Appeal No. 02-15693

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAN JOSE CHRISTIAN COLLEGE, a California non-profit Corporation

Plaintiff-Appellant,

v.

THE CITY OF MORGAN HILL, a municipal corporation of the State of California, DENNIS KENNEDY; LARRY CARR; STEVE TATE; HEDY L. CHANG; and GREG SELLERS,

Defendants-Appellees.

Appeal From the United States District Court
For the Northern District of California
Case No. 01-20857-RMW (PVT)

# AMICUS CURIAE BRIEF OF THE AMERICAN PLANNING ASSOCIATION IN SUPPORT OF APPELLEE CITY OF MORGAN HILL AND IN SUPPORT OF AFFIRMANCE

BINGHAM McCUTCHEN LLP
Geoffrey L. Robinson (SBN 112997)
1333 N. California Blvd., Suite 210
P.O. Box V
Walnut Creek, California 94596-1270
Telephone: 925.937.8000

Michael S. Giaimo
Robinson & Cole LLP
One Boston Place
Boston, MA 02108
Telephone: (617) 557-5900

Attorneys for *Amicus Curiae* American Planning Association

## STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Planning Association ("APA") is a nonprofit public interest and research organization founded in 1978 exclusively for charitable, educational, literary, and scientific research purposes to advance the art and science of planning — including physical, economic and social planning — at the local, regional, state, and national levels. The APA's mission is to encourage planning that will contribute to the public well-being by developing communities and environments that more effectively meet the present and future needs of people and society.

The APA resulted from a merger between the American Institute of Planners, founded in 1917, and the American Society of Planning Officials, established in 1934. The organization has 46 regional chapters and 17 divisions devoted to specialized planning interests. The APA represents more than 30,000 practicing planners, officials, and citizens involved with urban and rural planning issues. Sixty-five percent of the APA's members work for state and local government agencies. These members are involved, on a day-to-day basis, in formulating planning policies and preparing land-use regulations. *Amicus Curiae* California Chapter of the American

Planning Association ("CAAPA") is the largest chapter in the organization with _____ members.

The APA has filed *amicus* briefs on behalf of planning interests for many years, including in such cases as *Agins v. Tiburon*, 447 U.S. 255 (1980), *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687 (1999), and most recently in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S.Ct. 1465 (2002).

This case raises critical issues of national importance for the planning profession, property owners, and local governments. Appellant, San Jose Christian College ("SJCC"), attempts to undermine the local land-use authority of the City of Morgan Hill ("City") to the detriment of the general public and property owners who rely on the protection and stability that local land-use controls provide. Appellants are requesting special treatment and favored status that the law does not provide. If SJCC prevails in this case, local land-use authority will be seriously eroded throughout the country.

## ARGUMENT

I. SJCC HAS NO RIGHT TO INSIST THAT THE CITY CHANGE ITS NON-DISCRIMINATORY LAND USE LAWS TO ACCOMMODATE AN ASSERTEDLY RELIGIOUS FACILITY AT A SPECIFIC LOCATION

Plaintiff-Appellant SJCC claims a constitutional and statutory right to convert a dormant hospital property to a "religious college" campus. SJCC asserts this right in opposition to the City's rational and non-discriminatory decision to maintain the property's existing zoning status, which does not allow college use. The result sought by SJCC goes beyond what either the Free Exercise Clause of the First Amendment to the United States Constitution or the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc, requires.

As the Third Circuit Court of Appeals recently observed, the proposition that religious land uses automatically "get a preference in the land use context . . . would pose a significant problem." *Congregation Kol Ami v. Abington Township*, No. 01-3077, 2002 U.S. App. LEXIS 21541, at *50 (3d Cir. Oct. 16, 2002). Such an extraordinary preference would drastically undercut the established power of local governments to plan and regulate land uses in the

interests of their citizenry as a whole. It would create an approach to zoning incompatible with the understanding that, in our federal system, land use law is a "bastion of local control" and "perhaps the quintessential state activity." *Id.* at *38 (citing *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982), *reh'g denied,* 458 U.S. 431 (1982)). This perspective is a repeated theme in the case law. *See, e.g., Solid Waste Agency of Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159, 174 (2001) ("Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the State's traditional and primary power over land and water use."); *Hess v. Port Authority Trans-Hudson Corp.,* 513 U.S. 30, 44 (1994) ("[R]egulation of land use is a function traditionally performed by local governments.") (citing *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 402 (1979)); *Izzo v. Borough of River Edge*, 843 F.2d 765 (3rd Cir. 1988) ("Land use policy customarily has been considered a feature of local government and an area in which the tenets of federalism are particularly strong.").

