FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NEW HARVEST CHRISTIAN FELLOWSHIP, *Plaintiff-Appellant*, v. CITY OF SALINAS, *Defendant-Appellee*.	No. 20-16159 D.C. No. 5:19-cv-00334-SVK OPINION

Appeal from the United States District Court
for the Northern District of California
Susan G. Van Keulen, Magistrate Judge, Presiding

Argued and Submitted May 12, 2021
San Francisco, California

Filed March 22, 2022

Before: Jacqueline H. Nguyen and Daniel P. Collins, Circuit Judges, and Jed S. Rakoff,* District Judge.

Opinion by Judge Rakoff;
Partial Concurrence by Judge Collins

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

COUNSEL

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OPINION

RAKOFF, District Judge:

New Harvest Christian Fellowship ("New Harvest"), an evangelical church located in Salinas, California, appeals from the district court's entry of summary judgment in favor of the City of Salinas (the "City"), on the Church's "substantial burden" and "equal terms" claims brought under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq*. We affirm the district court's summary judgment as to the Church's substantial burden claim, but we reverse the district court's summary judgment as to the equal terms claim and remand for further proceedings consistent with this opinion.

I. Background[1]

In March 2018, New Harvest purchased the Beverly Building, a two-story building located on Main Street in downtown Salinas. After operating out of a rented building nearby for several years, New Harvest hoped to move to the more spacious Beverly Building, where it intended to host worship services on the first floor and build classrooms, offices, storage space, and a kitchen area on the second floor.

The Beverly Building, however, is located on Main Street in a part of downtown Salinas called the "Downtown Core Area." The Downtown Core Area is subject to certain zoning restrictions designed, among other things, to "[e]ncourage pedestrian-oriented neighborhoods where local residents and employees have services, shops, entertainment, jobs, and access to transit within walking distance of their homes and workplace." Salinas Zoning Code § 37-40.290. The zoning code classifies the area in which the Beverly Building is located as "mixed use," which generally requires "religious assembl[ies]," like New Harvest, to obtain a conditional use permit to operate. *See id.* § 37-30.240, Table 37-30.110. The zoning code also specifically prohibits "[c]lubs, lodges, places of religious assembly, and similar assembly uses" from operating on the "ground floor of buildings facing Main Street within the Downtown Core Area." *Id.* § 37-40.310(a)(2). We refer to this

[1] The material facts in this case are substantially undisputed. This summary draws from the district court opinion, *New Harvest Christian Fellowship v. City of Salinas*, 463 F. Supp. 3d 1027 (N.D. Cal. 2020).

latter zoning restriction as the "Assembly Uses Provision" and to the three blocks of Main Street subject to the Assembly Uses Provision as the "Main Street Restricted Area."[2]

Before New Harvest acquired the Beverly Building, the City advised the church that it would not be permitted to conduct worship services on the ground floor, because such a use would be inconsistent with Assembly Uses Provision.[3] Undeterred, New Harvest sought a zoning code amendment (to modify the Assembly Uses Provision to enable religious assemblies to operate on the ground floor of the Main Street Restricted Area) and a conditional use permit (to permit New Harvest, a religious assembly, to operate in the mixed use district). The City denied both of New Harvest's requests "based on" the Assembly Uses Provision. City staff, however, recommended that New Harvest submit a modified application that would maintain an

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[2] The zoning code also includes another provision that governs the contexts in which live entertainment is permitted in the Downtown Core Area. Salinas City Code § 37-40.310(a)(3). We have no need to address the parties' disputes concerning this provision, as we resolve this appeal on other grounds.

[3] The building that New Harvest presently rents is also located in the Main Street Restricted Area. New Harvest initially operated there under a series of conditional use permits granted before the adoption of the Assembly Uses Provision, the most recent of which, obtained in 2000, was granted only after New Harvest represented that it was "not looking for long term residence" but intended to "buy a permanent building or build elsewhere." The conditional use permit for the rented building has since expired, however, and New Harvest continues to operate there as a legal nonconforming use.

active use, like a café or a bookstore, at the front of the ground floor facing Main Street while building the sanctuary toward the back. The City also amended the zoning code to ensure that New Harvest would be permitted to operate a café or a bookstore on the first floor of the Beverly Building. New Harvest declined to submit a modified application.

Instead, New Harvest filed suit, alleging violations of RLUIPA's equal terms and substantial burden provisions. New Harvest sought, among other remedies, injunctive relief, declaratory relief, nominal and economic damages, and attorneys' fees. After discovery, both sides sought summary judgment. The district court granted the City's motion and denied New Harvest's. This appeal followed.

While this appeal was pending, New Harvest informed the Court that it was in the process of selling the Beverly Building, with escrow set to close on May 25, 2021. Having received no indication from New Harvest that escrow did not close on that date, we assume that New Harvest no longer maintains a legally cognizable interest in the Beverly Building.[4]

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[4] Under RLUIPA, a plaintiff has a cognizable interest in the regulated land "if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest." 42 U.S.C. § 2000cc-5(5).

II. Discussion

We review an order of summary judgment de novo. *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter*, 456 F.3d 978, 985 (9th Cir. 2006). Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Before turning to the merits, we address justiciability.

A. Justiciability

Because New Harvest no longer has a cognizable interest in the Beverly Building, its claims for declaratory and injunctive relief are moot. *See Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1167-69 (9th Cir. 2011) ("The church no longer owns the [relevant] building, so the city could not be required to issue a conditional use permit for the building to the church. Nor could the church be entitled to a declaration that a code provision and statute violate federal law, because they no longer affect the church.").

The appeal, however, is not moot. For one thing, New Harvest's claim for nominal damages is sufficient to keep the case alive. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021). Moreover, New Harvest seeks compensatory damages for the money it spent applying for the conditional use permit, paying the Beverly Building's monthly mortgage, and paying property taxes that, according to New Harvest, were only assessed because the building was not used for religious

worship. The City, therefore, may be liable for nominal and compensatory damages under RLUIPA, assuming that New Harvest proves a violation and damages.

B. Substantial Burden Provision

The first operative provision of RLUIPA at issue in this case is the substantial burden provision. It provides:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
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> (A) is in furtherance of a compelling governmental interest; and
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> (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1). This provision applies, *inter alia*, if the challenged government action involves "individualized assessments of the proposed uses for the property involved." 42 U.S.C. § 2000cc(a)(2)(C). The City's denials of New Harvest's applications constitute "individualized assessments." *See Guru Nanak*, 456 F.3d at 987.[5] New Harvest "bears the burden to prove

[5] As mentioned, New Harvest sought and was denied both a zoning code amendment and a conditional use permit. It has been argued that only the latter should constitute an "individualized

the [City's] denial of its application imposed a substantial burden on its religious exercise." *Id.* at 988. Only if New Harvest establishes that it has experienced a substantial burden does the burden shift to the City to show that its denial of the church's application is narrowly tailored to accomplish a compelling governmental interest. *See Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1067 (9th Cir. 2011).

