

Docket No. 09-15163

In the
UNITED STATES COURT OF APPEALS
for the
FOR THE NINTH CIRCUIT

INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL

Plaintiff-Appellant,

v.

CITY OF SAN LEANDRO

Defendant-Appellee,

v.

FAITH FELLOWSHIP FOURSQUARE CHURCH

Real Party in Interest-Appellant.

*Appeal from a Decision of the United States District Court for the Northern District of California,
San Francisco, Case 07-CV-03603, Honorable Phyllis J. Hamilton*

**APPELLEE CITY OF SAN LEANDRO'S PETITION FOR
PANEL REHEARING AND REHEARING EN BANC**

Panel: Kevin Thomas Duffy, District Judge, John T. Noonan
and Richard A. Paez, Circuit Judges

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I. *FRAP RULE 35 STATEMENT*

The City of San Leandro (“the City” or “San Leandro”) petitions for rehearing and rehearing en banc of the Panel Opinion (Duffy, K.¹, Noonan, J., and Paez, R.) to address issues of national significance concerning: When, if ever, a municipality’s refusal to amend its zoning code to accommodate a religious institution’s desire to relocate to a particular property constitute a substantial burden on the assembly’s religious exercise, in violation of the Religious Land Use and Institutionalized Persons Act (“RLUIPA,” 42 U.S.C. § 2000cc(a))? A rehearing en banc is necessary to address the following questions of exceptional national importance:

1. Does a municipality impose a “substantial burden” on the exercise of religion within the meaning of RLUIPA where the municipality has zoned ample land to accommodate religious and nonreligious assembly uses alike, where the City declines to rezone an additional parcel of industrial land for assembly use, and where a religious assembly contends that the industrial property is the only property that is currently available that suits its own specific financial and operational needs?

¹ The Honorable Kevin Thomas Duffy, United States District Judge of the Southern District of New York, sitting by designation.

2. Does the Panel's reading of RLUIPA create a special land use preference for religious assemblies in violation of the Establishment Clause?

3. Did the Panel improperly modify the "substantial burden" standard of RLUIPA by holding that facially neutral zoning regulations that permit religious assembly uses in the majority of a city's territory may be challenged under a strict scrutiny standard if the regulations do not guarantee that property be deemed affordable, desirable and currently available for use by a religious assembly, based on the assembly's particular needs?

In addition, a panel rehearing is sought because the Panel Opinion stated that it was "undisputed" that the decision not to rezone property constituted an individualized assessment triggering RLUIPA review for a substantial burden. However, the City disputed this point. Under existing precedent of this Court, the enactment of zoning laws, and hence the refusal to change those zoning laws, are not individualized assessments. The Panel's holding to the contrary is what leads to the noted constitutional problems.

II. *BACKGROUND*

San Leandro is a built out city of approximately 79,000 located in the East Bay area. Historically, churches have been permitted with a conditional use permit ("CUP") in residential zones, *i.e.* approximately 52% of the City's total land area. There are currently 45 existing churches in the City. II ER 249-251; 2 SER 1249.

International Church of the Foursquare Gospel (“ICFG” or “the Church”) has operated in San Leandro since 1993. Over the years, the Church expanded from 65 persons to 1500-1700 attendees at three worship services. III ER 485, FAC ¶ 12; 2 SER 1343:24-1344:1; 1345:15-16; III ER 499, 503-504. In 2006, the Church began looking for a larger parcel for its growing congregation. Without any City input, the Church on March 24, 2006 entered into escrow to purchase a vacant industrial building located on three parcels on Catalina (“the Catalina property”). 1 SER 1136:19-25. The escrow was expressly contingent on the Church obtaining land use entitlements from the City allowing for a church. 2 SER 1219, 1226, 1230. Just four days later, however, this contingency was deleted by the Church. *Id.*