Our system of government empowers local governments "to determine that the community should be beautiful as well as healthy,

spacious as well as clean, well-balanced as well as carefully patrolled." *Construction Indus. v. City of Petaluma*, 522 F.2d 897, 906 (9th Cir. 1975). "Cities have a 'strong interest' in establishing and implementing zoning systems, as zoning systems 'protect the zones' inhabitants from problems of traffic, noise and litter, avoid spot zoning, and preserve a coherent land use zoning plan.'" *Foothills Christian Ministries Inc. v. City of El Cajon*, No. 01-CV-1197-JM (S.D. Cal. 2001) (citing *Christian Gospel Church*, 896 F. 2d 1221, 1224 (9th Cir. 1990)). "The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981).

It is impossible for local zoning and planning functions to serve their essential governmental objectives if they are also required to "satisfy every citizen's religious needs and desires." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988). *See Employment Division v. Smith ("Smith II")* 494 U.S. 872, 888 (1990) (warning of "the prospect of constitutionally required religious exemptions from civic obligations of almost every

conceivable kind"), *reh'g denied,* 496 U.S. 913 (1990). The District Court correctly treated SJCC's rezoning request as a decision properly left to local officials acting in a religion-neutral manner, and not one that warrants federal judicial intervention. This Court should uphold that decision.

## II. THE DISTRICT COURT CORRECTLY APPLIED RATIONAL BASIS SCRUTINY UNDER THE FREE EXERCISE CLAUSE TO THE CITY'S NEUTRAL AND GENERALLY APPLICABLE ZONING LAW

A neutral law of general applicability need only satisfy a rational basis standard and not the more rigorous scrutiny applicable to a law that singles out or discriminates against religion. *Smith II,* 494 U.S. 872; *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993); *Davey v. Locke*, 299 F. 3d 748, 753 (9th Cir. 2002). "If the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Hialeah* at 533 (citing *Smith II*, 494 U.S. at 878-879). Neutrality may be determined from the face of an enactment or from its motivation. *Id.* at 532-542.

There is no basis in the record for finding that the City's zoning system in general or its planned unit development ("PUD") provisions in particular are not neutral. For example, there is no indication that

the zoning ordinance or any of its provisions are discriminatory on their face. There has been no evidence presented reflecting covert governmental hostility to SJCC or religious actors generally as a motivating factor in the City's decision to deny SJCC's zoning amendment request. *Hialeah*, 508 U.S. at 534, 540-541. SJCC does not argue, for example, that the City would have approved a *non*-religious college campus at the hospital property, or that the City's zoning and planning system generally fails to accommodate or discriminates against religious uses so that a constitutional remedy is appropriate.[1] There is no indication that a religious entity, even SJCC itself, would be prohibited from operating a hospital at the property consistent with its current zoning. "Discrimination may not be inferred . . . simply because a public program is incompatible with a religious organization's spiritual priorities." *Prater v. City of Burnside*, 289 F.3d 417, 428 (6th Cir. 2002).

Nor is there any indication that the zoning ordinance violates a general applicability standard because it selectively "impose[s]

---

[1] As indicated by the City's website, there are, in fact, 21 churches in the City. *See* http://www.morganhill.org/commprof.htm (last visited Oct. 31, 2002).

burdens only on conduct motivated by a religious belief" rather than applying to all landowners. *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 (8th Cir. 1991). *See Hialeah,* 508 U.S. at 543 (discussing general applicability standard). The same rezoning process that SJCC faced would apply to any secular property owner who wants to create or change a PUD, and the secular owner would be subjected to the same standards of review. "Every restriction . . . is evenly applied to all and only falls upon the particular behavior in the way that it falls on everyone else." *Goehring v. Brophy*, 94 F.3d 1294, 1307 (9th Cir. 1996) (Fernandez, J., concurring). Therefore, contrary to SJCC's claim, the rational basis test applies to the non-discriminatory application of the City's zoning laws.