We have explained that a substantial burden "must place more than inconvenience on religious exercise." *Id.* (quoting *Guru Nanak*, 456 F.3d at 988). Instead, a challenged land use regulation must impose a "significantly great restriction or onus upon [religious] exercise." *Foursquare Gospel*, 673 F.3d at 1067 (quoting *San Jose Christian Coll.*, 360 F.3d at 1034); *see also Guru Nanak*, 456 F.3d at 988-89. Our previous cases indicate that some factors we consider in determining the existence of a substantial burden include, but are not necessarily limited to, whether the government's reasons for denying an application were arbitrary, such that they could easily apply to future applications by

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assessment" under the substantial burden provision of RLUIPA. *See* Katie M. Ertmer, Note, *Individualized vs. Generalized Assessments: Why RLUIPA Should Not Apply to Every Land-Use Request*, 62 Duke L.J. 79, 98, 110-11 (2012). We have previously assumed, however, that the denial of a requested zoning code amendment could be an individualized assessment under RLUIPA. *See San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1027, 1033-36 (9th Cir. 2004) (considering RLUIPA claim related to denial of a re-zoning application, following prior approval of a conditional use permit). In any event, because the City does not raise the issue, we have no occasion to revisit it.

the religious group; whether the religious group has ready alternatives available to it or whether the alternatives would entail substantial uncertainty, delay, or expense; and whether the religious group was precluded from using other sites in the city. *See San Jose Christian Coll.*, 360 F.3d at 1035-36; *Guru Nanak*, 456 F.3d at 989; *Foursquare Gospel*, 673 F.3d at 1067, 1070. These cases demonstrate that our approach to determining the presence or absence of a substantial burden is to look to the totality of the circumstances.

The City, however, asks us to adopt two bright-line rules. First, the City contends that the existence of feasible alternative locations for a church to conduct its worship forecloses a finding of substantial burden. Second, the City argues that there can be no substantial burden when, knowing of the restrictions against use of a property for worship purposes, a church proceeds with the purchase anyway. We decline to adopt either of these bright-line rules. The availability of alternative locations, although plainly relevant to the substantial-burden inquiry, does not necessarily foreclose a finding of substantial burden. That is, other circumstances may create a substantial burden even where an alternative location is technically available. *See Foursquare*, 673 F.3d at 1068. Likewise, that a religious group has imposed a burden upon itself by acquiring a property whose use is already restricted is relevant to but not dispositive of the substantial burden inquiry. A city's zoning code may be so restrictive that a religious group has no option other than to purchase a property where religious assembly is forbidden

and hope that an accommodation will be made on its behalf.

Looking, then, to the totality of the circumstances, we agree with the district court that New Harvest has failed to demonstrate a substantial burden. That is so for three primary reasons, none of which alone is necessarily dispositive.

First, New Harvest has not shown that the Assembly Uses Provision precludes it from conducting worship services in the Beverly Building. The record reflects that New Harvest could have reconfigured the first floor of the building both to hold religious assemblies and to comply with the zoning requirements applicable in the Downtown Core Area. But New Harvest declined to adopt the City's proposed modification to its plans for the first floor of the Beverly Building or otherwise reconfigure the first floor.[6] This stands in contrast to the plaintiff congregation in *Guru Nanak*, which we concluded had faced a substantial burden when it had "readily agreed to every mitigation measure" the government had proposed but was

[6] New Harvest argues that the City's mitigation proposal "is unworkable because it contradicts the City's own zoning code." New Harvest, however, would have been free to apply for another zoning code amendment and conditional use permit incorporating the proposed modifications. Had the City denied applications after inviting New Harvest to file them, we would have been more likely to find a substantial burden. *See Guru Nanak*, 456 F.3d at 989 (finding a substantial burden where the city had a history of giving inconsistent reasons for denying a religious group's applications, thus "lessen[ing] the possibility that future applications [for a conditional use permit] would be successful").

nonetheless denied the conditional use permit required to build the Sikh temple it proposed. 456 F.3d at 989. While the City's proposed reconfiguration of the Beverly Building's first floor might have resulted in a space that could fit only 208 seats rather than New Harvest's preferred layout that could fit 299 seats, New Harvest never proved that this difference in capacity would have imposed a "substantial burden." *San Jose Christian Coll.*, 360 F.3d at 1034 (internal quotation marks omitted).[7]

The Assembly Uses Provision also permits services on the second floor. New Harvest objected in proceedings before the City that using the second floor would not be "convenient" for worship services with live music because the second floor's lower ceiling results in worse acoustics. While it might be that limiting services to the second floor could amount to more than a mere inconvenience in another case, New Harvest has offered no evidence other than the conclusory testimony of its pastor that the second floor's nine-foot ceiling is too low for live music. In any event, even assuming *arguendo* that the second floor is acoustically suboptimal, New Harvest has not shown that the resulting inconvenience would be anything more than that—an inconvenience. *Id.*

Second, even if we were to conclude that it would be a substantial burden for New Harvest to conduct

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[7] With either layout, New Harvest would have had greater seating capacity than the 160-175 seats that could fit in the congregation's rented facility.

worship on the second floor or to remodel the first floor, New Harvest has not shown that it was precluded from using other sites within the City. Under the zoning code, New Harvest is free to conduct worship services in almost any area of the City outside of the ground floor of the Main Street Restricted Area. To the extent that New Harvest would need to apply for a conditional use permit for religious assembly in other parts of the City, there is no evidence that suggests the City would deny such an application. To the contrary, over the past fifty years, the City has granted all but one such application from a church, among more than 100 applications. There is accordingly no record here that any subsequent application from New Harvest would be "fraught with uncertainty," since the City has not exhibited the "inconsistent decision-making" and conflicting rationalizations for repeated denials that led us to find that the *Guru Nanak* congregation faced a substantial burden after it acquired a second property but was again denied zoning approval. 456 F.3d at 990-91.

Moreover, many properties have become available in Salinas since New Harvest represented that it was intending to look for a new location. But New Harvest did not take steps to acquire any of these properties. The parties disagree as to the time frame relevant to determining whether a suitable alternative property was available to New Harvest. But we need not resolve this issue because a suitable property was available for sale during the pendency of this litigation. Before the district court, New Harvest argued that this property

was unsuitable because it would require congregants to make a U-turn on a highway in order to reach the property on the other side. New Harvest presented no evidence, however, showing that this feature would render the property unsuitable for its congregation's use. It did not show, for example, that the property was unsuitable because of "size, configuration, safety issues, or current uses." *See Foursquare Gospel*, 673 F.3d at 1068. Inconvenience alone is not a substantial burden.

Finally, New Harvest's wholesale failure of proof concerning available alternatives is more significant because New Harvest purchased a building that it knew at the time was subject to unique zoning restrictions that would preclude it from conducting worship services on the first floor. This, combined with New Harvest's failure to diligently pursue other suitable buildings that came on the market since it represented to the City that its stay at the rented building would be temporary, suggests that New Harvest's burden is at least partly of its own making.