City staff advised the Church that the Catalina property was zoned IP (Industrial Park), not allowing for a church. Slip Op. 2440. And, City staff also advised the Church that it could apply for a zoning code amendment and then file for a CUP. II ER 252-254. Some two months after its purchase the Church applied to have the property rezoned. 2 SER 1241; II ER 254. Meanwhile, the City had undertaken a comprehensive analysis of its existing zoning code to determine whether assembly uses might be allowed in any industrial or commercial zones. Based on eight objective planning criteria, the City added some 196 commercial and industrially zoned properties to the Assembly Use Overlay zoning

(“AU Zone”). Slip Op. 2441. The effect of the AU Zone was to expand the areas available for religious and non-religious assembly uses (including churches) by over 200 acres. However, the Catalina property did not meet two of the City’s eight objective criteria and the Church’s rezoning request for Catalina was denied. II ER 252-254, ¶¶ 15-18.

III. ARGUMENT

The Panel Opinion at issue interprets and applies the “substantial burden” provision of RLUIPA. RLUIPA was passed in response to *City of Boerne v. Flores*, 521 U.S. 507 (1997) which held the Religious Freedom Restoration Act (“RFRA”) was unconstitutional. To avoid the same infirmities, RLUIPA was limited to actions involving federally funded programs, effecting interstate commerce, or implementing a system of land use regulations by making “individualized assessments” of proposed land uses. Here the Panel held it was “undisputed” that a denial of a request to rezone property constituted an individualized assessment, which is wrong. The Panel then held that a substantial burden could be based on failure to rezone property if there were no properly zoned properties immediately available for purchase meeting the Church’s needs.

The net effect of the decision, if allowed to stand, cannot be overstated. As a practical matter, the decision will effectively require cities to grant religious uses special preferences based on their professed subjective needs in clear violation of

the Establishment Clause. Second, the decision reformulates the “substantial burden” test to eliminate any consideration of the objective reasonableness or facial neutrality of the challenged zoning regulations. Third, the Panel Opinion essentially reinterprets RLUIPA’s threshold requirement that a challenged action involve an “individualized assessment” into a mandate that all zoning regulations be subject to strict scrutiny.

A. *This Panel’s Opinion On RLUIPA’s Substantial Burden Provision Violates The Establishment Clause By Granting The Church A Blanket Immunity From San Leandro’s Zoning Plan.*

The Establishment Clause of the First Amendment “prohibits the government from abandoning secular purposes in order to put an imprimatur on one religion, or religion as such, to favor the adherents of any sect or religious organization.” *Gillette v. United States*, 401 U.S. 437, 450 (1971). Laws which grant a specific government benefit to religious institutions which are not enjoyed by non-religious groups are unconstitutional. *See, e.g., Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9-10 (1989) [state sales tax exemption for religious writings held unconstitutional]. This Panel’s Opinion on substantial burden is in error as it results in an “accommodation” (*Civil Liberties for Urban Believers v. City of Chicago* (“C.L.U.B.”), 342 F.3d 752 (7th Cir. 2003)) and crosses the boundary into religious favoritism. *See Lynch v. Donnelly*, 465 U.S. 668, 714 (1984) (Brennan,

J., dissenting) [“[G]overnment is to remain scrupulously neutral in matters of religious conscience ... [and] must avoid those overly broad acknowledgments of religious practices that may imply governmental favoritism....”].

RLUIPA was carefully drafted to avoid giving religious institutions special land use rights because to do so would violate the constitutional requirement of government neutrality towards religion. The Act states that it should not “be construed to affect, interpret, or in any way address ... the Establishment Clause.”

42 U.S.C. § 2000cc - 4. RLUIPA’s two chief sponsors, Senators Kennedy and Hatch, issued a joint statement stating:

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

146 Cong. Rec. S. 7774, 7776.

In enacting RLUIPA, Congress addressed two Supreme Court cases as they applied to land use law and religious uses, *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872, 879 (1990) and *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). In *Smith*, the Supreme Court found that drug laws prohibiting peyote used by Native Americans did not violate the right to free exercise of religion because “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the

incidental effect of burdening a particular religious practice.” *Lukumi*, 508 U.S. at 531, citing *Smith*.

