV.

PLAINTIFF'S REQUEST FOR A PRELIMINARY INJUNCTION SHOULD BE DENIED BECAUSE PLAINTIFF HAS NO CHANCE OF SUCCEEDING ON THE MERITS OF ITS CLAIM

Plaintiff's assertion that the County cannot enforce its zoning ordinance and thereby require plaintiff to obtain a major use permit is completely without merit. Plaintiff has cited no authority that supports its position and all authority is to the contrary.

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[5] Section 7358 of the County zoning ordinance is part of Exhibit 4.

A. Plaintiff's RLUIPA Claim Cannot Succeed On The Merits.

In 2000, Congress passed RLUIPA, which provides as follows:[6]

> (a) Substantial burdens
>
> (1) General Rule
>
> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly or institution
>
> (A) is in the furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.
>
> . . . . .
>
> (b) Discrimination and exclusion
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> (1) Equal terms
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> No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.
>
> (2) Nondiscrimination
>
> No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.
>
> (3) Exclusions and limits
>
> No government shall impose or implement a land use regulation that -
>
> (A) totally excludes religious assemblies from a jurisdiction; or
>
> (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

[6] RLUIPA is the latest round in a sparring match between the legislative and judicial branches. In 1990, the Supreme Court held in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) that neutral, generally applicable laws may be applied to religious practices even when the government does not have a compelling interest for enacting such laws. In direct response to *Smith*, Congress passed the Religious Freedom Restoration Act of 1993, which prohibited "government" from "substantially burdening" a person's exercise of religion even if the burden results from a rule of general applicability unless the government could demonstrate the burden "(1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court found the Religious Freedom Restoration Act to be unconstitutional as applied to state and local governments in large part because by enacting the statute, Congress usurped the power of the judicial branch to interpret the Constitution. In 2000, Congress passed RLUIPA, which also requires the application of the "compelling interest" test, but is limited to government "land use regulations" and government regulations that effect "institutionalized persons."

42 U.S.C § 2000cc.

1. The RLUIPA Claim Is Not Ripe.

It is undisputed that the County's zoning ordinance requires plaintiff to obtain a major use permit for Religious Assembly use on the Property. (Ex. 2 at § 2185.) It is also undisputed that that plaintiff has not applied for a major use permit from the County. (Elias Decl., at ¶ 3.) Neither has plaintiff submitted an application to the County to have the zoning for the Property changed to a classification that allows Religious Assembly use as a matter of right. (*Id.*) Therefore, plaintiff's RLUIPA claim is not ripe. In *Murphy v. New Milford Zoning*, 402 F. 3d 342 (2d Cir. 2005), 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),[7] 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 been rendered, we lack jurisdiction."). 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 Religious Assembly use of the Property. *Id.* at 353-54.

In this case, plaintiff's RLUIPA challenge is not ripe because it has not applied for a major use permit from the County or submitted an application to the County to have the zoning for the Property changed to a zone that allows Religious Assembly use as a matter of right. For this reason alone, this motion should be denied.

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[7] In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), 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 regulation 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.

2. RLUIPA Does Not Prohibit The County From Requiring Use Permits.

To the extent that plaintiff claims that RLUIPA prohibits the County from requiring it to obtain a major use permit to engage in Religious Assembly use in an area zoned for residential use, it is mistaken. Plaintiff's position has consistently been rejected by the Ninth Circuit. *San Jose Christian College v. City of Morgan Hill*, 360 F. 3d 1024 (9th Cir. 2004) is on point. In that case, the Property in question was zoned for hospital use. *Id.* at 1027. The plaintiff, a religious college, submitted an application asking the city to rezone the Property for college/religious use. The city denied the plaintiff's application "due to the College's failure to comply with the City's application requirements." *Id.* at 1029. Thereafter the plaintiff sued the city asserting that the "zoning process violated the First Amendment and [RLUIPA]." *Id.* The district court denied the plaintiff request for a preliminary injunction and granted summary judgment in favor of the city. The Ninth Circuit affirmed.

In reviewing the RLUIPA claim, the Ninth Circuit explained that a 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 plaintiff in *City of Morgan Hill* identified the "substantial burden . . . as its inability to carry on its mission of Christian education and transmitting its religious beliefs." *Id.* at 1035 (internal quotation marks and brackets omitted). The Ninth Circuit rejected that argument, concluding that "it 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.***" *Id.* (emphasis added). Moreover, the Ninth Circuit stated that there was no substantial burden on the plaintiff's exercise of its religion because "while the [zoning] ordinance may have rendered College unable to provide education and/or worship at the Property, ***there is no evidence in the record demonstrating that College was precluded from using other sites within the city***." *Id.*. (emphasis added).