### A. The Rezoning Process Is Not Premised On An Inquiry Of Subjective Motivation

*Smith II* distinguished an earlier line of unemployment compensation cases in which the Supreme Court applied heightened scrutiny, by observing that those cases involved a context of "individualized governmental assessment of the *reasons* for the relevant conduct" in which the standards for decision "created a mechanism for individualized exemptions." 494 U.S. at 884 (emphasis supplied). *Hialeah* followed this analysis when it

invalidated, under heightened scrutiny, an animal cruelty ordinance that required the city to inquire into the reasons for a killing, thereby allowing the city, in applying the law, to impermissibly judge religious reasons for a killing to be less important than non-religious ones. 508 U.S. at 537-538.

The heightened scrutiny employed in those cases addresses the "prospect of the government deciding that secular motivations are more important than religious motivations." *Fraternal Order of Police v. City of Newark* 170 F.3d 359, 365 (3d Cir. 1999). This concern is not present in this case. Accordingly, heightened scrutiny is not appropriate.

In an apparent effort to bring its situation closer to this "individualized assessment/exemptions" rubric, SJCC repeatedly mischaracterizes its request for a zoning *amendment* as a "variance" application. *See* Appellant's Brief at 3, 24, 28, 33, 43, 52, and 61. A "variance" is a mechanism for excepting a particular property from the application of a zoning requirement. A grant of variance relief must be premised on a finding that the applicant will incur a "hardship" if the variance is not granted. *See* Patrick J. Rohan, *Zoning And Land Use Controls*, §43.02[4] (1998); Cal Govt. Code §

65906. While the variance inquiry may under some circumstances come closer to the type of "individualized assessment" contemplated in *Smith II*,[2] it is a very different form of relief from that actually sought by SJCC. The college does not contend that the City evaluated its religious motivation for requesting the zoning *amendment* or that it evaluated the request on any different basis than the City would have used in considering a zoning amendment to use the same site for a secular college. Indeed, there was no reason for the City to assess the applicant's *motivation* for the zoning amendment request at all – as opposed to the land use and planning *effects* of that request.[3] There are simply no grounds for applying heightened scrutiny under the Free Exercise Clause to the land use decision at issue in this case.[4]

---

[2] *But see DiLaura v. Ann Arbor Charter Township*, No. 00-1846, 2002 U.S. App. LEXIS 3135 at *18 (6th Cir. Feb. 25, 2002) (constitutional free exercise claim based on variance denial dismissed where zoning ordinance at issue was facially neutral and there was no evidence of religious animus in the passage or interpretation of the law).

[3] Ironically, it was the college itself that introduced the issue of motivation into the City Council when it sought a preference on religion grounds. Administrative Record ("AR") 196-199; 308-09.

[4] SJCC also claims heightened scrutiny based on a "hybrid rights" theory which, under this Court's precedent, requires a demonstration of a "colorable claim that a companion right has been violated – that

(Footnote Continued on Next Page.)

### B. The Legislative Process of Rezoning Land Should Be Evaluated Under a Rational Basis Standard

By contrast, there is ample precedent for considering a rezoning process, such as the one at issue in this case, under the rational basis standard of *Smith II*. For example, in *Mount Elliot Cemetery Ass'n v. City of Troy*, 171 F.3d 398 (6th Cir. 1999), the city's refusal to rezone a property to accommodate a Catholic-only cemetery was sustained against a free exercise challenge after the Court concluded that the applicable city ordinances were neutral laws of general applicability and that there was no showing that the city denied the rezoning request for reasons of religious discrimination. 171 F.3d at 405, 407. Similarly, *Cornerstone Bible Church* concerned a municipality's refusal to rezone land in its central business district to accommodate a

---

(Footnote Continued from Previous Page.)

