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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 SUMMARY JUDGMENT Date: August 13, 2009 Time: 3:30 p.m. Courtroom: 16 Judge: Honorable Jeffrey T. Miller

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Defendant County of San Diego (the "County") submits the following memorandum of points and authorities in opposition to plaintiff Guatay Christian Fellowship, Inc.'s Motion for Summary Judgment. [1]

I.

INTRODUCTION

Plaintiff contends that the First Amendment and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") exempts it from obtaining a Major Use Permit from the County in order to use the approved Recreation Building as a church. Plaintiff makes this argument even though it is contrary to RLUIPA's legislative history, established caselaw, and this Court's ruling on the Motion for a Preliminary Injunction. Indeed, plaintiff argues for this exception, even though it has dismissed the "discrimination" claim under RLUIPA in light of the fact that the County would require a Major Use Permit for virtually all non-residential or non-agricultural uses of the Property that plaintiff currently rents. Plaintiff has cited no authority, because none exists, that churches are exempt from applying for conditional use permits required by local governments. Indeed, all of the authority is to the contrary.

One of the reasons plaintiff contends that it needs this exemption is because it does not have the money to obtain a Major Use Permit from the County. However, as discussed in the County's moving papers, plaintiff's expert admits that any entity (including non-religious social organizations) would need to expend the same amount of money in order to obtain a Major Use Permit. Moreover, courts have consistently held that the cost to obtain a zoning permit does not impose a substantial burden on a religious organization in violation of RLUIPA or the First Amendment.

Plaintiff contends that even though its does not have and cannot obtain a Major Use Permit, the County should be prohibited from enforcing the Zoning Ordinance by requiring plaintiff to stop holding religious assemblies on the Property. Plaintiff contends that if it must find another location to rent, it will impose a substantial burden on its religious practices. As explained in the County's moving papers,

[1] Rather than repeat the undisputed facts and arguments made in the County's Motion for Summary Judgment and supporting documents, the County incorporates those items into its opposition. *Omega Healthcare Investors, Inc. v. Res-Care*, Inc., 475 F.3d 853, 863 n.6 (7th Cir. 2007). In addition, the declarations filed in support of the County's Motion for Summary Judgment are also incorporated into this opposition. The arguments that are made in this opposition are arguments that were not made in the County's Motion for Summary Judgment.

this type of incidental burden is not a substantial burden within the meaning or RLUIPA or the First Amendment. Indeed, courts routinely hold that ***denial*** of a conditional use permit to build a church on a particular piece of property does not violate either RLUIPA or the First Amendment. *Christian Gospel Church, Inc. v. San Francisco*, 896 F.2d 1221, 1224 (9th Cir. 1990) (denial of a zoning permit for a church did not violate the First Amendment); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004) ("[W]hile 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.").[2]

Plaintiff also contends that the County granted a Special Use Permit or Major Use Permit authorizing use of the Recreation Building as a church when it "approved" certain plot plans that referred to the Building as an "EXIST. CHURCH" or "Rec Hall & Chapel." For the reasons discussed in the County's moving papers, this argument fails. In addition, even if the County "approved" a Major Use Permit allowing use of the Building as a church, that approval expired long before plaintiff began using the Building. Under the County's Zoning Ordinance, an approval expires if the use has been discontinued for more than one year. Here, it is undisputed that the Recreation Building had not been used as a church for many years before plaintiff began renting it in 1986.

Plaintiff urges the Court to use "principals [sic] of estoppel" in ruling on its RLUIPA and First Amendment claims. However, estoppel is a state law theory (not a federal statutory or constitutional claim) that plaintiff has not alleged. Moreover, as discussed in detail in the County's moving papers,

[2] Without legal support, plaintiff asserts that it has the right to conduct religious services "in a place of their choosing." (Plaintiff's Br. at 13.) However, that is not the law. *Grace United Methodist Church v. City of Cheyenne*, 451 F. 3d 643, 658 (10th Cir. 2006) ("nor does a church have a constitutional right to build its house of worship where it pleases.") (internal quotation marks and citation omitted). Plaintiff quotes the district court's decision in *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 326 F. Supp. 2d 1140, 1152-1153 (E.D. Cal. 2003), which in turn quoted the district court's decision in *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp.2d 1203, 1226 (C.D. Cal. 2002). According to the district court in *County of Sutter*, "preventing a church from building a worship site fundamentally inhibits its ability to practice its religion. Churches are central to the religious exercise of most religions. If [plaintiff] could not build a church, it could not exist." 326 F. Supp. 2d at 1152-53 (brackets in original) (internal quotation marks and citation omitted). On appeal, however, the Ninth Circuit stressed that the fact that Sutter County had turned down two conditional use permit applications ***and*** based on the "underlying rationales" for the denials limited "the large amount of land theoretically available to Guru Nanak under the Zoning Code to several scattered parcels that the County may or may not ultimately approve." *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978, 992 (9th Cir. 2006). Thus, denial of a conditional use permit alone does not result in a substantial burden on religion in violation of either the First Amendment or RLUIPA.