Like the plaintiff in *City of Morgan Hill*, plaintiff in this case is unwilling to even submit an application for a major use permit, which is required by 19 other kinds of uses in addition to Religious Assembly. Indeed, only residences and certain agricultural operations are allowed to operate as a matter

of right in a rural residential zone. Thus, there is absolutely no evidence that the County's zoning ordinance discriminates against religious organizations. Further, there is no evidence that if plaintiff applied for a major use permit, its application would be denied. Even if plaintiff's application were denied, there is no evidence that plaintiff would be precluded from using other sites within the County. Indeed, plaintiff could operate a church as a matter of right within 5 of the County's 12 commercial zones and in 1 of the County's residential zones. (Ex. 5.)

The Ninth Circuit in *City of Morgan Hill* also 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 non-religious) 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). *See also Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F. 3d 978, 992 (9th Cir. 2006) (noting that under *City of Morgan Hill*, mere denial of a permit application without any evidence that future applications will be denied does not establish a RLUIPA violation).

This Court's decision in *Foothills Christian Ministries, Inc. v. City of El Cajon*, Case No. 01CV1197JM(LAB) (S.D. Cal. November 6, 2001) is also on point.[8] In that case, the plaintiff sought a preliminary injunction based on its contention that under RLUIPA a church has a fundamental right to locate within the boundaries of a city without obtaining a permit, absent an extreme situation involving public safety or public health. Relying on RLUIPA's legislative history, this Court rejected that

[8] A copy of *Foothills Christian Ministries* is Exhibit 6.

assertion:

> To the extent, therefore, plaintiff contends that after RLUIPA a city may simply not impose land use restrictions or conditions upon a religious institution without violating that institution's first amendment free exercise rights or denying the institution the equal protection of the laws, plaintiff's contention is without merit.

Id., at p. 4.

Further, this Court held that a governmental entity does not place a substantial burden on religion when it refuses to allow a church to operate on a particular site:

> As for plaintiff's claim that the City has imposed a substantial burden simply by refusing to allow it to occupy a particular site, Ninth Circuit case law is clear: a municipality does not necessarily impose a substantial burden on a plaintiff's religious exercise when it denies a CUP to operate on a particular piece of property. This is true, as *Christian Gospel Church* [v. *City and County of San Francisco*, 896 F.2d 1221, 1226 (9th Cir. 1990)] teaches, even where there exists on the part of church members a sincerely held belief that the church has been called to a particular location.

Foothills Christian Ministries, at p. 6 (citation omitted). *See also International Church of the Foursquare Gospel v. City of Chicago Heights*, 955 F. Supp. 878, 880 (N.D. Ill. 1996) ("We do not believe that the City's denial of a permit imposes a substantial burden within the meaning of the Act. . . . The impact is not upon the content of religious practices but upon where that religion may be practiced. Having a church facility is important to the Church, but specific location is not.").

Moreover, the Court in *Foothills Christian Ministries* held that even if the plaintiff could show that it was substantially burdened in its exercise of religion, "the City is just as likely to be able to demonstrate a compelling interest in imposing the requirement that churches obtain a CUP prior to operating in the C-R zone." *Id.* at 7. The Court cited *Christian Gospel Church* for the proposition that "[c]ities have a strong interest in establishing and implementing zoning systems, as zoning systems protect the zones' inhabitants from problems of traffic, noise and litter, avoid spot zoning, and preserve a coherent land use zoning plan." *Id.* (citations and internal quotation marks omitted).

Plaintiff's reliance on Judge Huff's decision in *Grace Church of North County v. City of San Diego*, 2008 U.S. Dist. LEXIS 38227 (S.D. Cal. May 9, 2008) is misplaced. In that case, the church applied for a conditional use permit. The City of San Diego granted a 5-year conditional use permit, but indicated that it would not grant any extensions of that permit. The church had signed a 10-year lease,

so it needed a conditional use permit that was valid for 10-years. Judge Huff found that the city's conduct violated RLUIPA. However, Judge Huff in no way indicated that it is a RLUIPA violation to require a religious organization to obtain a use permit in order to operate at a specific location. Therefore, the *Grace Church* case does not help plaintiff.

Simply put, it is not a RLUIPA violation for the County to require plaintiff to obtain a major use permit to engage in Religious Assembly in the RV park's former recreation center.

3. The Fact That A Major Use Permit Modification Was Previously Granted For A Completely Different Use Does Not Mean That Plaintiff Does Not Have To Obtain A Major Use Permit From The County.

In 1971, the County issued a special use permit for the operation of a recreational campground on the Property that plaintiff currently uses for Religious Assembly. (Ex. 7.) (Pltfs' Ex. 23.) The use permit indicates that a building on the Property would be used as a "recreation building." (*Id.*, at p. 1.) A plot plan was submitted in support of the special use permit application and shows the proposed recreation building on it. (Ex. 8, at p. 1.) In 1982, the property owner obtained a modification of the major use permit from the County to "allow the conversion of the existing recreational hall for on and off site sale of beer and wine, and [to] allow live music and entertainment." (Ex. 9.)