RLUIPA afforded greater protection to religious exercise than the “floor” established by *Smith*. *Maryweathers v. Newland*, 314 F.3d 1062, 1070 (9th Cir. 2002). However, RLUIPA is consistent with *Smith* in that it applies “strict scrutiny” review, and thus requires a showing of furtherance of a “compelling” government interest, only to substantial burdens on religion imposed in the context of governmental “individualized assessments” that were subject to such scrutiny under *Smith* and preceding case law. *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter*, 456 F.3d 978, 994-995 (9th Cir. 2006).

Therefore, the “substantial burden” criteria of RLUIPA should not be interpreted to grant churches special exemptions from otherwise reasonable and valid land use regulations. *World Outreach Conference Center v. City of Chicago*, 591 F.3d 531, 539 (7th Cir. 2009). The substantial burden test of RLUIPA cannot be read so broadly and that it falls outside the treacherous narrow zone between Free Exercise and the Establishment Clause. *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 355 (2nd Cir. 2007). By its ruling this Panel has landed in this treacherous zone and conferred special benefits on ICFG.

Under California law, the rezoning of a parcel of land is considered a legislative act of the local governing body. *Topanga Assn. for a Scenic Community*

v. County of Los Angeles, 11 Cal.3d 506, 517 (1974). When any person comes to a municipality and applies to have a parcel of land rezoned, they are asking to have the municipality's law changed. In reviewing rezoning denials for most landowners, the courts afford deference to the discretion of the local governing board. *Tandy v. City of Oakland*, 208 Cal.App.2d 609, 612 (1962). Here, the Panel held that the failure to rezone the Catalina property may create a substantial burden in violation of RLUIPA if the Church can establish that under the existing zoning ordinance there are no other properties which meet its needs. Slip Op. 2449-2452. This risks creating a federal law entitlement to have a zoning ordinance changed to suit the needs of a religious institution and thus violates the Establishment Clause.

B. *This Court Has Improperly Reformulated The Substantial Burden Test.*

The Panel Opinion held that a refusal to amend an otherwise facially neutral zoning code may constitute a substantial burden under RLUIPA. In doing so, the Panel's Opinion is inconsistent with existing decisions of this Circuit (*see Guru Nanak*, 456 F.3d 978 [for a land use regulation to impose a substantial burden it must be oppressive to a significantly great extent] and *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034-35 (9th Cir. 2004)) and creates a new standard not endorsed by any other Circuit. *Westchester*, 504 F.3d at 350

[generally applicable burdens, neutrally imposed, are not “substantial”]; *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007) [“[t]he ban on churches in the industrial zone cannot in itself constitute a substantial burden on religion, because then every zoning ordinance that didn’t permit churches everywhere would be a prima facie violation of RLUIPA.”].

The legislative history of RLUIPA makes it clear that the term “substantial burden” was intended to have the same meaning as the term “substantial burden” in Free Exercise Clause case law. “[I]t is not the intent of this Act to create a new standard for the definition of ‘substantial burden’ on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence.” 146 Cong.Rec. S. 7774-01; 2 SER 1276. This and other courts have concluded that Supreme Court jurisprudence concerning “substantial burdens” on religion is “instructive” if not controlling in construing the same term within RLUIPA. *Guru Nanak*, 456 F.3d 978, 988, fn 11; *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226 (11th Cir. 2004); *C.L.U.B.*, 342 F.3d 752, 760-761.

Governmental action that is specifically targeted upon core religious activities will almost invariably be found to impose a substantial burden, if for no other reason than such conduct is almost necessarily oppressive and places an “onus” on religion. *See, e.g. Lukumi*, 508 U.S. 520, 532. Actions that are so

arbitrary as to suggest intentional discrimination or deliberate disregard of legitimate rights will also generally be found to impose a substantial burden for the same reason. *Westchester*, 504 F.3d at 350-351.

