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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

REDWOOD CHRISTIAN SCHOOLS, et al.

Plaintiffs,

v.

COUNTY OF ALAMEDA, et al.

Defendants.

Case No. C01-4282 SC ADR

DEFENDANTS' TRIAL BRIEF

Dept: 1
Judge: Hon. Samuel L. Conti

Trial Date: February 12, 2007

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INTRODUCTION

As the Court is well aware, this case concerns the decision by the County of Alameda defendants ("County") to deny a Conditional Use Permit sought by plaintiff Redwood Christian Schools ("Redwood"). Redwood wanted to build a 650-student, combined junior-high and high-school campus on two plots of land that it owns in a semi-rural area of Alameda County and contends that the County's denial of Redwood's CUP application infringed upon its federal civil rights. The County contends that it properly denied the CUP based on a variety of legitimate concerns, including the impact that Redwood's outsized project would have had on the environment and character of a protected, semi-rural area.

All this will sound familiar, of course. By the time the Court reads this brief, it already will have ruled on the parties' respective summary-judgment motions, bifurcated the trial into liability and damages phases, and decided over 20 motions *in limine*. It will be steeped in the facts and law of this case. Yet the Court's most critical decision will lie ahead of it: What to do about the parties' irreconcilable differences over the key jury instructions? We devote this brief to that subject.[1]

There is no getting around the fact that—to a perhaps unusual degree—the Court's decisions on the instructions could well decide this case. No standard-form instructions exist for Redwood's claims. And because the key statute—RLUIPA—is only six years old, controversial, and still making its way through the courts, there are still relatively few published appellate decisions authoritatively interpreting its sparsely worded land-use provisions. Thus, judicial guidance is uniquely necessary in this case, where the jury will find itself confronting a host of novel and important questions, such as:

- Did the County deny Redwood's CUP application based on animus toward its religious beliefs and practices, or based on legitimate concerns about maintaining and enforcing a coherent zoning system and preserving the rural character of an area?

[1] We intend for this Trial Brief, our Instructions (and the arguments and authorities contained therein), our forthcoming formal objections to Redwood's instructions, and any objections made during trial, to constitute our objections to instructions for purposes of Federal Rule of Civil Procedure 51(c).

- Did it burden "religious exercise" to deny permission to build a proposed school that would accommodate many non-religious activities common to any school? And if so, was that burden "substantial" within the meaning of RLUIPA and the Free Exercise Clause?

- Is Redwood effectively seeking a complete exemption from the County's land-use laws and regulations?

- How are Redwood's claims affected by some of the actions it took during the permit process—like its refusal to consider alternative plans and its failure to submit much of its "burden" evidence to the County during the CUP process?

Faced with these complex issues and the need to craft jury instructions that will encompass them, the parties have responded quite differently. Redwood has tendered instructions that have the virtue of being succinct and (at least superficially) simple. Some of Redwood's RLUIPA instructions attempt to paraphrase the statute, while others go to extravagant lengths to dictate the outcome—*e.g.*: by defining a "compelling governmental interest" as one "so strong that [it] would allow the County to discriminate on the basis of race or order a person to be chemically sterilized."

The County, in contrast, has tendered somewhat longer and more detailed instructions that attempt to tailor the applicable rules to the specific facts and theories of the case, while giving the jury whatever guidance can be gleaned from the available case law. Thus, it is the County's instructions which provide the appropriate, and necessary, roadmap that the jury will need to navigate the complex issues before it.

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KEY ISSUES REGARDING JURY INSTRUCTIONS

The County's instructions are appropriate, and Redwood's are not, for at least six reasons.

(1) Redwood's instructions merely repeat or paraphrase statutory language without explaining its meaning and application to the facts.[2] Redwood's basic instructional pitch is that the Court can't go wrong by simply quoting (or loosely paraphrasing) the statute. But that approach can go wrong—badly wrong. An instruction's "recitation of statutory language does not preclude a finding of error." *Summers v. Mo. Pac. R.R. Sys.*, 132 F.3d 599, 607 (10th Cir. 1997). This is especially true where the statute employs a term that is not "readily understood by a jury" but instead is "overladen with layman's meanings different from its legal connotation, which can only add confusion to the decision-making process by the most conscientious jury." *Structural Rubber Prods. Co. v. Park Rubber Co.*, 749 F.2d 707, 723 (Fed. Cir. 1984). The instructions in this case are replete with such terms. "Substantial burden"; "religious exercise"; "compelling governmental interest"'; "least restrictive means"—these are all words that a lay juror may *think* he understands, even though it would take an experienced lawyer days or even weeks of effort to untangle their true legal meanings.