Section 7372 of the County's zoning ordinance provides that "[e]ach use permit granted pursuant to these provisions ***shall expire and become null and void at the expiration of one year after the purpose for which it was granted shall have been discontinued or abandoned.***" (Ex. 4, at § 7372.) (emphasis added). The use for which the major use permit modification was granted (sale of beer/wine and live music/entertainment) has been discontinued for at least 22 years because the church has been using the former recreation building for Religious Assembly since 1986.[9] (Complaint, at ¶ 15.) Therefore, this modification of the major use permit has expired.

Plaintiff apparently believes that RLUIPA compels the County to allow plaintiff to utilize the prior major use permit. Plaintiff has cited no authority that supports its position. Indeed, as discussed above, requiring plaintiff to apply for a major use permit does not impose a substantial burden on religion in violation of RLUIPA. Further, the County's zoning ordinance does not discriminate against

[9] According to the Declaration of Pastor Stan Peterson submitted in support of plaintiff's motion, the recreation center may not have actually been used for the purpose for which the use permit was modified. (Peterson Decl., at 12.)

religious organizations. The ordinance would require anyone desiring to use the former recreation building for virtually any purpose other than residential use to obtain a major use permit. Indeed, any entity wanting to operate an establishment selling beer and wine and providing live music/entertainment would have to apply for and obtain a major use permit or a modification of the existing major use permit because the previous modification to the use permit has expired.[10]

Despite the specific provisions of the County's zoning ordinance, plaintiff apparently believes that a use permit for an establishment selling beer and wine and providing live music/entertainment should apply to all "public assembly uses." Plaintiff, however, offers no legal support for its argument.

Indeed, it makes perfect sense for the County to require plaintiff to obtain a new or modified use permit. A bar is not going to have the same environmental impact as a church. At a bar, people generally arrive and depart at different times. Some come after work and leave early. Others arrive late and stay until closing. On weekends, patrons may come and go throughout the day and night. At a church, people generally arrive shortly before the scheduled service and depart shortly after the service is finished.[11] This difference in arrival/departure patterns may result in significantly different environmental impacts. For instance, a road may be adequate to handle traffic from bar patrons who arrive and depart at various times throughout the day and night. The same road may not be adequate to handle traffic from church members who arrive and depart at roughly the same time. The same is true for parking. A parking lot may be adequate for bar patrons because their arrival/departure patterns may allow for a sufficient number of spaces to remain open at any given time. The same parking lot may not have enough spaces for church members who arrive at roughly the same time.

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[10] Even if the previous modification of the use permit allowing the sale of beer/wine and the provision of live music/entertainment had not expired, plaintiff would not be able to utilize that permit. Section 7357 of the zoning ordinance provides that "[f]or the portion of the parcel covered by the use permit, no use shall be allowed within the use permit boundary ***other than those specified in the use permit. No additional uses, by right or conditionally permitted, shall be allowed within the use permit area without modification of the permit.***" (Ex. 4, at § 7357) (emphasis added). Section 7378(a) of the zoning ordinance provides that "[a]ny person holding a use permit may apply for a modification by" submitting an application and materials identical to those required for a new major use permits. (*Id.*, at § 7378(a)) In addition, section 7378(a) of the zoning ordinance provides that the same standards governing applications for new use permits will cover requests to modify use permits. (*Id.*) Thus, all uses not covered by the original use permit or its modification, not just religious assembly uses, would need a new or modified major use permit.

[11] Plaintiff holds services twice per week, at 10:00 a.m. on Sundays and at 7:00 p.m. on Wednesdays. (Peterson Decl., at ¶ 8.)

1 Requiring the submission of an application for a major use permit allows the County to examine
2 the potential environmental impacts and to require measures that will reduce or mitigate these impacts.
3 By requiring plaintiff to submit a major use permit application, the County is not treating Religious
4 Assembly any differently than it would treat "ambulance services," "law enforcement services," "lodge,
5 fraternal and civic assembly," "postal services" or any of the other use types for which a major use
6 permit is required in a RR zone. These use types would all have to apply for a major use permit because
7 their use may create different environmental impacts. Accordingly, the County has not discriminated
8 against Religious Assembly use in violation of RLUIPA. Further, the Ninth Circuit has held that
9 requiring a religious organization to obtain a conditional use permit does not impose a substantial
10 burden on religion.

11 **4. The Church Is Not A Legal Nonconforming Use.**

12 Based on the declaration of Mike Stevens, a purported expert, plaintiff alleges that it is entitled to
13 operate a church on the Property because it is "grandfathered" or a legal nonconforming use.[12] This is
14 state law claim and plaintiff's complaint does not allege that plaintiff is entitled to continue operating on
15 the premise because it is a legal nonconforming use. Moreover, plaintiff should not be entitled to turn a
16 routine state law claim into a federal RLUIPA claim. Therefore, plaintiff's argument should be rejected
17 for these reasons alone.