estoppel does not apply here. While plaintiff's moving papers make no mention of this fact, plaintiff was told by the County that it needed to obtain a Major Use Permit (or modification of the existing Major Use Permit) in 1988. After apparently agreeing to submit an application for modification of the Major Use Permit, plaintiff failed to do so. Under these circumstances, there is no basis for applying estoppel against the County. Moreover, since plaintiff has no viable federal claims, the Court should decline to exercise supplemental jurisdiction over plaintiff's estoppel "claim."

II.

THE COUNTY DID NOT APPROVE OF USE OF THE RECREATION BUILDING AS A CHURCH.

For the reasons discussed in the County's moving papers, plaintiff's argument that the County granted a Special Use Permit or Major Use Permit for church use of the Recreation Building based on plot plans that were submitted in 1971 and 1978 fails. Under the County's Zoning Ordinance and the practices of the Planning Commission, the Planning Commission must determine that specific criteria have been satisfied in order to grant a Special Use Permit or Major Use Permit. (Declaration of Jeff Murphy in Opposition to Plaintiff's Motion for Summary Judgment, at ¶ 2.)[3] There is no indication that in 1971 or 1979 that the Planning Commission found that use of the approved Recreation Building as a church would satisfy the criteria specified by the Zoning Ordinance. (Declaration of Jeff Murphy, at ¶ 3.)

In addition, even if the County did grant a Special Use Permit for church use, that permit expired long before plaintiff began using the Building for religious services in October, 1986. Section 711 of County's Zoning Ordinance provided in 1971, 1978 and 1979 that "[e]each . . . permit heretofore or hereafter issued shall expire and become null and void at the expiration of one (1) year ***after the use for which it was issued*** shall have been discontinued." (Ex. 63.)[4] (emphasis added). Pastor Peterson, Cheryl Rice and Charles Rice all testified that in 1986 when plaintiff began renting the Recreation Building, it had not been used for any purpose for many years. (Ex. 2, at 15:18 - 16:16; Ex. 19, at 13:25

[3] Unless specifically noted, all declarations were submitted in support of the County's Motion for Summary Judgment. All exhibits are attached to the County's Notices of Lodgment of Exhibits.

[4] The same basic provision is still contained in the Zoning Ordinance. (Ex. 64, at § 7372.)

- 14:4; Ex. 21, at 19:19-21.) Prior owner La France Bragg also testified that the Building was not used for a church between 1977 and 1980. (Ex. 12, at 28:16 - 29:5; 29:12-25.) Therefore, the church use had been discontinued for well more than one year before plaintiff started using the Building in October, 1986. Accordingly, if the County approved church use in 1971, 1978 or 1979 by approving plot plans, that approval expired well before plaintiff started renting the Building in October, 1986.

For these additional reasons, plaintiff contention that it has the necessary Major Use Permit fails as a matter of law.

III.

PLAINTIFF HAS TRIED TO HIDE OR MISREPRESENT CRITICAL FACTS.

Plaintiff's lack of candor in its Motion for Summary Judgment is telling. Plaintiff fails to inform the Court that in 1988 the County discovered that plaintiff was illegally using the Recreation Building for religious assemblies while conducting an inspection regarding an unrelated permit application.[5] (Exs. 27, 28 & 29.) After this discovery, the County told plaintiff through Pastor Peterson and Ms. Rice that it would need to obtain a modification of the existing Major Use Permit in order to continue holding religious services at the Recreation Building. (Ex. 27.) The County informed plaintiff during a meeting that was held on April 25, 1988. (Ex. 27.) The meeting was also attended by Mr. O'Flynn, the RV park owner. (Ex. 27.) During the meeting, plaintiff agreed to obtain a modification of the Major Use Permit, but ultimately failed to submit the required application or to obtain the modification. (Ex. 27; Declaration of Pam Elias, at ¶ 4.)