Moreover, in many instances, Redwood's instructions are even *less* informative than RLUIPA's austere wording. For example, Redwood would have the Court give the jury a bare-bones definition of "religious exercise" that defines the term as "any religious activity" and adds that "[u]sing land or building on land—or intending to use land or build on land—for the purpose of religious exercise are all considered to be religious exercise." Even the unadorned statute requires a bit more, as it states that "[t]he term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief"[3]; and that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property

[2] *See* 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2556, at 442-43 (1995) [hereinafter "Wright & Miller "].

[3] 42 U.S.C. § 2000cc-5(7)(A).

for that purpose."[4]

But even the unabridged statutory language would not be sufficiently particularized for use in this case. RLUIPA's drafters understood that, *as applied to certain fact patterns*, the statute's apparently straightforward definition of religious exercise would require a more nuanced application. They therefore observed—in words directly pertinent here—that:

> not every activity carried out by a religious entity or individual constitutes "religious exercise." In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institution, or may permit a religious institution to obtain additional funds to further its religious activities, this alone does not automatically bring these activities or facilities within the bill's definition of "religious exercise." For example, a burden on a commercial building, which is connected to religious exercise primarily by the fact that the proceeds from the building's operation would be used to support religious exercise, is not a substantial burden on "religious exercise."

146 Cong. Rec. S7774-01, S7776 (2001) (joint statement of Sens. Hatch & Kennedy).

Here, of course, Redwood is not building a church, but a school that will be used for many purely secular activities, much like the example cited in the legislative history. Accordingly, the County's proposed instruction defining "religious exercise" that incorporates the substance of this passage setting forth the drafters' understanding of how the statute should be applied in such situations. It also explains the difference between a practice that qualifies as "religious exercise" and the many secular practices that one encounters at any school. The County's longer and more detailed instruction thus attempts to address the Second Circuit's warning that it could violate the Establishment Clause to favor the permit application of a religious school over that of a non-religious school, when *both* schools actually sponsor many secular activities. *See Westchester Day Sch. v. Village of Mamaroneck*, 386 F.3d 183, 189-90 (2d Cir. 2004).

(2) Redwood's instructions omit numerous material issues.[5] This problem is especially apparent in Redwood's instructions about RLUIPA's "substantial burden" rule. On

[4] 42 U.S.C. § 2000cc-5(7)(B).

this pivotal issue, Redwood's approach to instruction-writing becomes truly Zen-like in its brevity. Here is *all* that Redwood has to say on the matter: "Redwood claims that the County violated [RLUIPA] by imposing a substantial burden on Redwood's religious exercise. . . . A burden on religious exercise is 'substantial' if it is a significantly great restriction or onus on religious exercise."

This stripped-down instruction even omits some of the operative statutory elements, including the requirements that the County must have "impos[ed] or implement[ed] a land use regulation in a manner that imposes" a substantial burden on religious exercise. A jury sent back to deliberate on these instructions would be lost, utterly bereft of guidance. What is a "significantly great restriction or onus"? (For that matter, what is an "onus"?) How did that restriction get imposed—by dirty looks, by ostracizing Redwood's members at social events, or by some official action—and if the latter, what specific action was it? This is manifestly *not* an instruction that guides the jury "on every material issue." 9A Wright & Miller § 2556, at 448. Indeed, it furnishes *no* guidance on *any* material issue. Rather, it invites the jury either to wander aimlessly or to simply make up the legal standard as it goes along.

In contrast, the County's proposed instructions on this subject guide the jury on every material issue. They give real meaning to the drafter's observation that "[t]he term 'substantial burden' as used in [RLUIPA] is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden on religious exercise." 146 Cong. Reg. 7774-01, 7776 (2001) (joint statement of Sens. Hatch & Kennedy). Although you would never know it from reading Redwood's instructions, "several courts have observed" that RLUIPA was "intended to leave intact the traditional 'substantial burden' test, as defined by the Supreme Court's free exercise jurisprudence." *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 701 (E.D. Mich. 2004).