is, a fair probability or a likelihood, but not a certitude, of success on the merits." *Miller*, 176 F. 3d at 1207. The very claim that SJCC makes was recently characterized by the Third Circuit Court of Appeals as "so astonishing that we are unaware of any court – or even any law review article – that has suggested it." *Tenafly Eruv Ass'n Inc. v. Borough of Tenafly*, No. 01-3301, 2002 U.S. App. LEXIS 22157 at *38 (3d Cir. Oct. 24, 2002) (if constructing a building "constituted 'speech' every religious group that wanted to challenge a zoning regulation preventing them from constructing a house of worship could raise a 'hybrid' rights claim triggering strict scrutiny"). The District Court correctly rejected this claim.

church. The court concluded that the *Smith II* standard applied to the subsequent challenge to the applicability of the zoning ordinance, as it was "a general law that applies to all land-use . . . " and that there was no showing of an "anti-religious purpose in enforcing the ordinance." *Cornerstone Bible Church*, 948 F.2d at 472.

In *Saint Paul's Protestant Episcopal Church v. City of Oakwood,* No. C-3-88-230, 1993 U.S. Dist. LEXIS 21319, at *1 (S.D. Ohio Mar. 3, 1993), the city denied a proposed zoning amendment, requested by the church, that would have made it lawful for the church to construct a parking lot on a particular tract of land to accommodate worshipers. The court upheld the rezoning decision, finding that "[b]y rejecting the proposed amendment, the Council merely continued the general application of its zoning ordinance by refusing to grant an exemption for churches [from the applicable requirements]." *Id.* at *5. *See also Miller v. Reed*, 176 F.3d 1202 (9th Cir. 1999) (interpreting *City of Bourne* v. *Flores,* 521 U.S. 507 (1997), as holding the *Smith II* standard applicable to local zoning ordinances); *Congregation Kol Ami*, *supra*, 2002 U.S. App. LEXIS 21541, at *50 n.5 (same); *First Assembly of God v. Collier County*, 20 F.3d 419 (11th Cir. 1994) (zoning ordinance neutral and generally

applicable); *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990) (landmarks ordinance a neutral law of general applicability under *Smith II*, notwithstanding exercise of discretion as to individual applications); *C.L.U.B. v. City of Chicago*, 157 F. Supp. 2d 903 (N.D. Ill. 2001) (zoning ordinance as a whole and special use provisions are neutral, generally applicable laws). The district court correctly applied rational basis analysis to SJCC's constitutional claims and upheld the City's zoning decision.

## III. ASSUMING THAT RLUIPA EVEN APPLIES TO THIS CASE, THE ZONING AMENDMENT DECISION AT ISSUE SATISFIES HEIGHTENED SCRUTINY UNDER THAT STATUTE

### A. RLUIPA Is A Statute Of Limited Jurisdiction

While the parties and the Court below seem to have assumed that this case implicates RLUIPA, 42 U.S.C. §2000cc(a)(1), as a matter of law SJCC "may not rely upon RLUIPA unless it first demonstrates that the facts of the present case trigger one of the bases for jurisdiction provided in that statute." *Prater v. City of Burnside*, 289 F.3d 417, 433 (6th Cir. 2002). These jurisdictional bases "are meant to protect [RLUIPA] from constitutional challenge of the kind advanced in *Bourne,*" *supra*, to invalidate the Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et. seq.* (1993) ("RFRA").

*DiLaura*, *supra*, 2002 U.S. App. LEXIS 3135, at **22-23.

It was Congress' intent that RLUIPA's jurisdictional grounds codify the standards articulated in Supreme Court precedent. 146 *Cong. Rec.* S7775 (joint statement of Senators Hatch and Kennedy (2000)). In particular, Section 2000cc(a)(2)(C) is intended to codify the standard of the *Hialeah* and *Smith II* decisions pertaining to "individualized assessments." 146 *Cong. Rec.* at S7775-S7776. This interpretation of RLUIPA's intent is consistent with the constraints on congressional authority under the Fourteenth Amendment Enforcement Clause. *See Bourne*, 521 U.S. at 519 ("Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a right by changing what the right is."). *See also Foothills Christian Ministries, Inc. slip op.* at n. 3 (noting that RLUIPA is subject to constitutional attack under *Bourne* if it is interpreted as altering the Supreme Court's interpretation of the meaning of the Free Exercise Clause).