18 Further, plaintiff's contention that it qualifies as a legal nonconforming use is simply wrong.
19 Under California law, "[a] legal nonconforming use is one that ***existed lawfully before a zoning***
20 ***restriction became effective*** and that is not in conformity with the ordinance when it continues
21 thereafter." *Hansen Bros. Enters. v. Bd. of Supervisors*, 12 Cal. 4th 533, 540 (1996) (emphasis added).
22 Plaintiff does not qualify under the legal nonconforming use doctrine for several reasons.

23 First, plaintiff admits that the County has required a "special use permit" for a church to operate
24 on the Property since the County adopted zoning for this area in the 1960's. (Stevens Decl., at ¶ 23.)
25 Plaintiff does not contend that a church was operating on the Property at the time the County first
26 adopted zoning for the Property. (*Id.*) Therefore, the legal nonconforming use doctrine in inapplicable
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28 [12] The ultimate question whether something qualifies as a legal nonconforming use is a legal question that the Court must decide. Therefore, this in not a proper subject for expert opinion.

for this reason alone.

Mr. Stevens declares that, in his "opinion," the church was lawfully established on the Property in 1971. (Stevens Declaration, at ¶ 24). However, he cites no evidence that supports his position. In 1971, the owner applied for a special use permit to operate a "recreational campground" on the Property. (Ex. 7.) (Pltfs' Ex. 23.) The campground was to have a "recreation building." One page of the plot plan submitted in support of the special use permit application indicates that the building where the church currently holds services is an "Exist. Rec. Hall." (Ex. 8, at p. 1.) Another page of the plot plan indicates that this building is an "Exit. Bldg. Rec. Hall or chapel." (*Id.*, at p. 2.) Accordingly, it is not clear whether the building was being used for religious assembly in 1971. Further, this issue is irrelevant because the applicant was only seeking to use the building as a recreation building in the future. The Planning Commission decision approving the application for a special use permit authorizes a recreation building, but does not authorize a church or chapel. (Ex. 7.) It is undisputed that a special use permit was needed to operate a church on the premises in 1971 and there is absolutely no evidence that the County granted the necessary special use permit.

In 1978, the property owner applied for a modification of the 1971 use permit. (Ex. 10.) The property owner did not seek to modify the use permit to allow the approved recreation building to be used as a church. Rather, the property owner sought to exclude "4.13 acres located at the northeast corner of the site" as well as a separate ".83 acre parcel" from Property covered by the use permit. (*Id.* at p. 2.) The Planning Commission granted the requested modification. The Planning Commission's decision, which was reached on February 2, 1979, does not state in any way that the approved recreation building could be used as a church. (*Id.*)

Plaintiff makes much of the fact that the two "plot plans" submitted in support of this modification to the use permit refer to the approved recreation building as an "Exist. Bldg. (Church)" or "Exist. Church." (County Ex. 11, at p. 2; County Ex. 12, at p. 12; Pltf's Exs. 27 & 28.) In its decision, however, the Planning Commission did not modify the use permit to allow use of the existing recreational building as a church. (Ex. 10.) It is therefore clear that a church was not ***legally*** operating

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on the premises.[13] Thus, the legal nonconforming use doctrine does not apply. At most, these plot plans show that the County was aware that a church was ***illegally*** operating on the Property. However, as discussed in detail below, this knowledge does not prevent the County from enforcing the zoning ordinance.

Moreover, even if a church was legally operating on the Property in 1978/1979, plaintiff cannot utilize this prior use because it was discontinued by at least 1981. In 1981, the owner of the Property submitted an application to modify the special/major use permit. (Ex. 9.) In the application, the property owner sought permission to convert the approved (in 1971) and existing recreational hall into an establishment offering the "on and off site sale of beer and wine" and "live music and entertainment." (*Id.*) ***The plot plan submitted in support of this application referred to the building where the church currently operates as an "Existing Rec. Hall."*** (Ex. 13, at p. 2.) The Planning Commission decision refers to the building an existing recreational hall and allows it to be converted into a limited bar, not a church. (Ex. 9, at p. 2.) Therefore, it is undisputed that any use of the recreation building as a church had been discontinued by at least 1981. Plaintiff did not start to operate a church on the Property until October 5, 1986, a break in use of at least five years. (Peterson Decl. at ¶ 8.) Under California law, if a use has been discontinued it does not qualify under the nonconforming legal use doctrine. *Hill v. Manhattan Beach*, 6 Cal. 3d 279, 286 (1971) ("Nonuse is not a nonconforming use. This rule is consistent with the further rule that reuse may be prohibited when a nonconforming use is voluntarily abandoned."); *Hansen Bros.*, 12 Cal. 4th at 552 ("Nonuse is not a nonconforming use, however, and reuse may be prohibited if a nonconforming use has been voluntarily abandoned."). The County's zoning ordinance provides that "[w]henever a use which is nonconforming, wholly or partly because it is not itself a permitted use where it is located, discontinues active operation for a continuous period of 12 months, such nonconforming use shall not be resumed. Intent to abandon such use shall not be