Under the traditional test, Redwood cannot demonstrate a substantial burden on its religious exercise unless it proves by a preponderance of the evidence that the County compelled Redwood to affirm a repugnant belief; penalized or discriminated against Redwood because it

[5] *See* 9A Wright & Miller § 2556, at 448.

holds religious views abhorrent to the County; conditioned the availability of the CUP upon Redwood's willingness to violate a principle of its religious faith; took sides in a controversy over religious authority or dogma; punished the expression of religious doctrines that it believes to be false; or banned religious conduct only when that conduct was performed for religious reasons or only because of the religious belief that that conduct displayed. *See Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1188 (9th Cir. 2006), *reh'g en banc denied*, 455 F.3d 1052 (9th Cir. 2006), *petition for cert. on different issue filed*, 75 U.S.L.W. 3248 (U.S. Oct. 26, 2006) (No. 06-595); *Sherbert v. Verner*, 374 U.S. 398, 402 (1963); *Employment Div., v. Smith*, 494 U.S. 872, 877-78 (1990). The County's main "substantial burden" instruction recites these standards; and a follow-up instruction provides further guidance by describing "incidental" burdens that courts have determined do *not* constitute a "substantial burden" under RLUIPA.

Thus, the County's substantial-burden instructions are both fair and useful. They are fair because they accurately summarize the legal rules that RLUIPA's drafters believed they were codifying, yet leave the jury free to decide whether Redwood has satisfied those rules. And they are useful because they adequately instruct the jury on "every material issue." 9A Wright & Miller § 2556, at 448.

(3) Redwood's instructions fail to bridge the gap between abstract principles and the specific facts of the case.[6] Instructions should attempt to particularize abstract legal rules to clarify their relation to the facts and theories in the case. "[T]he duty of a trial court in any jury trial is to give instructions which are meaningful, not in terms of some abstract case, but which can be understood and given effect by the jury once it resolves the issues of fact which are in dispute." *Structural Rubber Prods.*, 749 F.2d at 723. "Indeed, abstract charges typically are not favored by the federal courts. Even though there are decisions holding that the instructions need not be phrased in terms of the specific facts of the particular case, the courts have shown a distinct preference, particularly in complex cases, for instructions that relate the law to the evidence presented by the parties." 9A Wright & Miller § 2556, at 444-45.

[6] *See* 9A Wright & Miller § 2556, at 444.

This is another principle violated by Redwood's religious-exercise instruction, which fails utterly to mention, for example, that the project in question is a school.

Likewise, Redwood's "least restrictive means" instruction—a component of its "substantial burden" instruction—is a prime example of the type of hopelessly abstract jury charge that federal courts disfavor. In this case, "least restrictive means" can only be understood in the context of a permit-application process where *the applicant* controls which "alternative means" the government will be allowed to consider. The applicant—here, Redwood—controls the range of alternative means by deciding which plans it will present to the government for approval. In this case, the County intends to show that some of the alternative plans that the parties studied were unacceptable to Redwood. The place where this fact becomes most plainly relevant is in applying the "least restrictive means" test. The County's instruction therefore sets that test in an appropriate factual context, enabling the jury to bring the relevant facts to bear when applying the test.

Redwood's substantial-burden instruction shares the same flaw of abstractness. It takes no account of one of the striking facts about this case—that Redwood now seeks to hold the County liable for burdens that it failed to mention during the administrative process, even though RLUIPA burdens were expressly raised and considered in that process. In contrast, the County's instructions narrow the gap between the law and the facts by pointing out that the word "imposes" in 42 U.S.C. § 2000cc(a)(1) implies a causal requirement that cannot be met if the County's liability is predicated on burden evidence that Redwood failed to timely submit. And the County's "defense of waiver" instruction makes the same point.

(4) Redwood's instructions would mislead the jury by reciting a legal rule that is not applicable to the facts.[7] A party "'is entitled to an instruction about his or her theory of the case *if* it is supported by law and *has foundation in the evidence*.'" *Dang v. Cross*, 422 F.3d 800, 804-05 (9th Cir. 2005) (citation omitted) (emphases added). Conversely, "[a] party is *not* entitled to a jury instruction which is *unsupported* by the evidence." *Beachy v. Boise Cascade*

[7] *See* 9A Wright & Miller § 2552, at 393.

Corp., 191 F.3d 1010, 1013 (9th Cir. 1999) (emphases added).[8] Some of Redwood's instructions would misleadingly suggest the existence of facts for which there is actually no evidence whatsoever. Those instructions would confuse the jury and possibly result in a miscarriage of justice.