Plaintiff goes beyond failing to disclose that it has known since 1988 that it needed to obtain a modification of the Major Use Permit in order to use the Recreation Building for religious assemblies. In its memorandum of points and authorities, plaintiff states that on May 16, 2008, it "***learned for the first time*** that the County contended that religious assemblies, religious worship, and religious institutions were not permitted by the County's land use ordinances and regulations." (Plaintiff's Br., at 10.) (emphasis added). This statement is clearly wrong. Plaintiff was informed in 1988 that it could not

[5] Plaintiff began using the Recreation Building in October, 1986. However, when Mr. O' Flynn submitted a minor deviation application to the County on March 10, 1988 seeking approval for RV spaces that he had previously relocated, he hid the fact that plaintiff was using the Recreation Building as a church from the County. (Ex. 24.) In the plot plan he submitted in support of the minor deviation application, Mr. O' Flynn labeled the Building as a Recreation Building, not a church. (Ex. 24.)

engage in Religious Assembly on the Property without obtaining a modification of the existing Major Use Permit.

Plaintiff's tactics are not limited to the above issue. In its memorandum of points and authorities and in the declarations of its experts and Pastor Peterson, plaintiff repeatedly contends that in a November 30, 1988 letter written by John Melbourne of the County's Department of Health Services to Mr. John O' Flynn, the County "ackowledg[ed] the existence and approv[ed] of the Church's use of the Church Building as a place of religious assembly and worship." (Plaintiff's Br., at 6.) Plaintiff and its experts know that this is simply not true.

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

The November 30, 1988 letter written by Mr. Melbourne simply accepts Mr. O' Flynn's position that no study of the water system would be necessary for Mr. O'Flynn to obtain a modification of the Major Use Permit to allow use of the Building as a church (and relocation of the RV spaces). (Ex. 30.)

Mr. Melbourne's letter did not approve the modification (something only the Planning Commission could do); he simply stated that the water supply would not be an obstacle to the Planning Commission's approval of a modification application. However, neither Mr. O' Flynn nor plaintiff submitted a modification application to the County. Accordingly, Plaintiff's use of the November 30, 1988 letter is deceptive.

Plaintiff also attempts to deceive the Court into believing that a document maintained by the County's Assessor's Office reflecting appraisals of the Building shows that "as early as August 13, 1958, the Church Building was designated as a church and was used as place for religious exercise and worship." (Plaintiff's Br., at p. 1.) The document shows that on August 13, 1958, a County appraiser with the last name of Wilder appraised the Building. (Ex. 1.) The form was created in 1958 (see lower left hand corner). (Ex. 1.) For purpose of the 1958 appraisal, the Building is described as a store. (Ex. 1.) Mr. Wilder indicated that the Building was "90% good." (Ex. 1.) He valued the "Replacement Cost Less Normal Depreciation" as $13,631.[6] (Ex. 1.) On March 25, 1966, a County appraiser named JM Early appraised the Building. Plaintiff does not discuss this appraisal. In his "remarks" from the appraisal, Mr. Early indicated that the Building was "[a]ll open, ***vacant***, in bad condition as to useability without extensive remod. % good per appraiser to reflect condition." (Ex. 1, at p. 2) (emphasis added). Mr. Early decreased the "% good" to 50%. (Ex. 1.) That decreased the Replacement Cost Less Normal Depreciation[7] to $7,573. (Ex. 1.) On February 26, 1970, an appraiser named W. Christman performed another appraisal. (Ex. 1.) Mr. Christman left the "% good" at 50% and also kept the Replacement Cost Less Normal Depreciation at $7,573. (Ex. 1.) This strongly suggests that the Building was also vacant on February 26, 1970.

Accordingly, the appraisal records suggest that the Building ***was not used as a church prior to February 26, 1970.*** Plaintiff notes that on the document under the heading "name," there are three entries. (Ex. 1.) The bottom entry is "Guatay Variety Store and PO" and this entry has a line through it. (Ex. 1.) The next entry is "Church/Recr. Hall" and it also has a line through it. The top entry is

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

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

"Church." (Ex. 1.) Plaintiff is well aware, however, that this document was altered long after the date of the last appraisal shown (2/26/70). On page 2, there is a reference to "Mountain Christian Center, P.O. Box. 147, Guatay, CA 92031." (Ex. 1, at p. 2.) That is the name and address that plaintiff used beginning in 1986. (Decl. of Todd McCracken, at ¶ 5; Ex. 4.) Thus, this document does not show that the Building was being used as a church anytime prior to 1986. For plaintiff to speculate otherwise is disingenuous.