[13] As discussed in detail below, the Planning Commission could not legally give permission for a church to operate on the Property by stamping the plot plans "approved." The Planning Commission could only give such permission by granting a modified use permit allowing the recreation building to be used as a church. Indeed, to legally modify the use permit to allow the recreation building to be used as a church, the Planning Commission would need to make the findings required by the zoning ordinance. (Ex. 4, at § 7358.) The Planning Commission would also have to comply with all of the notice and procedural requirements in the zoning ordinance for modifying use permits. The Planning Commission must follow the zoning ordinance and actions taken in violation of the zoning ordinance are void. *Pettitt v. City of Fresno*, 34 Cal. App. 3d 813, 822 (1973).

necessary to constitute such discontinuance." (Ex. 14 at § 6865(a).)

Grasping at straws, plaintiff notes that as part of the 1979 decision allowing the property owner to modify the special/major use permit to exclude certain property from being covered by the use permit, the County modified a condition that was contained in the original use permit. The original condition stated that "[n]o loud speaker or sound amplification system [shall] be used so as to produce sound audible beyond the boundaries of the premises." (Ex. 7, at p. 3, ¶ F.) The modified condition states that "[n]o loudspeaker or sound amplification system shall be used to produce sounds beyond the boundaries of the premises, (except for an electric bell or chime system which may be sounded between 9:00 a.m. and sunset one day per week and on religious holidays)." (Ex. 10, at p. 3, ¶ C.) The Planning Commission's 1982 approval of the conversion of the existing recreational hall into a limited bar makes no mention of this condition. (Ex. 9.) It simply states that "[a]ll conditions of the Major Use Permit P71-104 and previous modification P71-104W shall be complied with." (*Id.*, at p. 3, ¶ C.)

It is apparent that in 1979 the County did not grant a major use permit to operate a church on the Property by the inclusion of the modified condition. As discussed above, the modification request had nothing to do with use of the recreation building – it involved exclusion of property governed by the major use permit. The fact that the County modified the above condition does not equate with granting a major use permit to operate a church on the Property. Plaintiff's expert calls this a "church-bell condition," but the condition makes no mention of a church. (Stevens Decl., at ¶ 23.) Indeed, placing a condition on the use of the Property is simply not the same as granting or modifying the use permit to allow church use.

Further, in 1982 the County granted the property owner's request to turn the recreation hall into a limited bar. (Ex. 9.) If the condition created any doubt, it was removed in 1982 because it was clear that the County was allowing the recreation building to be used as a limited bar, not a church. The Planning Commission's decision makes no mention of the "loudspeaker" condition. Further, the fact that a stock provision indicated that all prior conditions remained in place does not indicate that the County was granting a major use permit to operate a church at the recreation building. Indeed, since the property owner sought permission to convert the recreation building into a limited bar, it is clear that the County was not granting a major use permit to convert the recreation building into a church.

Plaintiff also apparently contends that the County approved the use of the recreation building as a church in a November 30, 1988 letter from a Public Health Engineer of the County's Department of Health Services (now called the Department of Environmental Health) to the property owner. (Pltf's Ex. 1.) The letter indicates that the Department of Health Services made a "thorough review' of the "Oak Crest Resort water system" and determined 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." (*Id.*, at p. 1). It is apparent that the Department of Health Services was only considering whether the water supply was adequate, not whether church use was allowed under the zoning ordinance. The letter makes absolutely no mention of the zoning ordinance. Indeed, the Department of Health Services/Department of Environmental Health only reviews water supply adequacy/safety, not zoning compliance. (Elias Decl., at ¶ 24.)[14]

Moreover, it undisputed that the County's zoning ordinance requires a major use permit to operate a church on the Property. (Ex. 2 at § 2185.) Only the Planning Commission can grant a major use permit. (Ex. 4 at § 7352(a).) The Planning Commission must make specific findings before granting a major use permit and must follow the notice and other procedures contained in the zoning ordinance. (Ex. 4.) Under California law, the County is bound to follow its own ordinances. *Pettitt,* 34 Cal. App. 3d at 822 ("Even an express permit granted by the board contrary to the terms of the ordinance would be of no effect.") (citations omitted); *Magruder v. City of Redwood*, 203 Cal. 665, 675 (1928) ("We know of no power possessed by a board of trustees that will permit it in any such manner to nullify a legal ordinance adopted by the municipality. An ordinance of a municipality when once legally adopted becomes binding upon all the citizens thereof, officers as well as private citizens, and it is the sworn duty of those officers, charged with its enforcement, to prosecute all violations thereof. This duty is not a personal duty that can be waived at their will . . . .") Thus, even if the 1988 letter from the Public Health Engineer of the County's Department of Health Services purported to give permission to operate a church on the Property, this action was invalid because it was contrary to the County's zoning ordinance.

[14] The fact that this letter was copied to employees of the Department of Planning and Land Use in no way indicates that this Department approved use of the recreation building as a church. The letter only refers to the sufficiency of the water supply, not compliance with the zoning ordinance.