For example, Redwood's procedural due process instruction, under the heading "Due Process—Bias," asks the jury to consider whether "any member of the Board of Supervisors showed actual bias" or "an appearance of partiality" or "reasonably appears to have prejudged an issue." There is not one iota of evidence that could satisfy any of these prongs, especially if they are revised—as Redwood's supporting case law suggests they should be[9]—to limit them to "conflict of interest" situations—*e.g.*, where the decision maker has a pecuniary or other personal stake in the outcome of his own decision. Accordingly, this instruction should not be given.

(5) Redwood's instructions would require the jury to decide facial claims that the Court should determine for itself—and that the Court already has rejected.[10]

Redwood's proposed instructions twice invite the jury to strike down County ordinances based on purely legal, facial attacks that only a trained judge is competent to adjudicate. Thus, in the middle of its RLUIPA Unreasonable Limitation" instruction, Redwood incongruously inserts some "unbridled discretion" language, stating that a "land use regulation is unreasonable if any one of the following is true: the land use regulation is vague and imprecise, the land use regulation confers standardless discretion on government decision-makers, the land use regulation . . . invites inconsistent applications, or the land use regulation is arbitrary."

Not only is this purely facial attack "a matter that the Court should determine for itself" (for reasons explained at pages 1-5 of our Motion in Limine #7), it is a matter that this Court *already has* determined for itself. The Court dismissed Redwood's "unbridled discretion claim" in its August 29, 2006 order on the parties' summary-judgment motions, and reaffirmed that

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[8] *See also Fikes v. Cleghorn*, 47 F.3d 1011, 1014 (9th Cir. 1995); 9A Wright & Miller § 2552, at 393 (1995).

[9] *See Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995).

[10] *See* 9A Wright & Miller § 2552, at 393-94.

ruling in an order dated September 18, 2006, where it explained that "[t]he ordinance in this case is one of general application, making the unbridled discretion doctrine inapplicable."

Redwood reiterates this already-dismissed facial claim in its instruction on First Amendment Freedom of Expression and again in its instruction on Fourteenth Amendment Due Process of Law, under the subheading "Due Process—Vagueness." This Court should reject all three instructions.

(6) Redwood's instructions fail to instruct the jury properly on the controlling issues and should be rejected.[11] "'In evaluating jury instructions, prejudicial error results when, looking to the instructions as a whole, the substance of the applicable law was not fairly and correctly covered.'" *Dang*, 422 F.3d at 805 (brackets and citation omitted).

Several of Redwood's instructions do not fully and correctly state the law and therefore should be rejected. For example, Redwood's "compelling governmental interest" instruction (a component of its "substantial burden" instruction) erroneously states that a governmental interest is not "compelling" unless it involves preventing "'a clear and present, grave and immediate danger to public health, peace and welfare.'"[12] This standard brazenly stacks the deck against any local government involved in land-use regulation. That aside, the instruction is just wrong, for reasons set forth in our Opposition to Redwood's Motions in Limine ## 1 and 2 at pages 4-6. As explained there, that standard describes the inquiry under the *Washington State* constitution; and even the Washington court that articulated that standard has since backed away from it. *See Open Door Baptist Church v. Clark County*, 995 P.2d 33, 47 (Wash. 2000). No federal case articulates this standard, to our knowledge.

As previously mentioned, Redwood's compelling-interest instruction also tries to poison the jury's mind by defining a "compelling governmental interest" as one that is "so strong that [it] would allow the County to discriminate on the basis of race or order a person to be chemically sterilized." Thus, the cumulative impression left by Redwood's instruction is that

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[11] *See* 9A Wright & Miller § 2556, at 438.

[12] Redwood's RLUIPA-SUBSTANTIAL BURDEN Instruction (quoting *First Covenant Church of Seattle v. Seattle*, 820 P.2d 174, 187 (Wash. 1992).

land-use regulation is non-compelling as a matter of law if it involves anything less pressing than halting the spread of the bubonic plague or preventing a halfway house for sex offenders from moving next door to an elementary school.

Redwood's RLUIPA Equal Terms instruction is equally defective, as it completely omits to mention that Redwood must prove that it received worse treatment than a "*similarly situated*" nonreligious assembly or institution. *See, e.g., Primera Iglesia Bautista Hispana v. Broward County*, 450 F.3d 1295, 1313-14 (11th Cir. 2006) and other authorities cited in the County's jury instructions.