At the other end of the spectrum are facially neutral regulations of general applicability adopted for purposes unrelated to religion. *See Lukumi*, 508 U.S. at 531; *Westchester*, 504 F.3d at 350. Burdens imposed on religious activities by this type of regulation are considered *incidental* burdens which must be borne by religious organizations on the same footing as non-religious parties, and not “substantial burdens on religion.” Denial of use of a particular property has been found to impose a substantial burden where property was zoned to allow such use and denial of permits was found to be arbitrary or intentionally discriminatory. *Sts. Constantine and Helen Greek Orthodox Church v. City of New Berlin*, 396 F.3d 895, 900-901 (7th Cir. 2005); *Grace Church of North County v. City of San Diego*, 555 F.Supp.2d 1126, 1135-1138 (C.D. Cal. 2008); *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203 (C.D. Cal. 2002).

Zoning regulations generally fall within the “generally applicable” category of regulation. *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 275-76 (3rd Cir. 2007); *San Jose Christian*, 360 F.3d at 1031. “A law is one of neutrality and general applicability if it does not aim to infringe upon or restrict practices *because* of their religious motivation, and if it does not ‘in a

selective manner impose burdens only on conduct motivated by religious belief.””
Id. at 1031, quoting *Lukumi*, 508 U.S. at 533, 543. Zoning provisions are also laws of general application if they are directed at allocation of land among competing uses in the city as a whole, rather than focused on some particular property or use. Therefore, the mere application of existing zoning to a particular parcel cannot constitute a substantial burden.

C. *The Court’s Endorsement Of A Test Mandating That Sites Be Listed For Sale And “Suitable” Improperly Creates A Split Of Authorities.*

Until now, this Circuit had recognized that being denied a use for a specific parcel does not constitute a substantial burden. *San Jose Christian*, 360 F.3d 1024. In *San Jose Christian*, this Circuit stated that no substantial burden was imposed, even where an ordinance “rendered [plaintiff] unable to provide education and/or worship” on its property, because the plaintiff was not “precluded from using other sites within the city” *and* because “there [is no] evidence that the City would not impose the same requirements on any other entity.” *Id.* at 1035.

Until this Panel Opinion, however, the Court has not further elaborated what criteria should be considered in determining whether other sites are reasonably available for religious uses. If allowed to stand, the Panel Opinion establishes precedent that is irreconcilable with authority in other circuits, and would effectively require that zoning for religious uses be dictated entirely by the stated

needs, desires and pocket-book interests of individual churches rather than by legitimate planning criteria equally applicable to similar secular assemblies.

In *C.L.U.B.*, 342 F.3d 752, the Seventh Circuit upheld summary judgment for the city and rejected the RLUIPA claims of five churches, each of which had applied for and were denied special use permits. The Court noted that RLUIPA does not require cities to grant churches preferential rights over other land uses, nor insulate churches from “the harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them.” *Id.* at 761-762.

In *Midrash Sephardi*, 366 F.3d 1214, the Eleventh Circuit addressed regulations that required a number of congregations to locate new facilities in another zone. In response to assertions that the churches might not be able to find “suitable” alternate space, the court concluded “That the congregations may be unable to find suitable alternative space does not create a substantial burden with the meaning of RLUIPA ... whatever specific difficulties [the plaintiff church] claims to have encountered, they are the same ones that face all [land users], not merely churches.” *Id.* at 1227, fn 11, quoting *Love Church v. City of Evanston*, 896 F.2d 1082, 1086 (7th Cir. 1990).