Plaintiff's legal nonconforming use fails because the undisputed evidence establishes that no church has ever legally operated on the Property. Further, even if church use was legal for a period of time, that use was broken, making the legal nonconforming use doctrine inapplicable.[15]

5. Even If The County Knew That Plaintiff Was Operating At The Premises, Plaintiff Still Needs To Obtain A Major Use Permit From The County.

As discussed above, plaintiff asserts that the County knew that it was engaging in Religious Assembly at the Property.[16] Plaintiff, however, does not argue how this purported fact supports its position that the County is violating RLUIPA by requiring plaintiff to apply for and obtain a major use permit. As discussed above, requiring a religious organization to apply for a use permit does not impose a substantial burden on religion in violation of RLUIPA.

Further, plaintiff does not assert a state law estoppel claim. However, if it had, that claim would not be successful. "The doctrine of equitable estoppel is based on the theory that a party who by his declarations or conduct misleads another to his prejudice should be estopped from obtaining the benefits of his misconduct." *Kleinecke v. Montecito Water Dist.*, 147 Cal. App. 3d 240, 245 (1983). "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 this test. First, there is no evidence that the County departments intended for plaintiff to rely on their actions (issuing tax bills, stating that drinking water was adequate and safe) in

[15] Plaintiff notes that there is a Jehovah's Witness church located near the Property where plaintiff has been operating. However, the Property where the Jehovah's Witness church is located is in a commercial ("C40") zone. (Ex. 15.) Religious Assembly use is allowed as a matter of right in a C40 zone. (Ex. 5.) If plaintiff believes the Property it rents should be rezoned, it should file an application with the County to have the Property rezoned.

[16] In addition to the plot plans and 1988 letter from the Department of Health Services discussed above, plaintiff contends that the County Assessor assigned plaintiff an Assessor's parcel number and that plaintiff receives "property" tax bills from the County Treasurer/Tax Collector. (Pltf's Ex. 2.) The County did not assign plaintiff an Assessor's Parcel number. There is only one Assessor's Parcel Number (408-200-17-00) and it is assigned to the owner of the RV park. (Ex. 16; Elias Decl., at ¶ 19.) Moreover, the Assessor and the Treasurer/Tax Collector have nothing to do with enforcement of the County's zoning ordinance. (Elias Decl., at ¶ 24.) There is no evidence that these departments had any knowledge whether plaintiff was allowed to legally operate a church on the Property under the zoning ordinance.

order to locate the church in an area for which it was not properly zoned.[17] Second, plaintiff obviously did not rely on the actions taken by the County Treasurer/Tax Collector/Department of Health Services because all of these actions were taken after plaintiff began using the premises for Religious Assembly on October 5, 1986. (Pltf's Ex. 2.) Therefore, plaintiff's estoppel claim would fail as a matter of law.

Even if plaintiff could establish the required elements, an estoppel claim would still fail. While estoppel may sometimes be applied against governmental entities, "estoppel 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,* 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

[17] Plaintiff cannot rely on the plot plans that were stamped in 1978 and 1979 because it was not using the Property at that time. Further, there is no evidence that plaintiff had seen those plot plans before this litigation.

> 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.

34 Cal. App. 3d 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").

Because enforcement of the County's zoning ordinance serves an important public interest, the County cannot be estopped from requiring plaintiff to obtain a major use permit to engage in Religious Assembly on the Property.

6. Plaintiff's "Retaliation" Contention is Meritless.

This primary issue in this lawsuit is whether the provisions of the County's zoning ordinance requiring plaintiff to obtain a major use permit to engage in Religious Assembly use on the Property impose a substantial burden on religion in violation of RLUIPA. Plaintiff understands that it has no chance to prevail on this claim. Therefore, in an attempt to distract from the real issue, plaintiff asserts -- without support -- that the County retaliated against plaintiff for filing this lawsuit by obtaining an inspection warrant from a San Diego Superior Court judge. According to plaintiff's theory, the County wanted to "order"[18] plaintiff not to use the recreation building for Religious Assembly. In order to achieve this goal, plaintiff theorizes that the County obtained the inspection warrant so that it could find non-existent building code violations. Based on those non-existent violations, the County could then achieve its goal of "ordering" plaintiff not to use the recreation building for Religious Assembly use. Plaintiff's theory does not withstand scrutiny.

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[18] The County is not a court and does not issue orders.