These three factual circumstances—that New Harvest could have conducted worship services in the Beverly Building had it been willing to hold services on the second floor or reconfigure the first floor; that New Harvest was not precluded from using other sites within Salinas and that at least one suitable property has come on the market during the course of this litigation; and that at the time it purchased the Beverly Building, New Harvest was on notice that the Assembly Uses Provision would prohibit it from conducting

worship services on the first floor—all militate against a finding of substantial burden. None is necessarily dispositive on its own, but taking all the circumstances together, we conclude that New Harvest has not met its burden of showing that the Assembly Uses Provision imposes a "significantly great" restriction, rather than an inconvenience, on its religious exercise. *Foursquare Gospel*, 673 F.3d at 1067. We therefore affirm the district court's entry of summary judgment in favor of the City on New Harvest's substantial burden claim.

C. Equal Terms Provision

The other provision of RLUIPA that New Harvest claims the City has violated is the equal terms provision. It provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). We have previously identified four elements of an equal terms claim: "(1) there must be an imposition or implementation of a land-use regulation, (2) by a government, (3) on a religious assembly or institution," and (4) the imposition or implementation must be "on less than equal terms with a nonreligious assembly or institution." *Centro Familiar*, 651 F.3d at 1170-71. It is undisputed here that the City has imposed or implemented a land use regulation, that the City is a government, and that New Harvest is a religious assembly or institution. Thus, only the fourth element is at issue in this case: whether the Assembly Uses Provision impermissibly

treats religious organizations on less than equal terms with a nonreligious assembly or institution.

The equal terms provision contemplates both facial and as-applied challenges. It prohibits the government from "'imposing,' *i.e.*, enacting, a facially discriminatory ordinance or 'implementing,' *i.e.*, enforcing[,] a facially neutral ordinance in a discriminatory manner." *Elijah Group, Inc. v. City of Leon Valley*, 643 F.3d 419, 422 (5th Cir. 2011); *see also Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1308 (11th Cir. 2006) (describing "three distinct kinds" of equal term violations, including regulations that "facially differentiate[] between religious and nonreligious assemblies or institutions" and regulations that are "truly neutral" but are "selectively enforced against religious, as opposed to nonreligious assemblies or institutions"). Here, New Harvest alleges that the Assembly Uses Provision facially violates the equal terms provision because it permits certain nonreligious assemblies to operate on the ground floor of the Main Street Restricted Area while forbidding religious assemblies from doing the same.[8]

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[8] New Harvest also purports to bring an as-applied challenge to the implementation of the Assembly Uses Provision. "The line between facial and as-applied challenges can sometimes prove 'amorphous.'" *Bucklew v. Precythe*, 139 S. Ct. 1112, 1128 (2019) (quoting *Elgin v. Dep't of Treasury*, 567 U.S. 1, 15 (2012)). Such is the case here. Although the contours of New Harvest's as-applied challenge are murky, the argument appears to be that particular nonreligious assemblies, such as the Ariel Theatre, currently operating on the ground floor of the Main Street Restricted Area should have been precluded from doing so under the Assembly

"As this is a facial challenge, we consider only the text of the zoning ordinance, not its application." *Calvary Chapel Bible Fellowship v. County of Riverside*, 948 F.3d 1172, 1176 (9th Cir. 2020). New Harvest bears the initial burden of "produc[ing] prima facie evidence to support a claim alleging a violation" of the equal terms provision. 42 U.S.C. § 2000cc-2(b). If New Harvest succeeds in doing so, the statute shifts the burden of persuasion to the government on "any element of the claim." *Id.*

To make out a prima facie case of facially unequal treatment, New Harvest must show that the Assembly Uses Provision draws an "express distinction" between religious assemblies and nonreligious assemblies. *See Centro Familiar*, 651 F.3d at 1171 ("[T]he express distinction drawn by the ordinance establishes a prima facie case for unequal treatment."). The Assembly Uses Provision does just that: it draws an express distinction between "[c]lubs, lodges, and places of religious assembly, and similar assembly uses," on the one hand, and all other nonreligious assemblies, on the other hand, with regard to permitted first-floor uses in the Main Street Restricted Area. Salinas City Code § 37-40.310(a)(2). Because the Assembly Uses Provision expressly excludes religious assemblies while permitting some nonreligious assemblies, New Harvest has

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Uses Provision because they are "similar" to "clubs, lodges, [and] places of religious assembly." Because this provision's applicability, on its face, thus turns on the issue of whether other uses are "similar" to churches, New Harvest's facial and as-applied challenges are not meaningfully distinct. We therefore analyze it as a facial challenge.

established a prima facie case. *See Centro Familiar*, 651 F.3d at 1171 ("It is hard to see how an express exclusion of 'religious organizations' from uses permitted as of right by other [nonreligious] 'membership organizations' could be other than 'less than equal terms' for religious organizations."). Accordingly, the City has the burden of persuasion on each element of the equal terms provision claim.[9]

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[9] Of course, a religious organization will face a more difficult challenge establishing a prima facie case where, unlike here, the challenged regulation does not expressly prohibit religious assemblies. Instructive is our recent decision in *Calvary Chapel.* In that case, a church purchased a plot of land in the Citrus-Vineyard (C/V) Zone of the Temecula Wine Country of Riverside County. 948 F.3d at 1174. The zoning ordinance neither expressly permitted nor excluded religious assemblies. Rather, in the C/V Zone, "vineyards, groves, crops, orchards, gardens, and pastures for raising livestock are all permitted as of right," while "[e]ighteen-hole golf courses, child day care centers, bed and breakfasts, country inns, hotels, restaurants, spas, cooking schools, wine sampling rooms, retail wine sale stores, and special occasion facilities are all permissible . . . upon approval of a plot plan." *Id.* at 1174. After the county declined to amend the zoning ordinance "to specifically permit churches in the C/V Zone," the church brought a facial challenge under RLUIPA's equal terms provision. *Id.* at 1175. The church argued that the zoning ordinance facially violated the equal terms provision by prohibiting religious assemblies, while permitting the above-mentioned nonreligious assembly uses. *See id.* We rejected that challenge, holding that the church failed to make out a prima facie case because, "[a]t least on the face of the ordinance, secular and religious places of assembly are treated the same." We explained that "[b]oth are permitted in the C/V Zone only if they meet the requirements of a 'special occasion facility,' " and "nothing in the text of the ordinance prevents churches from holding regular worship services or other religious assemblies in their special occasion facilities." *Id.* at 1176. Here, unlike *Calvary Chapel*, the challenged land-use regulation expressly

To meet that burden with respect to the contested fourth element, the City must show that any nonreligious assembly permitted to operate on the first floor of the Main Street Restricted Area is not similarly situated to a religious assembly "with respect to an accepted zoning criteri[on]." *Centro Familiar*, 651 F.3d at 1173. The City, taking a different view of the proper order of operations, argues that the burden should shift only after New Harvest identifies a similarly situated nonreligious assembly that is permitted to operate on the ground floor of the Main Street Restricted Area. Such an approach, however, is inconsistent with *Centro Familiar*, where we found that the ordinance's express exclusion of religious assemblies gave rise to the plaintiff's prima facie case, without requiring the plaintiff to point to similarly situated nonreligious comparators. *Id.* ("The burden is not on the church to show a similarly situated secular assembly, but on the city to show that the treatment received by the church should not be deemed unequal, where it appears to be unequal on the face of the ordinance."). Accordingly, we conclude that the similarly situated comparators come into play, in a facial challenge, only after the plaintiff has put forward sufficient evidence that the regulation makes an express distinction between religious and nonreligious assemblies.[10]

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prohibits religious assemblies from operating on equal terms with at least some nonreligious assemblies—a prima facie violation of the equal terms provision.