Similarly, in *Centro Familiar Christiano Buenas Nuevas v. City of Yuma*, 615 F.Supp.2d 980 (D. Ariz. 2009), the plaintiff church wished to expand its existing operations and purchased property on Main Street. Its CUP was denied on

the ground that it was incompatible with the city's plans to concentrate commercial uses on Main Street. *Id.* at 985-986. The fact that other properties were either too costly or did not fully accommodate future expansion were not valid grounds for rejecting these other sites. *Id.* at 991-992. To find otherwise would "provide a growing religious organization with a de facto exemption from the zoning laws allowing it to locate anywhere it pleases so long as it has purchased an adequate facility." *Id.* at 991.

The Panel's Opinion does not clearly define all the conditions which might be deemed relevant in determining whether alternate "suitable sites" existed for ICFG's proposed mega-church expansion. This alone is good grounds for rehearing. It is clear, however, that the Panel regarded numerous factors that are effectively beyond the City's control as relevant. These include whether "suitable" property was currently for sale, and whether the size and "configuration" of the property as suitable for ICFG's needs. The Church also contends that sites that are currently occupied or not currently for sale cannot be considered "suitable". These standards, however, improperly attempt to impose responsibility on the City for conditions created by market forces. This Circuit and the United States Supreme Court have dealt with and rejected similar arguments in the Free Speech context. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) [that local regulations permit adult businesses a reasonable opportunity to compete for space

on the same footing as other businesses subject to city land use regulations]; *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1531-1532 (9th Cir. 1993) [“The issue is whether any site is part of an actual market for commercial enterprises generally.”].

Municipalities are *not* required to guarantee that these properties will actually be for sale, nor improvements tailored to a user’s specifications or offering visual desirable settings. *Id.* However, ICFG considered all of the potential properties unsuitable because they were not then listed for sale or in compliance with their subjective criteria. Appellant’s Opening Brief, p. 32. Under this Panel’s new test, cities would be required to serve as a virtual real estate broker finding a suitable site for a store front church, a mega-church and every other sized religious facility in between.

In demanding different rules for religious assemblies, the Church is attempting to transform RLUIPA from a statute which protects religious organizations from unfair discrimination into one which requires states and local governments to grant churches immunity from local market conditions, a special consideration afforded to no other type of development. This is not the intent of RLUIPA. *C.L.U.B.*, 342 F.3d 752, 762; 2 SER 1257. The question is not whether the market allowed the Church to purchase a particular property, but whether a City can be compelled to amend its zoning ordinance to insure property is available

which meets the Church's criteria. Where the Church excludes reasonable alternatives from consideration based on its own subjective laundry list of preferences, it cannot claim the burden is one imposed by the City. That is precisely what ICFG did here and what this Panel has endorsed. Slip Op. 2449 [finding improper the District Court's rejection of the realtor's examination that was based on the Church's stated requirements versus a detailed objective analysis of the parcels in the AU Overlay].

D. *A Refusal To Rezone Property Is Not An "Individualized Assessment" Requiring Strict Scrutiny Under RLUIPA.*

A further problem with the Panel Opinion is that it essentially collapses the jurisdictional question of whether a local government has undertaken an "individualized assessment" in applying its land use regulations to property, with the question of whether the burden allegedly imposed on a religious use is "substantial," or merely incidental to the operation of a facial neutral system of general land use regulations. Slip Op. 2447-2448; *Guru Nanak*, 456 F.3d 986. As well, the City did question whether application for a rezoning could satisfy the jurisdictional requirement for an "individualized assessment" for a substantial burden claim under RLUIPA. *See City's Answering Brief*, p. 28, fn 4; II ER 68.²

² The City invites the Court to listen to the audio tape of the Ninth Circuit argument where City's counsel's opening argument calls out the fact that this case does not involve an individualized assessment.

However, the City's main argument and the District Court decision below were that the "substantial burden" test incorporates rather than abrogates past constitutional jurisprudence concerning "substantial burdens on religion." This test does not demand strict scrutiny where, as in this case, a religious plaintiff's claimed injury flows from the existence of a previously enacted, facially neutral general regulatory code.