First, the County did not need to perform an inspection or discover building code violations to "order" plaintiff to stop using the recreation building for Religious Assembly. The County had already told plaintiff not to use the building for Religious Assembly based on the zoning ordinance violation. On April 16, 2008, the County wrote a letter to the property owner stating that "Religious assembly is not allowed in an RR-1 Zone without a [major use permit]. You are required to notify the church staff to cease using the building for religious assembly within 30 days of the notice." (Pltf's Ex. 3.) On May 16, 2008, the property owner's attorney sent plaintiff's pastor a letter stating that "the County of San Diego has ordered Mr. O'Flynn to send you a letter saying that the Fellowship must cease its religious assembly, effective today. . . . Please by advised that any religious assembly in the recreational hall after today could ultimately result in County fines to Mr. O'Flynn and/or the Fellowship." (Ex. 17.) The County sent a letter to plaintiff's pastor on May 30, 2008, stating that "[i]t is my unpleasant task to inform you unless you cease conducting religious assembly on this site, the County has no choice other than to take legal action against you." (Ex. 18.) Accordingly, the County did not need to perform an inspection or discover building code violations so that it could request plaintiff to stop using the recreation building for Religious Assembly – it had already done so based on the zoning ordinance violation.

Second, a one hour inspection of the recreation building does not impose a significant burden on plaintiff necessary to be considered "retaliation." All plaintiff had to do was to unlock the building so that the inspection could take place. Indeed, plaintiff took extraordinary steps (filing an emergency motion with this Court) to avoid the inspection because it knew that the inspection would reveal building code violations.

Third, the County found real violations. (Pltf's Exs. 18 & 33.) Plaintiff admits that building code violations were discovered. (Declaration of Paul D. Giese, at ¶ 9) ("While they are violations to the approved code . . . .") The County's building official determined that the violations warranted revocation of the certificate of occupancy and issuance of a directive that the building not be used for any assemblies. (Pltf's Ex. 18.) Section 109.6 of the California Building Code gives the County building official this authority. 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

1 determined that ***the building or structure or portion thereof is in violation*** of any ordinance or
2 regulation or ***any provisions of this code***."[19] (Ex. 19.)
3 Plaintiff's experts contend that the building code violations are not serious. (Declaration of Carl
4 R. Suess, at ¶ 10) ("It is my opinion that the electrical items listed as 'serious violations' in the 8/15/08
5 Letter of violations (Exh. 18) are nothing more than typical, minor repairs."). However, section 109.6 of
6 the California Building Code gives the County building official authority to revoke the certificate of
7 occupancy based on any violation of the building code – major or minor. Therefore, it cannot be
8 disputed that the County was entitled to revoke the certificate of occupancy and request that plaintiff not
9 occupy the recreation building. Further, the County building official, not plaintiff's experts, is given
10 authority under the law to decide whether a certificate of occupancy should be revoked based on a
11 building code violation.
12 Moreover, if plaintiff disagreed with the building official's determination it should have filed an
13 administrative appeal. Section 105.1 of the California Building Code provides that "[i]n order to hear
14 and decide appeals of orders, decisions or determinations made by the building official relative to the
15 application and interpretation of this code, there shall be and is hereby created a board of appeals . . . ."
16 (Ex. 19.) Section 91.1.112.1 of the County's Code of Regulatory Ordinances similarly provides that "[a]
17 person may appeal an order, decision or determination made by the building official that relates to the
18 application or interpretation of this chapter by filing a written appeal to the Building Construction
19 Advisory Board of Appeals within 30 days of the building official's decision." (Ex. 20.)
20 The validity of the County building official's decision to revoke plaintiff's certificate of
21 occupancy is a question governed by state law, not RLUIPA. The building official clearly had the
22 authority to revoke the certificate of occupancy under the California Building Code. Further, to the
23 extent that RLUIPA is implicated, plaintiff's claim is not ripe because it did not obtain the County's
24 final decision on the revocation of the certificate of occupancy. A final decision could have been
25 obtained by appealing the building official's decision to the Building Construction Advisory Board of
26 Appeals. *Murphy*, 402 F.3d at 352-53 (court held that the plaintiffs' First Amendment and RLUIPA
27 claims were not ripe because the plaintiffs failed to appeal an order to cease and desist from holding
28

[19] Section 91.1.110.04 of the County's Code of Regulatory Ordinances gives the County building

regular religious services on their property to the municipality's zoning board of appeals).[20]

For these reasons, plaintiff's "retaliation" contention is meritless.

V.

THE BALANCE OF THE PARTIES' HARDSHIPS FAVORS DENYING INJUNCTIVE RELIEF

Since plaintiff has not demonstrated a reasonable chance that it will prevail on the merits of its claim, the question of which party will be harmed the most if the request for injunctive relief is granted or denied is irrelevant. However, to the extent that the parties' relative harms are considered, the balance of hardships supports denial of plaintiff's request for a preliminary injunction. In this case, plaintiff is seeking an order enjoining the County from enforcing its zoning ordinance. Plaintiff has not met its burden of showing that the County' zoning ordinance violates RLUIPA or is otherwise invalid. Further, the County has shown that plaintiff is violating the zoning ordinance. The Ninth Circuit has recognized that in cases where the federal government has shown that it is likely that a statute has been violated, "inquiry into irreparable injury is unnecessary" because "the passage of the statute is itself an implied finding by Congress that violations will harm the public." *United States of America v. Nutri-Cology, Inc.*, 982 F. 2d 394, 398 (9th Cir. 1992). The same principle applies under California law. *IT Corp. v. County of Imperial,* 35 Cal.3d 63, 72 (1983) ("Where a governmental entity seeking to enjoin the alleged violation of an ordinance . . . establishes that it is reasonably probable it will prevail on the merits, a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant.") (footnote omitted).