Plaintiff notes that on May 1, 2008, Charles LePla, counsel for Mr. O'Flynn, wrote the County a letter in which he asserted that plaintiff could operate a church under the 1982 modification of the Major Use Permit that the County had granted to allow the Building to be used as a limited bar (beer and wine sales and live entertainment). (Plaintiff's Br., at pp. 9-10.) Plaintiff fails to note, however, that its experts now contend that Mr. LePla was wrong and that the 1982 modification expired on July 16, 1984 and therefore cannot be utilized by plaintiff or anyone else. (Ex. 3, at 70:13 - 72:19.)

Plaintiff also continues to assert that the County Assessor assigned plaintiff a separate parcel number for the Recreation Building. However, it is undisputed that there is only one parcel number (408-200-17-00) for the entire property owned by John O' Flynn's limited partnership. https://www.sdctreastax.com/ebpp3/(zckihyuhityirx45vd322v55)/Start.aspx

The true undisputed facts establish that the County, and not plaintiff, is entitled to summary judgment.

IV.

THE FREE SPEECH CLAIM FAILS AS A MATTER OF LAW.

Plaintiff cites no authorities to support its claim that its right to free speech has been violated. Indeed, it is unclear whether requiring a church to obtain a permit even implicates the Free Speech Clause of the First Amendment. *Tenafly ERUV Association, Inc. v. The Borough of Tenafly*, 309 F.3d 144, 163 (3rd. Cir. 2002) ("Otherwise, the act of constructing houses of worship would implicate the Free Speech Clause, whereas courts consistently analyze the constitutionality of zoning regulations limiting such construction under the Free Exercise Clause, not the Free Speech Clause.") (emphasis in original) (citations omitted); *City of Morgan Hill*, 360 F.3d at 1032 ("We note that free speech, arguably, is not even implicated by the [zoning] ordinance.").

Even if the Free Speech Clause applied, the County Zoning Ordinance is a constitutional "place" restriction. The County's Zoning Ordinance would require a Major Use Permit for any use of the Recreation Building that is not agricultural or residential. (Ex. 32, at §§ 2184, 2185.) Further, the Zoning Ordinance would allow plaintiff to operate a church in several zones as a matter of right. (Ex. 35.) Therefore, the Zoning Ordinance is properly analyzed as a time, place, and manner restriction. *Cornerstone Bible Church v. City of Hastings*, 948 F. 2d 464, 469 (8th Cir. 1991) ("[W]e construe the overall Hastings zoning ordinance, which makes allowances for churches in residential areas, as simply restrictive and therefore find the time, place, and manner rule applicable."); *Grace United Methodist Church*, 451 F. 3d at 657 ("[T]he City's zoning ordinance is neutral and generally applicable, placing Grace United on an equal footing with other religious and non-religious entities seeking to build and operate"; "content neutral regulations that only incidentally burden speech are subject to intermediate scrutiny.") (citations omitted).

"A valid time, place, and manner restriction must (1) be narrowly tailored to serve a significant governmental interest, and (2) leave open ample alternative channels for communication of the information." *Cornerstone Bible Church*, 948 F. 2d at 469.

Here, the County's Zoning Ordinance, which requires a Major Use Permit, advances a significant governmental interest. *Christian Gospel Church*, 896 F.2d at 1224 ("A zoning system protects the zones' inhabitants from problems of traffic, noise and litter, avoids spot zoning, and preserves a coherent land use zoning plan. These concerns are particularly strong in this case since the Church is applying for nonresidential use in a residential neighborhood. San Francisco has a strong interest in the maintenance of the integrity of its zoning scheme and the protection of its residential neighborhoods.") (internal quotation marks and citations omitted.); *Grace United Methodist Church*, 451 F. 3d at 657 ("There is no question that Cheyenne has a substantial interest in regulating the use of its land and that its zoning regulations promote that interest.") (citations omitted).