B. The Jurisdictional Basis For SJCC's RLUIPA Claim Has Not Been Established.

For the reasons stated above, SJCC's petition for zoning amendment does not implicate the sort of individualized assessment regime to which *Smith II* heightened scrutiny applies. Consequently,

the rezoning request cannot form the basis for a RLUIPA cause of action in this case under the "individualized assessment" clause of the statute. 42 U.S. C. §2000cc(a)(2)(C).

Unless the factual record establishes that SJCC's rezoning request implicated the jurisdictional provisions of RLUIPA grounded in Congress' Commerce Clause or Spending Clause authority, 42 U.S.C. § 2000cc(a)(2)(A) and (B), the Court lacks subject matter jurisdiction over the RLUIPA claim and it should be dismissed.

### C. Even if RLUIPA Applies, the City's Decision Should Be Upheld Because the City Did Not Impose a Substantial Burden on SJCC

In any event, the City's decision to deny a zoning amendment proposed by SJCC so that it could relocate its college campus to the hospital site did not impose a substantial burden on the religious exercise of SJCC within the meaning of RLUIPA. 42 U.S.C. §2000cc(a)(1). In ascertaining whether a particular government decision imposes a "substantial burden," Congress intended that courts look to "traditional Supreme Court jurisprudence" on this issue. *Murphy v. Zoning Comm.*, 148 F. Supp. 2d 173 (D. Conn. 2001), citing 146 *Cong. Rec.* S7776. As the *Murphy* court noted, "substantial burden" has been defined in a variety of ways by the courts. *Id.* at

188.

This Circuit has interpreted the "substantial burden" test as requiring a showing that:

> [A] governmental action burdens the adherent's practice of his or her religion by preventing him or her from engaging in conduct or having a religious experience which the faith mandates. This interference must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine.

*Bryant v. Gomez* 46 F.3d 948 (9th Cir. 1995); *Goehring v. Brophy*, 94 F.3d at 1294. In applying this standard below, the district court acknowledged SJCC's argument that *Smith II* renders the "central tenet" portion of the test questionable, but concluded *nonetheless* that SJCC had not been substantially burdened by the City's denial of the zoning amendment.[5]

This conclusion was correct. A long line of cases applying the Supreme Court's "substantial burden" analysis to religious land use

---

[5] However, in *Henderson v. Kennedy*, 265 F.3d 1072, 1074 (2001), the D.C. Circuit expressed the view that it remains proper under RLUIPA to inquire into the importance of a religious practice when assessing whether a substantial burden exists, even though the scope of the statutory protection of religious exercise extends by its terms to practices "whether or not compelled by, or central to, a system of religious belief."

disputes under both the Free Exercise Clause and RFRA establishes that the mere denial of a zoning amendment to accommodate the relocation of a religious land use does not rise to the level of a "substantial burden," even if it prevents a religious entity from using a particular property as it prefers.

Most notably, in *Lyng*, the Supreme Court considered proposed governmental action that "would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs." 485 U.S. at 449. The plaintiffs in that case, like the SJCC here, claimed that a particular property had a religious significance to them and that the government action would adversely affect their ability to use the property in accordance with their religion. The Court nonetheless found constitutional standards satisfied because the affected individuals would not be "coerced by the Government's action into violating their religious beliefs" nor would the governmental action "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 449. According to the Court, "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to

coerce individuals into acting contrary to their religious beliefs, [do not] require government to bring forward a compelling justification." *Id.* at 450.

The City's decision to deny the proposed zoning amendment did not coerce SJCC into violating its religious beliefs, nor did it deny SJCC any rights, benefits and privileges available to others. Indeed, the college's main complaint seems to be that it was not treated *more* favorably than others *because of* its religious beliefs. As *Lyng* noted, however, the Free Exercise Clause was not written "in terms of what the individual can exact from the government." *Id.* at 451. Even conceding that SJCC sincerely holds a belief that the hospital site has a religious significance, "it does not logically follow, as the plaintiffs contend, that any governmental action at odds with these beliefs constitutes a substantial burden on their right to free exercise of religion." *Goehring* v. *Brophy*, 94 F.3d 1294, 1300 (9th Cir. 1996).