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official the same authority to revoke a certificate of occupancy. (Ex. 20.)

[20] Plaintiff asserts that it is in compliance with the County's zoning ordinance. Therefore, plaintiff claims that the County could not conduct an inspection of the recreation building and that plaintiff should be given permits to make the repairs necessary to bring the building into compliance with the California Building Code. Plaintiff is mistaken. First, as discussed throughout this memorandum of points and authorities, plaintiff has changed the approved use of the recreation building without the necessary use permit. The County never granted plaintiff a major use permit allowing the recreation building to be used for religious assembly. Plaintiff's assertion is meritless for this reason alone. Second, the County never told plaintiff that it could not obtain permits to repair the building. It simply indicated that such permits were not "available at the building counter at this time." (Pltf's Ex. 20, at 1.). Obviously, the County wanted to make sure that plaintiff would not be able to claim that by issuing a permit to correct the building code violations, the County was in any way waiving its right to enforce the zoning ordinance. It is undisputed, however, that plaintiff has not sought to obtain the necessary permits from supervisors in the Department of Planning and Land Use.

In this case, the County Board of Supervisors' enactment of the zoning ordinance constitutes an implied finding by the Board that violations of the ordinance will harm the public. Accordingly, further inquiry into irreparable injury is unnecessary and the request for a preliminary injunction should be denied.

Further, in *Foothills Christian Ministries*, this Court recognized that local governments are "just as likely to be able to demonstrate a compelling interest in imposing the requirement that churches obtain a CUP prior to operating in the C-R zone." (Ex. 6 at 7.) According to the Court, local governments "have a strong interest in establishing and implementing zoning systems, as zoning systems protect the zones' inhabitants from problems of traffic, noise and litter, avoid spot zoning, and preserve a coherent land use zoning plan." *Id.* (citations and internal quotation marks omitted). Thus, if plaintiff's request for an injunction is granted, the County's citizens will be harmed because the environmental impacts of plaintiff's use of the Property (traffic, noise, etc.) will go unanalyzed and unmitigated.

Further, the only harm claimed by plaintiff is its inability to hold religious assemblies at its current location. Plaintiff has not shown that there is no other location available for rent where it could hold its religious services. If such a location were available, plaintiff would likely have to incur additional rent. However, having to make additional rent payments is not irreparable harm because plaintiff could potentially recover the amount of these payments from the County if it were to prevail in this lawsuit.

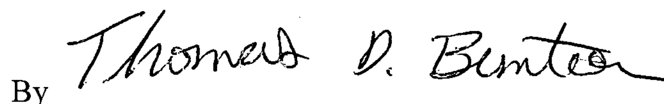
Because the balance of hardships tips in favor of the County, plaintiff's request for a preliminary injunction should be denied.

VI.

CONCLUSION

For all of the foregoing reasons, plaintiff's request for a preliminary injunction should be denied.

DATED: 9/12/08 JOHN J. SANSONE, County Counsel

By 

THOMAS D. BUNTON, Senior Deputy
Attorneys for Defendant County of San Diego

DECLARATION OF SERVICE

I, the undersigned, declare:

That I am over the age of eighteen years and not a party to the case; I am employed in, or am a resident of, the County of San Diego, California where the service occurred; and my business address is: 1600 Pacific Highway, Room 355, San Diego, California.

On September 12, 2008, I served the following documents: **1) DEFENDANT COUNTY OF SAN DIEGO'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION; and 2) DECLARATION OF PAM ELIAS IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION** in the following manner:

☐ By personally delivering copies to the person served.

☐ By placing a copy in a separate envelope, with postage fully prepaid, for each addressee named below and depositing each in the Federal Express overnight mail service at San Diego, California.

☐ By faxing a copy to the person served. The document was transmitted by facsimile transmission and the transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine.

☒ By electronic filing, I served each of the above referenced documents by E-filing, in accordance with the rules governing the electronic filing of documents in the United States District Court for the Southern District of California, as to the following parties:

James M Griffiths The Western Center for Law & Policy 300 West Grand Avenue, Suite 200 Escondido, CA 92025 (760)747-4549 (760)747-4505 (fax) *jgriffiths@wclplaw.org*	Peter Dominick Lepiscopo Lepiscopo & Morrow 2635 Camino del Rio South, Suite 109 San Diego, CA 92108 (619)299-5343 (619)299-4767 (fax) *plepiscopo@att.net*

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 12, 2008, at San Diego, California.

By: Thomas D. Bunton
Attorney for Defendant County of San Diego