"[T]he requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock against Racism*, 491 U.S. 781, 798-99 (U.S. 1989) (internal quotation marks, ellipses and citations omitted). The County Zoning Ordinance is narrowly tailored. It allows Religious Assembly Use in

several zones as a matter of right. (Ex. 35.) In addition, Religious Assembly Use is allowed in most areas of the County with a Major Use Permit. (Ex. 35.) The Major Use Permit process allows the County to examine and mitigate the environmental effects of establishments such as churches which generate traffic, noise, and pollution and raise parking, water supply and septic issues.

For the same reason, there are alternative avenues of communication available. Plaintiff can hold church services in any of the zones where Religious Assembly is allowed as a matter of right. In addition, plaintiff has the right to obtain a Major Use Permit to continue operated in the rented Recreation Building. Thus, plaintiff's free speech rights have not been violated. *City of Morgan Hill*, 360 F.3d at 1033 ("The language of the City's [zoning] ordinance reveals no content-based orientation, and College has presented no evidence that the City enacted and/or enforced the [zoning] ordinance as a pretext for suppressing expression. Rather the ordinance is a content-neutral time, place and manner restriction, which has long been held to be permissible.") (internal quotation marks, ellipses and citations omitted).

Accordingly, the County is entitled to summary judgment on plaintiff's free speech claim.

V.

THE FREEDOM OF ASSEMBLY CLAIM ALSO FAILS.

Plaintiff's freedom of assembly claim fails for the same reasons that it other claims fail. Requiring plaintiff to refrain from using the Recreation Building without the requisite Major Use Permit does not violate plaintiff's right of assembly. This is true even if plaintiff ultimately will not be able to use the rented Recreation Building. Because there are many areas where plaintiff can engage in Religious Assembly as a matter of right under the County's Zoning Ordinance, the inability of plaintiff to worship at a particular location does not deny the right of assembly. *City of Morgan Hill*, 360 F.3d at 1033 ("Admittedly, the [zoning] ordinance and the City's enforcement thereof render College unable to provide education and/or to worship at the Property. But the fact that the church's congregants cannot assemble at that precise location does not equate to a denial of assembly altogether."); *Grace United Methodist Church*, 451 F. 3d at 658 ("[T]he ordinance only interferes with the congregation's ability to conduct that particular operation at a specific location, and, as previously stated, a church has no constitutional right to be free from reasonable zoning regulations nor does a church have a constitutional

right to build its house of worship where it pleases. The City's zoning regulations are unrelated to the suppression of . . . assembly and do not burden any more . . . associational rights than necessary to further the City's substantial interest in regulating traffic, noise and pollution in a residential zone. Therefore, the fact that Grace United must comply with the City's zoning regulations does not violate its rights to free . . . association.") (internal quotation marks and citation omitted); *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 2009 U.S. Dist. LEXIS 7225 (D. Ariz. Jan. 30, 2009) ("The City has effectively denied the Church the ability to assemble at its property at 354 S. Main St. or at any other location on Main Street. But the fact that the church's congregants cannot assemble at that precise location does not equate to a denial of assembly altogether. Accordingly, there has been no violation of the Church's right to free association.") (internal quotation marks and citations omitted).

For these reasons, the County is entitled to summary judgment on plaintiff's seventh cause of action.

VI.

PLAINTIFF'S DUE PROCESS CLAIM IS MERITLESS.

Plaintiff's due process claim is based on the fact that the County's building official revoked the certificate of occupancy after the August 13, 2008 inspection. (Plaintiff's Br., at pp. 35-36.) According to plaintiff, the Due Process Clause required notice and a hearing before the certificate of occupancy could be revoked. Plaintiff is mistaken.

Section 109.6 of the California Building Code (Ex. 52; Cal. Code Regs., tit. 24, § 109.6) gives the County building official authority to revoke the certificate of occupancy without notice or a hearing. That section provides that "[t]he building official may, in writing, suspend or revoke a certificate of occupancy issued under the provisions of this code . . . when it is determined that ***the building or structure or portion thereof is in violation*** of any ordinance or regulation or ***any provisions of this code***." (emphasis added).

Indeed, the certificate of occupancy was revoked in order to protect the health and safety of those who use the building. (Ex. 50.) Under these circumstances, no prior notice or hearing was required. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300-01 (1981) ("[D]eprivation of property to protect the public health and safety is one of the oldest examples of permissible summary

action. Moreover, the administrative action provided through immediate cessation orders responds to situations in which swift action is necessary to protect the public health and safety. This is precisely the type of emergency situation in which this Court has found summary administrative action justified.") (internal quotation marks, citations and brackets omitted).