This Court, in *Christian Gospel Church, Inc. v. City of San Francisco*, concluded that there was no substantial burden imposed on a church that was denied a use permit to worship in a home in a residential neighborhood. 896 F.2d 1221 (9th Cir. 1990). Like SJCC, the plaintiff in that case sought to move its activity to a new site, and

claimed a free exercise violation when a zoning decision made the preferred site unavailable. This Court indicated its view that "[t]he burden on religious practice is not great when the government action . . . does not restrict current religious practice but rather prevents a change in religious practice." *Id.* at 1224. Concerns of "convenience and expense, requiring appellant to find another home or another forum for worship" were held to be "minimal" burdens on religious practice. *Id.* at 1224.

The theme that the "substantial burden test" requires more than simply that a preferred location be rendered unavailable to a religious entity resounds in nearly all jurisdictions that have considered the issue. A municipality is not required "to make all land or even the cheapest or most beautiful land available to churches." *Lakewood Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303, 307 (6th Cir. 1983). In *Lakewood,* no substantial burden was found even though the City restricted the construction of new churches to only ten percent (10%) of the City's area, and land in those districts was more expensive and "less conducive to worship" than the area preferred by the plaintiff. 699 F.2d at 307. In that case, the court had no trouble concluding that the indirect financial burden

and subjective aesthetic burden of not being able to use its preferred site were not substantial enough to warrant heightened scrutiny. *Id* at 307-308.

The plaintiffs in *Thiry v. Carlson*, 78 F.3d 1491 (10th Cir. 1996), challenged the government's plans to condemn part of their property containing a grave site that held religious significance for them, but conceded that they would continue their religious belief and practices elsewhere if the condemnation were to proceed. The court concluded that the condemnation would not substantially burden the plaintiff's exercise of religion and upheld the taking under RFRA. Likewise, the City's zoning decision in this case did not preclude SJCC from continuing to operate its college elsewhere, notwithstanding its inability to use its preferred site.

Similarly, in *Messiah Baptist Church v. County of Jefferson,* 859 F.2d 820 (10th Cir. 1988), *cert. den.* 490 U.S. 1005 (1989), a County denied a church zoning approvals needed to construct a facility for worship services, administrative offices, classrooms, recreation purposes, parking and an ampitheater on property it owned in an agricultural district. Despite the church's preference to use its own land for this facility, the Tenth Circuit held that the additional

expense that the church would incur to find another site for its facility did not impose an impermissible burden on religious exercise. *Id* at 825.

In *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983), the plaintiff was barred by zoning requirements from using his home as a place of worship for the congregation of at least ten adult men that his religion mandated. Although the court assumed that religious conduct was burdened, it also observed that there were other parts of the city where such gatherings would be legal. *Id.* at 739. The burdens of "convenience, dollars or aesthetics" that would result from relocating the worship were held to be insufficient to support a free exercise claim. *Id.* The court in *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554, 1560 (M.D. Fla. 1995), held that there was no substantial burden on plaintiffs religious exercise under RFRA, where they had failed to show that the City code would prevent them from operating a homeless shelter and food program everywhere in the City. The court noted that plaintiffs had pursued only two sites and (like SJCC) had applied for approval at only one. *Id.* at 1560.

*International Church of the Foursquare Gospel v. City of*

*Chicago Heights*, 955 F. Supp. 878 (N.D. Ill. 1996), involved a religious organization that wanted to move to a new location. The church identified a particular vacant property for acquisition, with the intent to convert it to a facility for worship services and other activities. The price was favorable, and the location was desirable. The property in question had been the city's only department store, however, and the city plan called for using the site for future commercial development. The city denied a special use permit for the proposed religious use. Like SJCC, the church argued that it had outgrown its existing facility and would incur additional expense if forced to find an alternative property. The court, while acknowledging the importance of an adequate facility to the congregation, held that these factors did not impose a substantial burden on the church within the meaning of RFRA. *Id.* at 880. Likewise, SJCC's claim of substantial burden from the denial of its application for rezoning cannot be sustained in this case.