[10] A decade ago, we observed that the approaches of our sister circuits to facial challenges under RLUIPA's equal terms

Since, as mentioned, New Harvest has established a prima facie case, the burden shifts to the City to show that any nonreligious assembly permitted to operate on the first floor of the Main Street Restricted Area is not similarly situated to a religious assembly with respect to an accepted zoning criterion. As the Fifth Circuit has observed, this is functionally a two-part test, requiring the government to establish: (1) that the zoning criterion behind the regulation at issue is an acceptable one; and (2) that the religious assembly or

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provision fell "roughly into two camps." *Centro Familiar*, 651 F.3d at 1169 n. 25. Since then, the split has only widened, and we now discern not two but three distinct approaches to facial challenges under the equal terms provision. One camp—which includes the Third and Sixth Circuits—requires that plaintiffs "put forward" similarly situated nonreligious assemblies in order to make a prima facie case. *See Tree of Life Christian Sch.'s v. City of Upper Arlington*, 905 F.3d 357, 373 (6th Cir. 2018); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 270 (3d Cir. 2007). The second camp, which includes this Circuit and the Fifth Circuit, makes it easier for the plaintiff to make out a prima facie case, requiring only that the plaintiff bring forward sufficient evidence that the challenged regulation makes an express distinction between religious and nonreligious assemblies, regardless of whether those assemblies are similarly situated. *See Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 291-93 (5th Cir. 2012). Only after the plaintiff establishes a prima facie case does the burden shift to the government to show, among other potential rebuttals, that the religious and nonreligious assemblies are not, in fact, similarly situated. *See id.* In the final camp is the Eleventh Circuit, which, like this Circuit and the Fifth Circuit, does not require the plaintiff to put forward similarly situated nonreligious assemblies in order to make a prima facie case; however, under the Eleventh Circuit's approach, the government may carry its burden only by showing that the challenged provision survives strict scrutiny. *See Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1231-32 (11th Cir. 2004).

institution is treated as well as every other nonreligious assembly or institution that is "similarly situated" with respect to that criterion. *See Opulent Life*, 697 F.3d at 292-93.

Turning to the first element, one stated purpose of the Assembly Uses Provision is to encourage pedestrian-oriented neighborhoods. *See* Salinas Zoning Code § 37-40.290. New Harvest contends that the Assembly Uses Provision is not an acceptable zoning criterion because it does not further a "compelling interest." But, as the Sixth Circuit observed in rejecting a similar argument, there is no requirement that the criterion further a compelling interest; only an acceptable one. *See Tree of Life Christian Sch.'s*, 905 F.3d at 372. It is a closer question whether the City's choice to ban certain first floor uses is an acceptable means of realizing its stated purpose to foster a pedestrian-friendly Downtown Core Area. We need not resolve this issue because, even if the zoning criterion is lawful, the City fails the second element of the two-part test.

We conclude that the City has failed to show that the Assembly Uses Provision treats religious assemblies on equal terms with nonreligious assemblies that are similarly situated with respect to an accepted zoning criterion. The City assumes throughout its briefing that the Assembly Uses Provision distinguishes between "private" and "public" assembly uses, prohibiting only the former from operating on the ground floor of the Main Street Restricted Area. The City suggests that private assembly uses, but not public assembly uses, "typically are open only to organization members

and their guests, operate during limited hours and for most of the week are closed, and have 'blank facades' with no windows or windows with drawn shades or blinds." The Assembly Uses Provision itself, however, does not speak in terms of "public" and "private" assemblies. Instead, the provision prohibits three particular types of assembly uses—clubs, lodges, and places of religious assembly—along with "similar" assembly uses. Under the zoning code, clubs and lodges are fairly characterized as private assemblies. They are defined as "[m]eeting, recreational, or social facilities" that are "primarily for use by members or guests." Salinas Zoning Code § 37-10.270. Churches, however, are not fairly characterized as private assemblies because they are commonly open to the public and can attract substantial foot traffic. Indeed, some of the country's largest houses of worship, like New York's St. Patrick's Cathedral and Washington's National Cathedral, host hundreds of thousands of visitors annually, only a small fraction of whom are members or guests of the church.[11] And, although not directly relevant in this facial challenge, New Harvest itself explains that its own services "are held open to the public and no one has ever been denied entry."

For that reason, we hold that other nonreligious assemblies, such as theatres, which are permitted to operate on the first floor of the Main Street Restricted Area, are similarly situated to religious assemblies with

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[11] *See*, *e.g.*, Liam Stack, *With Tourists Gone, St. Patrick's Cathedral Pleads for Help*, N.Y. Times, July 19, 2020.

respect to the City's stated purpose and criterion.[12] Like many religious assemblies, including New Harvest, theatres are open only on certain days of the week and for certain portions of the day; they attract sporadic foot traffic around their opening hours; and while they have some regular patrons, they are also open to newcomers. Some patrons come from nearby; others drive miles to attend. When it comes to the "eyes on the street" effect, theatres generally do not have large windows facing the street with people visible inside.

Because the City prohibits New Harvest from hosting worship services on the ground floor of the Main Street Restricted Area but permits theatres to operate on the ground floor in that area, the City does not treat New Harvest as well as nonreligious assemblies similarly situated with respect to an acceptable zoning criterion. We therefore conclude that the Assembly Uses Provision facially violates the equal terms provision of RLUIPA.

Even if the City had met its burden of showing that the Assembly Uses Provision treats New Harvest on equal terms with similarly situated nonreligious assemblies, *Centro Familiar* suggests that the City would

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[12] Theatres are classified in the zoning code as "commercial recreation," *see* Salinas City Code § 37-10.270. They are permitted on the Main Street Restricted Area, with only a nondiscretionary site plan review required, so long as they are less than two thousand square feet in floor area; otherwise, a conditional use permit is required. *See id.* § 37-20.240, Table 37.30.110 & n. 6; *see also id.* § 37-60.270 (setting forth the nondiscretionary site plan review process).

need to make yet another showing: that the provision is "reasonably well adapted" to the accepted zoning criterion. *See* 651 F.3d at 1175. For this standard, which is less rigorous than strict scrutiny, *id.* at 1175, considerations of both over-and under-breadth are relevant. *Id.* at 1174-75. To be sure, we have not discussed, let alone applied, the "reasonably well adapted" test since we first articulated it in *Centro Familiar*, and we know of no other court that has done so. And because we find that the City's regulation does not treat religious assemblies on equal terms with similarly situated non-religious assemblies, we need not pass on this test's continuing vitality today.