Moreover, plaintiff could have appealed the building official's decision to the Board of Appeals and had a hearing, but chose not to do so. Section 105.1 of the California Building Code provides that "[i]n order to hear and decide appeals of orders, decisions or determinations made by the building official relative to the application and interpretation of this code, there shall be and is hereby created a board of appeals . . . ." (Ex. 52.) Section 91.1.112.1 of the County's Code of Regulatory Ordinances similarly provides that "[a] person may appeal an order, decision or determination made by the building official that relates to the application or interpretation of this chapter by filing a written appeal to the Building Construction Advisory Board of Appeals within 30 days of the building official's decision." (Ex. 53.) Since plaintiff failed to appeal, it cannot state a procedural due process claim. *Raditch v. United States*, 929 F.2d 478, 482 (9th Cir. 1991) ("This postdeprivation procedure would have compensated Mr. Raditch for any loss of property to which he was entitled. However, Mr. Raditch refused to cooperate. He cannot now argue that he was denied procedural due process."); *Hodel*, 452 U.S. at 303 ("Here, mine operators are afforded prompt and adequate post-deprivation administrative hearings and an opportunity for judicial review. We are satisfied that the Act's immediate cessation order provisions comport with the requirements of due process.").

Plaintiff also argues that revoking the certificate of occupancy was "unconstitutionally overbroad because it includes not only religious exercise but ANY kind of free speech, assembly and association activities." (Plaintiff's Br., at p. 34.) Plaintiff's argument misses the point. The County intended to prohibit all assemblies because it was unsafe for the Building to be used for this purpose. The County was not targeting speech – it was targeting use of the Building for assemblies. The fact that the County prohibited all assemblies shows that the County's conduct was not content based and was proper.

For these reasons, the County is entitled to summary judgment on plaintiff's due process claim.

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VII.

EQUITABLE ESTOPPEL IS NOT A VIABLE THEORY.

As discussed in detail in the County's motion for summary judgment, plaintiff cannot rely on a state law equitable estoppel theory for numerous reasons. While plaintiff urges the Court to use "principals [sic] of estoppel" in ruling on its RLUIPA and First Amendment claims, there is no basis for doing so. Estoppel is a state law theory, and no court has used that theory to resolve a First Amendment or RLUIPA claim. *See Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846, 849 (7th Cir. 2007).

Without citing a single declaration or any deposition testimony, plaintiff asserts that the "evidence in this case clearly proves that the church acted in good faith and detrimentally relied upon the omission of the County." (Plaintiff's Br., at p. 29.) By "omission," plaintiff is apparently referring to the fact that the County did not attempt to enforce the Zoning Ordinance against plaintiff for several years. However, there is no evidence that plaintiff relied on the lack of enforcement in any way. Moreover, the fact that plaintiff continued its illegal use of the Recreation Building for many years does not support an estoppel claim. *Golden Gate Water Ski Club v. County of Contra Costa*, 165 Cal. App. 4th 249, 257 (2008) ("For the most part the Club's reliance simply was to continue its illegal use of the island until it finally was compelled to desist. That is not an injury allowing the defense of equitable estoppel."); *Feduniak v. California Coastal Comm.*, 148 Cal. App. 4th 1346, 1369 (2007) ("[W]e observe that if it were reasonable for the Feduniaks to think that the restrictions would never be enforced because they had not been enforced for many years, then more generally, one could argue against the enforcement of a law that had not been enforced for many years and seek estoppel on that ground. However, courts have never accepted such reasoning.").

Moreover, since plaintiff has no viable claim under federal law, plaintiff's state law estoppel claim should be dismissed as well. In *Acri v. Varian Associates*, 114 F. 3d 999, 1001 (9th Cir. 1997), the Ninth Circuit noted that "[t]he Supreme Court has stated, and we have often repeated, that 'in the usual case in which all federal-law claims are eliminated before trial, the balance of factors will point toward declining to exercise jurisdiction over the remaining state-law claims.'") (citing *Carnegie-Mellon v. Cohill*, 484 U.S. 343, 350 n.7 (1988)) (ellipsis omitted). *Accord McKinney v. Carey*, 311 F. 3d 1198,

1201 n.2 (9th Cir. 2002) ("Having concluded in response to a motion to dismiss that the plaintiff's federal claims had to be dismissed, the district court appropriately declined to exercise its supplementary jurisdiction over the state claims.") (citations omitted); 28 U.S.C. § 1367(c)(3) ("the district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction . . . .").