Redwood's RLUIPA Equal Terms and Substantial Limitation instructions fail even to mention that Redwood has the burden of proving that the County's conduct was not "rationally related" to any legitimate governmental interest. But the RLUIPA section containing the Equal Terms and Substantial Limitation provisions "codifies 'existing Supreme Court decisions," including its Equal Protection precedents. *Ventura County Christian High Sch. v. City of San Buenaventura*, 233 F. Supp. 2d 1241, 1246 (C.D. Cal. 2002). Where, then, is the reference to rational-basis review, which applies whenever Equal Protection claims target laws that—like the County's ordinances—do not involve a suspect or quasi-suspect classification? *See San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004). Redwood offers—at best—half an instruction on these claims.

And any instructions that Redwood submits on its claims for violation of the rights to "procedural due process" and of "freedom of association" should be rejected, because Redwood simply has no claims under those theories, as a matter of law, for reasons explained at length in the County's proposed instructions.

Briefly: A proper instruction on Redwood's "freedom of association" claim would require Redwood to prove that the County caused a "significant interference" with the freedom of Redwood's members to associate.[13] A land-use regulation causes "significant interference" with the freedom of association only if it acts as a complete ban on the right of group members to

[13] *Bates v. City of Little Rock*, 361 U.S. 516, 523-24 (1960); *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973).

associate.[14] Redwood's instruction omits that standard (probably because Redwood knows that it can't prove that). The instruction therefore should be rejected.

Redwood's procedural-due-process instruction fails to mention that Redwood must prove that it has a Constitutionally protected property interest in obtaining a CUP for its project. "A protected property interest is present where an individual has a *reasonable expectation of entitlement* deriving from 'existing rules or understandings that stem from an independent source such as state law.'" *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994) (emphasis added). "A reasonable expectation of entitlement is determined largely by the language of the statute and the extent to which the entitlement is couched in *mandatory* terms." *Association of Orange Co. Deputy Sheriffs v. Gates*, 716 F.2d 733, 734 (9th Cir.1983) (emphasis added). Thus, if the ordinance had "circumscribed the discretion of the [County] to such an extent that approval of the particular use was mandatory once [Redwood] met certain minimal requirements, then a property interest could exist." *Silver v. Franklin Twp.*, 966 F.2d 1031, 1036 (6th Cir. 1992). But a "subjective expectancy" of a benefit "creates no constitutionally protected interest." *Goodisman v. Lytle*, 724 F.2d 818, 820 (9th Cir. 1984).

Thus, Redwood must show that it had a "reasonable expectation of *entitlement*" to its CUP and that approval of its CUP application was effectively "*mandatory*." *Association of Orange Co.*, 716 F.2d at 734 (emphases added). But the ordinances in question here are not couched in mandatory terms. Rather, they state that the decision-makers "may" authorize approval "if" the "circumstances and conditions of the particular case" indicate that "the use is properly located." Alameda County Gen. Ordinance §§ 17.54.135, 17.54.140 (AR 05311). This discretion defeats any reasonable expectation of entitlement that could have given Redwood a protected property interest in obtaining a CUP for the project that it proposed. *See Triomphe*

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[14] *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974) (holding that a neutral zoning ordinance of generally applicability "involve[d] no 'fundamental' right guaranteed by the Constitution, such as . . . the right of association[.]"); *Doe v. City of Butler*, 892 F.2d 315, 322-23 (3d Cir. 1989) ("The zoning occupancy limitation challenged here does nothing to prevent plaintiffs from associating with each other, and with others similarly situated."); *San Jose Christian College v. Morgan Hill*, 360 F. 3d 1024, 1033 (9th Cir. 2004) ("[T]he fact that the church's congregants cannot assemble at that precise location does not equate to a denial of assembly altogether.").

Investors v. City of Northwood, 49 F.3d 198, 203 (6th Cir. 1995) (holding that permissive phrasing "provid[ed] sufficient discretion to undercut any argument that the language of the zoning regulations vested . . . an entitlement to the special use permit")(citation omitted); *see also Silver*, 966 F.2d at 1036. Accordingly, Redwood's procedural due process instruction should be rejected.

CONCLUSION

For these reasons, the County believes that this action is one in which judicial guidance regarding jury instructions is necessary in order to prevent juror confusion regarding the key, and complex, issues to be decided by the jury. The County therefore requests that the Court provide jurors with the roadmap required for deciding such issues by approving the County's, not Redwood's, proposed jury instructions addressing the liability and damages issues to be decided by the jury.

Respectfully submitted,

Dated: January 26, 2007

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