We briefly note, however, that applying the "reasonably well adapted" test to the Assembly Uses Provision provides further support for our holding. First, the Assembly Uses Provision, like the ordinance at issue in *Centro Familiar*, is overbroad because it "excludes not only churches, but also religious [assemblies] that are not churches." *Id.* at 1174. The zoning code defines "religious assemblies," as relevant here, to include "[f]acilities for religious worship and assembly, incidental religious education, meeting halls, gymnasiums, and similar uses." Salinas City Code § 37-10.270. Even if churches were properly characterized as private assemblies—and they are not—the Assembly Uses Provision would also operate to exclude other "religious assemblies" that would appear to foster the sort of vibrancy that the zoning code is purportedly designed to promote. For example, the Assembly Uses Provision, as written, would bar a YMCA gymnasium

from operating on the first floor in the Main Street Restricted Area, even as it permits an Equinox gymnasium from operating in the same place.[13]

Second, *Centro Familiar* teaches that courts should also look to non-assembly uses whose presence is inconsistent with a city's stated zoning criterion. 651 F.3d at 1174-75. The City's zoning scheme permits on the ground floor of the Main Street Restricted Area numerous uses, including government offices, funeral services, and laboratories, that do not appear to advance the City's vision for a vibrant downtown.[14] To be sure, these are non-assembly uses, so they are not directly relevant as nonreligious comparators for New Harvest. But their potential operation on the first floor of the Main Street Restricted Area "would have the same

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[13] Both a YMCA and an Equinox would be classified as a "fitness center" under the zoning code. *See* Salinas Zoning Code § 37-10.300. They would be permitted in the Main Street Restricted Area with only a nondiscretionary site plan review so long as they are less than five thousand square feet in floor area; otherwise, a conditional use permit would be required. *See id.* § 37-30.240, Table 37-30.110 & n. 6. However, the Assembly Uses Provision would operate to bar the YMCA, but not an Equinox, from operating on the ground floor in the Main Street Restricted Area.

[14] *See* Salinas Zoning Code § 37-40.310 (defining the use classifications for the Downtown Core Area as those of the "underlying base district," with a small number of exceptions not relevant here); *id.* § 37-30.240, Table 37-30.110 (listing all use classifications in mixed use districts and providing that government offices, funeral services, and laboratories can operate in such districts, with only the nondiscretionary site plan review required).

practical effect" as a private assembly, undermining the City's vibrancy plan. *Id.* at 1174.[15]

RLUIPA, of course, does not prevent the City from crafting a zoning scheme that employs an accepted criterion in order to prohibit certain uses from operating on the ground floor of the Main Street Restricted Area. But the Assembly Uses Provision, as written, impermissibly treats religious assemblies on less than equal terms with nonreligious assemblies. In writing its zoning code, the City should have done and can do much better.

III. Conclusion

Because the Assembly Uses Provision facially violates the equal terms provision of RLUIPA, we reverse. On remand, the district court should proceed as appropriate to adjudicate New Harvest's claims for damages and attorneys' fees.

AFFIRMED in part, REVERSED in part, and REMANDED.

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[15] Other uses, such as hospitals and cemeteries, are permitted as of right in those portions of the Downtown Core Area zoned as commercial office, residential high density, and public/semi-public, but are not permitted in the Main Street Restricted Area, which is zoned as mixed-use. These uses—although, again, not assembly uses—also call into question the City's consistency in implementing its vibrancy plan.

COLLINS, Circuit Judge, concurring in part and concurring in the judgment:

I concur in the majority opinion except as to section II-B, and I concur in the judgment.

I agree that Plaintiff New Harvest Christian Fellowship failed to carry its burden, in opposing summary judgment, to present sufficient evidence to show that the land use regulations challenged here "impose[d] a substantial burden on the religious exercise" of Plaintiff and its members in violation of § 2(a)(1) of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc(a)(1). But in reaching that conclusion, I would rely on narrower grounds than does the majority.

We have indicated that a local government does not impose a "substantial burden" on religious exercise by enforcing a zoning restriction if the religious assembly has "ready alternatives" that do not "require substantial delay, uncertainty, and expense." *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1068 (9th Cir. 2011) (citation and internal quotation marks omitted). As the majority notes, the record here contains evidence that "a suitable property was available for sale" during the relevant time period, *see* Opin. at 14, and in my view Plaintiff failed to present sufficient evidence that purchasing that property—which was a church—would have entailed substantial delay, uncertainty, and expense.

In opposing summary judgment on this point, Plaintiff relied on a declaration from its real estate

agent, who stated that, "[t]o get to this church building," which was "at the far north end of Salinas," "one must drive out of Salinas on Highway 101 North and make a U-turn on the highway to reach the building and campus heading back on Highway 101 South." That single sentence is simply too thin, without more, to support a reasonable inference that this available church property was not a suitable and ready alternative. Plaintiff had the burden of proof to show a "substantial burden" under RLUIPA, *see Foursquare Gospel*, 673 F.3d at 1067, and on that issue Plaintiff failed to "come forward with 'specific facts' showing that there is a genuine issue for trial." *Wade v. Regional Credit Ass'n*, 87 F.3d 1098, 1100 n.2 (9th Cir. 1996) (citation omitted). On that basis, I concur in the judgment affirming the district court's grant of summary judgment in favor of the City on Plaintiff's claim under § 2(a)(1) of RLUIPA.

I disagree, however, with the majority's suggestion that, in evaluating the issue of substantial burden, we should also give weight to two other alternatives—namely, (1) that Plaintiff reconfigure the first floor of the Beverly Building according to the City's demands; or (2) that Plaintiff use the second floor of that building for its congregational space. *See* Opin. at 11–13 & n.6. On this record, neither of these options presented a ready and suitable alternative. Indeed, were it not for the fact that Plaintiff failed to establish that the alternative church property was not readily available and suitable, I would otherwise find a sufficient showing of a "substantial burden" to warrant a trial.

In seeking summary judgment below, the City relied on its proposal that Plaintiff dedicate almost the entire street-facing portion of the first floor of the Beverly Building to a nearly 1,500-square-foot commercial space (*i.e.*, "retail, food service, office, or other pedestrian-oriented uses"), with the back portion of the first floor available for a 208-seat congregational space. But Plaintiff's pastor submitted a declaration stating that a 208-seating capacity would give the church "only about a dozen more seats" than the church's existing location at the time it "purchased the Beverly Building"—which would thwart the plans for growth and evangelization that had led Plaintiff to acquire the Beverly Building in the first place. Plaintiff instead had proposed a much smaller 176-square-foot bookstore facing the street, which would allow a 299-person congregational space on the first floor of the Beverly Building, but the City rejected that proposal.

Taking Plaintiff's evidence as true, and drawing all inferences in favor of Plaintiff, I think that the record would permit a reasonable trier of fact to conclude that, by blocking the church's objectives for growth, the City's first-floor plan was not a suitable alternative and weighed in favor of finding a substantial burden on Plaintiff's religious exercise. In my view, the majority therefore errs in suggesting that Plaintiff should have "'readily agreed'" to what "the government had proposed." *See* Opin. at 12 (citation omitted). As the majority notes, what the City proposed would have reduced the seating capacity of the church's congregational space by more than 25%, *see id.*, thereby

thwarting the Plaintiff's plans for growth and evangelization. That is certainly a "burden" on Plaintiff's religious exercise, and the magnitude of that burden is plainly "substantial."