Moreover, application of the equitable estoppel theory under California law is complex. Therefore, the Court should decline to exercise supplemental jurisdiction for this additional research. 28 U.S.C. § 1367(c)(1) ("the district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the claim raises novel or complex issues of state law.").

For these reasons, estoppel is not a viable claim, and even if it were, the Court should decline to exercise jurisdiction over plaintiff's estoppel claim.

VIII.

PLAINTIFF HAS NO VIABLE CLAIM BASED ON THE COUNTY'S HANDLING OF THE INSPECTION THAT DISCOVERED BUILDING CODE VIOLATIONS.

Plaintiff spends a substantial portion of its brief discussing the inspection warrant that the County obtained from San Diego County Superior Court Judge Laura W. Halgren, the County's subsequent inspection, and the County building official's decision to revoke the certificate of occupancy based on the results of the inspection. Plaintiff has not shown that the County's handling of the building code issues was in any way improper.

The undisputed facts show that plaintiff was willing to allow an inspection of the Recreation Building, as long as this Court was kept in the dark regarding the results of that inspection. (Ex. 4) (Declaration of Thomas D. Bunton, at ¶ 2). When the County objected to plaintiff's condition that the Court not be informed of the results of the inspection, the County obtained an inspection warrant from Judge Halgren. While plaintiff states it its motion that the County did not have proper grounds to obtain to inspection warrant, it never asked Judge Halgren to revoke the inspection warrant on the ground that it was improperly issued. (Declaration of Thomas D. Bunton, at ¶ 3.)

It is also undisputed that the inspection revealed numerous building code violations, which this Court ordered plaintiff to correct in the Preliminary Injunction order. The County's building official

determined that those violations were serious enough to warrant revocation of the certificate of occupancy. (Ex. 50.) Plaintiff complains to this Court about that decision, but failed to appeal the decision as provided by state law and the County's Regulatory Ordinance.

Indeed, the validity of the County building official's decision to revoke plaintiff's certificate of occupancy is a question governed by state law, not the First Amendment or RLUIPA. The building official clearly had the authority to revoke the certificate of occupancy under the California Building Code. (Ex. 52; Cal. Code Regs, tit. 24, § 109.6.) Further, to the extent that the First Amendment or RLUIPA are implicated, plaintiff's claim is not ripe because it did not obtain the County's final decision on the revocation of the certificate of occupancy. A final decision could have been obtained by appealing the building official's decision to the Building Construction Advisory Board of Appeals. (Exs. 52 & 53.) Therefore, plaintiff's claims are not ripe. *Murphy v. New Milford Zoning*, 402 F. 3d 342, 352-53 (2d Cir. 2005) (court held that the plaintiffs' First Amendment and RLUIPA claims were not ripe because the plaintiffs failed to appeal an order to cease and desist from holding regular religious services on their property to the municipality's zoning board of appeals).

Plaintiff also complains that it was not allowed to correct the building code violations without obtaining a building permit from the County. However, plaintiff was clearly required to obtain a building permit and has cited no authority to the contrary. Further, neither RLUIPA nor the First Amendment exempts religious organizations from obtaining necessary building permits.

For these reasons, plaintiff has no viable claim based on the inspection and revocation of the certificate of occupancy.

IX.

CONCLUSION

For all of the foregoing reasons, plaintiff's motion for summary judgment should be denied and the County's motion for summary judgment granted.

DATED: July 30, 2009

JOHN J. SANSONE, County Counsel

By S/ Thomas D. Bunton
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 July 30, 2009, I served the following documents:

1) **DEFENDANT COUNTY OF SAN DIEGO'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT;**
2) **COUNTY OF SAN DIEGO'S OBJECTIONS TO DECLARATIONS SUBMITTED BY PLAINTIFF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT;**
3) **DECLARATION OF THOMAS D. BUNTON IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT;**
4) **DECLARATION OF JEFF MURPHY IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT;**
5) **NOTICE OF LODGMENT OF EXHIBITS IN SUPPORT OF DEFENDANT COUNTY OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** 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 United States 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:

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Lepiscopo & Morrow
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plepiscopo@att.net

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 30, 2009, at San Diego, California.

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