### D. The City Has a Compelling Governmental Interest in Having the Necessary Information to Make Sound Zoning and Planning Decisions and in Making Those Decisions in the Interests of its Entire Civic Body

SJCC's failure to present complete and candid development plans provides full justification under the "compelling governmental

interest/least restrictive means" standard for the City's refusal to rezone the property.

The City, like all municipalities, has a compelling governmental interest in making zoning and planning decisions based on complete and accurate information from a candid applicant. Land use decisions should be based on a full understanding of the nature of the proposed use and its potential impacts, both immediately and in the foreseeable future. Municipal legislative and other decision-making bodies, along with their staffs, depend on the descriptive and other information provided by an applicant to assess whether a proposed use or project is compatible with the municipality's overall plan and conforms to its regulations. In California, the local government also uses the information to conduct a proper environmental review of the impacts from the project as required by the California Environmental Policy Act ("CEQA").

Among the grounds on which the City Council denied the zoning application were SJCC's failure to provide the information requested by the City and required by the municipal code and past administrative practice:

> Specifically, the Council finds that there is inconsistent and contradictory evidence as to the timing, financial feasibility and

> scope of Applicant's future plans to build a sports complex, gymnasium, technology center, playing fields with lighting, and/or church/auditorium/theater. As such, the City finds that Applicant has reasonably foreseeable future construction plans which, pursuant to the City's past practice, should be submitted by Applicant as part of the Application and be duly considered in order to determine whether the goals and objectives of the PUD zoning have been met.

AR 943. The City Council also found that additional information was needed to conduct a proper CEQA review. *Id.*

It would be irresponsible for a local authority to approve *any* land use application under circumstances where the applicant has failed to answer reasonable requests for relevant information needed to make the decision. This failure to provide candid and complete information about future plans fully justifies the denial under the "compelling interest/least restrictive means" standard. Because RLUIPA, as its legislative history makes clear, "does not provide religious institutions with immunity from land use regulations," an applicant cannot hide behind that statute when it has failed to comply with a land use regulation. 146 *Cong. Rec.* S7775.

Furthermore, the City had a compelling governmental interest in upholding its zoning system by making the decision at issue in this case. *Christian Gospel Church* establishes as a general principle that a city has a strong interest in maintaining the integrity of its zoning

plan. 896 F.2d at 1224-25. *See also Skillken and Co. v. City of Toledo*, 528 F.2d 867, 879 n.4 (6th Cir. 1975) (finding that "zoning laws are essential to orderly community development" and the City's refusal to spot zone to accommodate subsidized public housing would survive a compelling interest test); *Murphy*, 148 F. Supp.2d at 190 (acknowledging a compelling state interest in protecting the health and safety of communities through enforcement of local zoning regulations); *Inter. Church,* 955 F. Supp. at 881 (City zoning plan to preserve a particular site for a particular use identified as important in the City's plan was the least restrictive means of furthering a compelling governmental interest).

The City Council articulated sound planning reasons for its decision, including the fact that the site is "the *only* such site in the City zoned for hospital facilities," and "the only site in the City which retains hospital and accessory improvements, and upon which a hospital may be quickly and efficiently reinstituted;" as well as the fact that SJCC's proposed use would be inconsistent with the surrounding uses and have detrimental traffic and parking impacts on the surrounding residential neighborhood. AR 943 (emphasis supplied). The City's religiously neutral planning-based desire to

retain the present zoning status, at least for the time being, is not rendered any less compelling by the fact that, as the district court noted, there may be a period of time before there is sufficient demand to result in full hospital use of the site again. "Indeed, the more desperate the endeavor, the more economically attractive the area is to alternate land users and the more compelling the City's need to exclude them if it is to have any chance to succeed." *Inter. Church,* 955 F. Supp. at 881. The very nature of land use planning involves identifying and projecting needed uses and services over an extended time horizon and instituting the necessary regulatory and other mechanisms to ensure that the needed program can be accomplished. Once a site is redeveloped with a new use, the possibility of reverting to the prior use is lost. Moreover, in vindication of the City's decision, medical services were recently re-established at the site. (*See* Appellee's Brief at 37.) The City Council's denial of this single zoning application furthered a compelling governmental interest by the least restrictive means.