The majority further errs in endorsing, as an adequate alternative that weighs against a finding of substantial burden, the proposal that Plaintiff use the *second* floor of the Beverly Building for worship services. *See* Opin. at 12–13. As an initial matter, the majority's reliance on this second-floor alternative is surprising, because the City itself did not make this argument in its answering brief in this court. Although the City's brief mentioned that option in its statement of facts, the brief's legal analysis under RLUIPA did *not* contend that the second floor was a suitable congregational-use alternative that defeated a showing of substantial burden. Instead, the City argued that its *first-floor* congregational-use proposal would free up "the entire spacious second floor for use" by Plaintiff's *non-congregational activities*, such as its "youth ministries," as well as for "clerical offices, rehearsal rooms, storage, and administrative functions." Moreover, the City's architectural expert below relied *only* on the proposal that the first floor be used for congregational services.

Furthermore, in suggesting that the Beverly Building's second floor would be a suitable space for "worship services," the majority improperly weighs the evidence and again makes arguments the City itself declined to make. *See* Opin. at 12–13. Plaintiff's pastor's declaration below asserted that the second floor's

low ceiling made it unsuitable for worship services, in which music was an important element:

> We could not place the sanctuary on the second floo[r] due to the low height of the ceiling which is 9'1". Acoustically, this is too low for live music. At 15'7" the ceiling on the ground floor is six and a half feet higher.

The majority discounts this concern as a mere "inconvenience" because, in its view, the pastor's testimony on this point is "conclusory." *See* Opin. at 12–13. But one does not need a degree in acoustical engineering to know that the sound quality of music—involving musical instruments and potentially hundreds of people signing—will be substantially inferior in an otherwise very large room that has only the ceiling height of a standard living room. The majority is effectively weighing the evidence itself, which we are not permitted to do on summary judgment. Viewing the record in the light most favorable to Plaintiff, consigning the church's congregation to the second floor would directly and substantially burden the conduct of Plaintiff's religious services—which is probably why the City never pressed the contrary view in this court.

For the foregoing reasons, I respectfully concur in part and concur in the judgment.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NEW HARVEST CHRISTIAN FELLOWSHIP, Plaintiff, v. CITY OF SALINAS, Defendant.	Case No. 19-cv-00334-SVK **ORDER ON (1) MOTION FOR SUMMARY JUDGMENT OF DEFENDANT CITY OF SALINAS; (2) MOTION FOR SUMMARY JUDGMENT OF PLAINTIFF NEW HARVEST CHRISTIAN FELLOWSHIP; AND (3) REQUEST FOR JUDICIAL NOTICE OF PLAINTIFF NEW HARVEST CHRISTIAN FELLOWSHIP** Re: Dkt. Nos. 28, 35, 41 (Filed May 29, 2020)

Plaintiff New Harvest Christian Fellowship ("New Harvest") challenges zoning decisions by Defendant City of Salinas ("Salinas" or "the City") that New Harvest claims affect its ability to conduct a religious assembly on the ground floor of a building it purchased located at 344 Main Street in downtown Salinas (the "Beverly Building"). New Harvest alleges that the City's zoning code and denial of New Harvest's proposed use of the Beverly Building treat New Harvest on less than equal terms with nonreligious assemblies and substantially burden religious exercise, in

violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq*. Dkt. 1 at ¶¶ 53-63. The parties have consented to the jurisdiction of a magistrate judge. Dkt. 6, 12.

Both parties seek summary judgment on all claims. Dkt. 28, 35. The Court heard oral arguments on April 14, 2020. After considering the arguments at the hearing, the parties' submissions, the case file, and relevant law, the Court **DENIES** New Harvest's motion for summary judgment and **GRANTS** the City's motion for summary judgment.

I. BACKGROUND

The City's zoning code specifies a "Central City Overlay" district and, within that, a "Downtown Core Area." Dkt. 28-5 (Hunter Decl.) at ¶ 4 and Ex. C. Most of the Downtown Core Area is classified as "mixed use." *Id.* However, in 2006, the City amended its zoning code to include a prohibition on "[c]lubs, lodges, places of religious assembly, and similar assembly uses" on the ground floor of buildings facing Main Street in the 100 to 300 blocks of Main Street. *Id.* at ¶ 5 and Ex. C at 4 (Section 37-40.310(a)(2)). This three-block area lies within the larger Downtown Core Area. *Id.* at ¶ 4. For purposes of this order, the Court will refer to this zoning restriction as the "assembly uses provision" and will refer to the 100 to 300 blocks of Main Street as the "Main Street restricted area."

According to the City, the purpose of the assembly uses provision is "to stimulate commercial activity

within the City's downtown, which had been in a state of decline, and to establish a pedestrian-friendly, active and vibrant Main Street." *Id.* at ¶ 5. Aside from "normal [Conditional Use Permit] requirements," there is no restriction on assembly uses in the Downtown Core Area outside the three blocks of the Main Street restricted area, and there is no prohibition on assembly uses within the Main Street restricted area above the ground floor. *Id.*

New Harvest is part of a consortium of churches called New Harvest that is "like a denomination, but without a hierarchy of leadership" and has "beliefs [that] fall within the general stream of conservative, Evangelical, Pentecostal doctrine." Dkt. 36 (Torres Decl.) at ¶ 2. New Harvest currently operates from a rented facility in downtown Salinas located at 357 Main Street under a conditional use permit ("CUP") issued in 1994. *Id.* at ¶ 17; Dkt. 28-5 at ¶ 3. The CUP has been extended twice; the second extension was a three-year extension granted in June 2000. Dkt. 28-5 at ¶ 3. At the time of the last CUP extension, New Harvest told the City it did not intend to occupy 357 Main on a long-term basis, expected to be at the location for up to an additional three years, and was hoping to either buy a permanent building or build elsewhere. *Id.* at ¶ 3 and Ex. B at 2. Nevertheless, New Harvest has since continued to use the building at 357 Main Street as a "legal nonconforming use." *Id.* at ¶ 3.

New Harvest's weekly schedule of activities includes a Sunday morning worship service (including a worship band) and programs for children and

teens/tweens; a Tuesday evening worship service, "Fun Club" for children ages 3-4, and boys' ministries (which alternate weekly between two different age groups); a Thursday evening worship band rehearsal; a Friday evening prayer meeting; and a women's Bible study on some Saturday mornings. Dkt. 36 at ¶¶ 11-16. Some of the children's ministries take place in buildings near New Harvest's current location due to lack of space. *Id.* at ¶ 12. New Harvest has also had to discontinue its girls' ministry due to lack of space. *Id.* at ¶ 13.

In March 2018, New Harvest closed escrow on the purchase of the Beverly Building, which is located at 344 Main Street, within the Main Street restricted area. *Id.* at ¶ 21; Dkt. 1 at ¶ 27. In January 2018, New Harvest filed applications for a zoning code amendment and CUP to allow it to conduct worship services on the ground floor of the Beverly Building. Dkt. 28-5 at ¶ 7. At an August 2018 hearing, the City's Planning Commission voted to deny New Harvest's applications based on the assembly uses provision. *Id.* at ¶ 9 and Ex. E. New Harvest appealed the Planning Commission's decision to the City Council, which denied the appeal and approved the Planning Commission's decision on November 6, 2018, following a public hearing. *Id.* at ¶ 10 and Ex. F. On the same date, the City Council amended the definition of "religious assembly" in the assembly uses provision so that the definition did not include schools, day care centers, offices, or retail. *Id.* at ¶ 10 and Ex. G.