In enacting the substantial burden provision of RLUIPA, Congress sought to limit the substantial burden provision through such discretionary review processes as the granting or denial of CUPs and other special use permits. An "individualized assessment" for purposes of RLUIPA is one that "is imposed in the *implementation* of a land use regulation," rather than their adoption of a legislative action. 42 U.S.C. § 2000cc(a)(2)(C). It is undisputed that the IP zoning which prohibits religious (and other) assembly uses on the Catalina property was enacted as part of a valid, generally applicable and facially neutral zoning code revision years ago. ICFG's inability to use the property existed long before, and totally independent of, any "individualized assessment" that was arguably made in rejecting ICFG's applications for a rezone or for a CUP that obviously could not be granted under the existing zoning.

The Panel Opinion holds that ICFG's applications for a rezoning and a CUP not only satisfied the threshold "individualized assessment," requirement of

RLUIPA, but also triggered strict scrutiny. This appears neither consistent with congressional intent in RLUIPA, nor justifiable under existing Ninth Circuit and Supreme Court jurisprudence. It also leads inexorably to the conclusion that no zoning district classification could escape strict scrutiny, since an interested organization could always bootstrap itself into an “individualized assessment” by applying for an amendment of the existing zoning code.

Application of strict scrutiny appears particularly inappropriate where, as in this case, the City’s purported “individualized assessment” followed a major good faith effort to *expand* existing opportunities for religious (and other) assembly uses using unquestionably reasonable, legitimate and neutral planning criteria. This same litmus test was applied even-handedly to all of the non-residential properties in the City resulting in adding some 196 properties. II ER 259-260, ¶¶ 31-35; 1 SER 1031, 1043, 1047 and 1055.

San Leandro’s authority to enact land use laws is derived from its police power. The police power is a well established, broad based right of cities to protect public health, safety and welfare through adoption of comprehensive land use and zoning laws. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). There is a clear hierarchy of land use laws with the general plan sitting as the constitution for all development in a city. *DeVita v. County of Napa*, 9 Cal.4th 763, 772 (1995). Zoning lies right beneath the general plan and is the systematic

organization of the City into zoning districts and indicates the development standards within said zoning districts. *Hewlett v. Squaw Valley Ski Corp.*, 54 Cal.App.4th 499, 531 (1997). Zoning by its very nature allows the governing body to determine the appropriate uses and where they should be located in a jurisdiction. This runs the gamut from location of hospitals, schools, residential neighborhoods, commercial serving zones, and industrial and manufacturing areas. In contrast, variances, conditional use permits and other special use permits allow local governments to adjust zoning or to provide *site specific* regulations, consistent with the adopted zoning ordinance to avoid hardship or to achieve other appropriate goals, without going to the extent of a legislative amendment of the zoning ordinance. *See Topanga Assn.*, 11 Cal.3d 506, 511.

This Court did observe in *Guru Nanak*, 456 F.3d 978, 987, “By its own terms, it appears RLUIPA does not apply to land use regulations, such as the Zoning Code here, which typically are written in general and neutral terms. However, when the Zoning Code is applied to grant or deny a certain use to a particular parcel of land, the application is an ‘implementation’ under 42 U.S.C. § 2000cc(a)(2)(C).” If RLUIPA is concerned with facial validity of zoning codes, these concerns are addressed in the equal terms or “total exclusion/unreasonable restriction” provisions of 42 U.S.C. § 2000cc(b). If the enactment of a zoning ordinance is not an individualized assessment, it should follow that refusing to

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 40-1(a), the Petition for Panel Rehearing and Rehearing En Banc is produced using at least 14 point Times New Roman type including footnotes and contains no more than 4,200 words. According to Microsoft Word's "Statistics," this document contains 4,185 words.

Dated: March 15, 2011

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: /s/ Deborah J. Fox

Deborah J. Fox

Attorneys for Appellee

CITY OF SAN LEANDRO

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2011, I electronically filed the foregoing Petition for Panel Rehearing and Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: /s/ Kathleen Rodell
Kathleen Rodell