E. Interpreting RLUIPA to Encompass the Rational and Neutral Legislative Process At Issue In This Case Would Offend the Establishment Clause

SJCC purchased a site that, under the valid and neutral zoning

in effect, a secular entity would have no right to use. SJCC now demands that the City be forced to change its non-discriminatory local zoning plan to accommodate a religiously-motivated desire to develop a college at that site – a demand that no secular entity could legally sustain. Were RLUIPA interpreted as requiring the City to subvert its plan for the college's benefit, it would transgress the limits set by the Establishment Clause of the United States Constitution.

"[G]overnment runs afoul of the endorsement test and violates the Establishment Clause when it affirmatively supports religion on preferential terms." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, No. 01-3301, 2002 U.S. App. LEXIS 22157, at *72 (3d Cir. Oct. 24, 2002) (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305 (2000)). *See City of Bourne v. Flores*, 521 U.S. 507, 536-537 (1997) (Stevens, J., concurring) (claim of religious entitlement to exemption from a generally applicable, neutral civil law is precluded by the Establishment Clause). The legislative history indicates that Congress considered this concern and designed RLUIPA with the intent that its free exercise protections not be interpreted to extend so far as to violate the Establishment Clause. 146 *Cong. Rec.* S7776 (joint statement of Senators Hatch and Kennedy (2000)). Had the City

ignored its own planning objectives and SJCC's failure to follow the requirements of CEQA and acceded to SJCC's demand for a religiously-motivated zoning amendment, it would have upset this delicate balance. This would have impermissibly "place[d] religion in an exalted position, exempt from the ordinary land use decision-making process." *Boyajian v. Gatzunis,* 212 F.3d 1, 34 (1st Cir. 2000) (Toruella, C.J., dissenting), *cert. denied*, 531 U.S. 1070 (2001). *See also Lyng* 485 U.S. at 453 (requested accommodation would constitute subsidy of the Indian religion); *Ehlers-Renzi v. Connelly School of the Holy Child, Inc.*, 224 F.3d 283, 292-93 (4th Cir. 2000) (Murnhaghan, J. dissenting) (exemption from generally applicable zoning requirements for schools on property owned or leased by religious institutions crosses the line from a permissible accommodation of religion to "ordinary favoritism for religious property owners" forbidden by the Establishment Clause), *cert. denied*, 571 U.S. 1192 (2001). By contrast, the City's reasoned decision not to rezone SJCC's property furthered its legitimate land use policies in a religion-neutral manner, violated no rights of the college, and, in accord with Congress' intent in adopting RLUIPA, protected the rights of its citizens under the Establishment Clause to

be insulated from government endorsement of and entanglement with religion.

## CONCLUSION

SJCC would have this Court grant religiously affiliated uses with preemptive powers to shape land use requirements to their subjective desires. But "[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." *Messiah Baptist Church* 859 F2d. at 826 (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *reh'g denied,* 404 U.S. 876 (1971)). To hold otherwise on the facts of this case would turn land use planning on its head, by creating a system where religiously affiliated entities could dictate municipal land use policy and procedural filing requirements in virtually any circumstance. The district court correctly resisted this effort. For the foregoing reasons, *amicus curiae* American Planning Association respectfully requests that the Court uphold the judgment of the district court.

DATED: November 8, 2002

BINGHAM McCUTCHEN LLP

By:________________________________________

Geoffrey L. Robinson

## CERTIFICATE OF COMPLIANCE

I certify that the attached brief is in compliance with the type-volume limitations of Fed. R. App. Proc. 32(a)(7)(B) and 29(d). This brief is proportionately spaced, has a typeface of 14 points, and contains 5,624 words.

DATED: November 8, 2002

BINGHAM McCUTCHEN LLP

By:________________________________________

Marc R. Bruner