II. LEGAL STANDARD

Summary judgment is appropriate if the moving party shows that there is no genuine dispute as to any material fact and the party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is material if it may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine dispute of material fact exists if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.*

The party moving for summary judgment bears the initial burden of informing the court of the basis for the motion and identifying portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Where the party moving for summary judgment has the burden of persuasion at trial, such as where the moving party seeks summary judgment on its own claims or defenses, the moving party must establish "beyond controversy every essential element of its [claim]." *So. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (citation omitted). Where the moving party seeks summary judgment on a claim or defense on which the opposing party bears the burden of persuasion at trial, "the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an

essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). If the moving party meets its initial burden, the burden shifts to the nonmoving party to produce evidence supporting its claims or defenses. *Id.* at 1103. If the nonmoving party does not produce evidence to show a genuine issue of material fact, the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 323.

"The court must view the evidence in the light most favorable to the nonmovant and draw all reasonable inferences in the nonmovant's favor." *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1049 (9th Cir. 2014). However, the party opposing summary judgment must direct the court's attention to "specific, triable facts." *So. Cal. Gas*, 336 F.3d at 889. "[T]he mere existence of a scintilla of evidence in support of the plaintiff's position" is insufficient to defeat a motion for summary judgment. *Anderson*, 477 U.S. at 252. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *City of Pomona*, 750 F.3d at 1049-50 (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

III. EVIDENTIARY ISSUES

A. Evidentiary objections

1. New Harvest's objections

New Harvest filed objections to the Declarations of Megan Hunter and Gregory R. Aker, which were

submitted by the City in support of its summary judgment motion, under Federal Rule of Evidence 408 on the grounds that selected portions of those declarations refer to settlement discussions. Dkt. 46. The evidence to which New Harvest objects concerns discussions between the City and New Harvest regarding possible modifications to the Beverly Building that would place commercial pedestrian-oriented activities on the ground floor facing Main Street and allow the church to hold worship services at the back portion of the ground floor. *Id.*[1]

New Harvest's evidentiary objections are **OVERRULED** on both procedural and substantive grounds. First, Civil Local Rule 7-3(a) requires that "[a]ny evidentiary and procedural objections to [a] motion must be contained within the [opposition] brief or memorandum." New Harvest's filing of a separate document containing evidentiary objections is in violation of this Civil Local Rule. Second, Federal Rule of Evidence 408, upon which New Harvest relies, states that evidence of settlement negotiations is not admissible "either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction" but "[t]he court may admit this evidence for another purpose." Therefore, even assuming that the evidence to which New Harvest objects relates to settlement negotiations between the parties, the Court may consider that evidence for purposes other

[1] New Harvest's opposition to the City's summary judgment motion addresses this evidence notwithstanding the evidentiary objections. *See* Dkt. 45 at 6-7.

than the validity or amount of New Harvest's claim or as impeachment. Nevertheless, the evidence of alleged discussions between the City and New Harvest regarding possible modifications to New Harvest's proposed use of Beverly Building is not material to the Court's analysis of New Harvest's RLUIPA claims.

2. The City's objections

The City objects to the Declaration of Robert W. Burgess submitted by New Harvest in support of its motion for summary judgment. Dkt. 48 at 21-22. The City argues that the Court should exclude Mr. Burgess's testimony because: (1) New Harvest did not disclose Mr. Burgess by the expert witness disclosure deadlines in this case; (2) Mr. Burgess's testimony is lay opinion barred under Federal Rule of Evidence 701; and (3) Mr. Burgess's testimony violates the standard set forth in *Daubert v. Merrell Dow Pharm.*, 509 U.S. 592 (1993), because it is "devoid of any explanation as to the 'reasoning' or 'methodology' used in reaching his conclusion." *Id.*

The City's objection to Mr. Burgess's declaration is **OVERRULED**. Although Mr. Burgess cannot testify as an expert in this case due to New Harvest's failure to disclose him, the declaration provides adequate foundation for the Court to consider Mr. Burgess as a fact witness concerning the current availability of other properties in Salinas.

B. Plaintiff's Request for Judicial Notice

New Harvest filed a request that the Court take judicial notice of several items. Dkt. 41. The City did not oppose the request for judicial notice.

The Court may judicially notice a fact that "is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993).

New Harvest seeks judicial notice of the articles of incorporation of Ariel Theatre. Dkt. 41 at 2. Articles of incorporation are subject to judicial notice. *In re Yahoo! Inc. Shareholder Deriv. Litig.*, 153 F. Supp. 3d 1107, 1117 (N.D. Cal. 2015). The remaining items in New Harvest's request for judicial notice are portions of the Salinas Zoning Code. Dkt. 41 at 2. Municipal ordinances are proper subjects of judicial notice. *Tollis Inc. v. Cnty. of San Diego*, 505 F.3d 935, 938 n.1 (9th Cir. 2007).

Accordingly, the Court **GRANTS** New Harvest's request that the Court take judicial notice to Exhibits 3-7 to the Declaration of Kevin Snider (Dkt. 40).

IV. DISCUSSION

RLUIPA was enacted "to protect the free exercise of religion guaranteed by the First Amendment from government regulation." *Guru Nanak Sikh Soc. Of*

Yuba County v. County of Sutter, 456 F.3d 978, 985 (9th Cir. 2006). RLUIPA contains several provisions limiting government regulation of land use, referred to as: (1) the substantial burden provision, (2) the equal terms provision, (3) the nondiscrimination provision, and (4) the exclusions and limits provision. *See* 42 U.S.C. § 2000cc; *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1169 and n.24 (9th Cir. 2011). In this case, New Harvest asserts claims under RLUIPA's substantial burden and equal terms provisions. Dkt. 1 at ¶¶ 53-63. Each party seeks summary judgment on both of New Harvest's RLUIPA claims and agrees that this case can properly be resolved on summary judgment. Dkt. 28, 35.

A. Substantial Burden Claim

A government land use regulation that imposes a substantial burden on the religious exercise of a religious assembly or institution is unlawful under RLUIPA "unless the government demonstrates that imposition of the burden . . . is in furtherance of a compelling government interest; and is the least restrictive means of furthering that compelling government interest." *Int'l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1066 (9th Cir. 2011) (quoting 42 U.S.C. § 2000cc(a)(1)). The plaintiff bears the burden of persuasion as to whether the City zoning ordinance, or the City's application of that ordinance to the plaintiff, "substantially burdens" the plaintiff's exercise of religion. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004). Even

if the plaintiff establishes a *prima facie* case of violation of RLUIPA such that the burden shifts to the government, the burden of establishing "substantial burden" remains with the plaintiff. *Centro Familiar*, 651 F.3d at 1171 (citing 42 U.S.C. § 2000cc-2(b)).

The City does not dispute that New Harvest is a religious assembly or institution. *See* Dkt. 28. RLUIPA provides 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 for that purpose." 42 U.S.C. § 2000cc-5(7)(B). The activities that New Harvest seeks to conduct at the Beverly Building include religious assemblies. *See* Ex. F to Dkt. 28-5 at 1. Such activities constitute a "religious exercise" within the meaning of RLUIPA's substantial burden provision. *See* 42 U.S.C. § 2000cc-5(7)(A) (defining "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief").

The Court next considers whether the City's zoning decisions have imposed a substantial burden on the religious exercise of New Harvest. The Court's analysis under the substantial burden provision "proceeds in two sequential steps." *Foursquare Gospel*, 673 F.3d at 1066. "First, the plaintiff must demonstrate that a government action has imposed a substantial burden on the plaintiff's religious exercise." *Id.* "Second, once a plaintiff has shown a substantial burden, the government must show that its action was 'the least restrictive means' of 'further[ing] a compelling

government interest.'" *Id.* (citation omitted). Thus, the Court must first find that the disputed regulation creates a "substantial burden" before reaching the question of "compelling interest." Whether a land use regulation imposes a substantial burden is a question of law. *See id.; see also Livingston Christian Schools v. Genoa Charter T'ship*, 858 F.3d 996, 1001 (6th Cir. 2017).

The Ninth Circuit has held that "for a land use regulation to impose a substantial burden, it must be oppressive to a significantly great extent"; in other words, "a substantial burden on religious exercise must impose a significantly great restriction or onus upon such exercise." *San Jose Christian College*, 360 F.3d at 1034 (internal quotation marks and citations omitted). Three key factors in determining "substantial burden" are (1) feasible alternative; (2) uncertainty, delay, expense; and (3) Plaintiff's own actions. *See Foursquare Gospel*, 673 F.3d at 1068; *Spirit of Aloha Temple v. County of Maui*, 322 F. Supp. 3d 1051, 1065 (D. Hawai'i 2018) (citing *Livingston Christian Schools*, 858 F.3d at 1004).

1. Feasible alternatives

In evaluating whether a land use regulation imposes a substantial burden, the availability of feasible alternatives to the property affected by the challenged land use regulation is a relevant consideration under Ninth Circuit law. For example, the Ninth Circuit affirmed a district court's entry of summary judgment

in favor of a city on a college's RLUIPA substantial burden claim where "there is no evidence in the record demonstrating that College was precluded from using other sites within the city." *San Jose Christian College*, 360 F.3d at 1035-36. By contrast, the Ninth Circuit affirmed summary judgment in favor of a religious organization on its RLUIPA substantial burden claim where a county denied of the organization's applications for a conditional use permit on two different properties, finding that "[t]he net effect of the County's two denials . . . is to shrink the large amount of land theoretically available to [the religious organization] under the Zoning Code to several scattered parcels that the County may or may not ultimately approve." *Guru Nanak Sikh Soc.*, 456 F.3d at 991-92

A case that illustrates the significance of feasible alternatives to the substantial burden analysis is *Victory Center v. City of Kelso*, which involved a zoning regulation that, similar to the regulation in this case, sought to encourage pedestrian-oriented retail activity on the street level within a four-block subarea of the city's "Commercial Town Center." No. 3:10-cv-5826-RBL, 2012 WL 1133643, at *1 (W.D. Wash. Apr. 4, 2012). A Washington district court granted summary judgment in favor of the city on a religious organization's RLUIPA substantial burden claim, finding that city's zoning regulations "do not impose a substantial burden of the Victory Center's religious exercise because the Victory Center is free to locate its facility anywhere outside the [Commercial Town Center] flour-block subarea dedicated to pedestrian retain activity"

or even "within this subarea anywhere above the first floor." *Id.* at *4. The court noted that "[t]he city estimates that the restricted area represents less than one eighth of one percent of zoned land within the city limits" and "locating outside of this small area does not substantially impede the Victory Center's ability to practice religious activities," particularly where "the Victory Center has not presented any evidence that the [location at issue] bears any religious significance . . . and any burden imposed by the [ ] land use restrictions is merely a matter of personal or economic convenience." *Id.*

It appears to be undisputed that New Harvest's current location at 357 Main Street is not a feasible alternative. In addressing other sites, both parties submit evidence in the form of declarations regarding the availability of alternatives. New Harvest submits the declaration of Robert W. Burgess, a licensed commercial real estate broker who is familiar with commercial properties in the City. Dkt. 38 (Burgess Decl.) at ¶¶ 1-3. Mr. Burgess states that as of the date of his declaration (February 18, 2020), only three of the 24 locations advertised for sale were in "the size range that might be considered." *Id.* at ¶ 5. Mr. Burgess indicates that two of the three properties are leased investments that were occupied and for which New Harvest would act as a landlord. *Id.* The third location is a 14,700 square foot church offered for sale at $2345,000 ($160 per square foot). *Id.* That property is located at 747 El Camino Real, nine miles north of Main Street, and can be reached by driving north from Salinas on Highway

101 North and making a U-turn on the highway to reach the property via Highway 101 South. *Id.;* Dkt. 48-1 at Ex. E.

The City has presented evidence that New Harvest told the City at least as early as June 2000 that it was looking for a new location. Dkt. 28-5 at ¶ 3 and Ex. B at 2. The City submits the declaration of Dean Chapman, a consulting expert in the field of appraised value of commercial or residential real property and other real estate matters. Dkt. 48-3 (Chapman Decl.) at ¶ 2. Mr. Chapman states that based on his review of public records for the period 2012 to 2019, he identified the sales of nine churches and other properties with square footage suitable to house New Harvest's religious worship and other activities and within or close to its price range. *Id.* at ¶ 4 and Ex. B. The City has also presented evidence that it has denied only one of over 100 conditional use permit applications submitted by churches over the past fifty years. Dkt. 28-5 at ¶ 12. Meanwhile, according to Pastor Torres, who testified as New Harvest's Rule 30(b)(6) designee, New Harvest considered only two properties between 2003 and its purchase of the Beverly Building in 2018: one property was unavailable because it was zoned industrial, and New Harvest did not submit a purchase offer for the second because Pastor Torres was out of the country. Ex. A to Dkt. 48-1 at 78:13-81:13.

New Harvest has not presented any evidence to counter the City's evidence of feasible alternative locations. Notably, the evidence submitted by New Harvest focuses only on church locations available at present,

even though by its own admission has been considering a move for many years. Dkt. 28-5 at ¶ 3 and Ex. B at 2 (minutes of June 2000 Planning Commission meeting at which New Harvest's attorney stated that New Harvest "may need to be [at its current location] another three years, as they are hoping to either buy a permanent building or build elsewhere"); *see also* Dkt. 36 at ¶ 20 (statement by Pastor Torres that New Harvest "looked for years at commercial properties to buy or lease within Salinas."). As to the one presently-available church property identified by New Harvest, New Harvest does not establish any reason why that property would not be a feasible alternative. The fact that any church members coming from the direction of downtown Salinas would have to make a U-turn does not establish that the location is unsuitable. Moreover, New Harvest has failed to offer any evidence as to (1) other properties (not currently configured as a church) that are available at present, (2) other properties that were available in relevant past years, or (3) other properties that are expected to become available in the future.

Even without evidence concerning specific available properties, such as that presented by the City in this case, courts in this circuit have rejected substantial burden claims based on the religious organization's ability to relocate elsewhere. *See*, *e.g.*, *Victory Center*, 2012 WL 1133643, at *4 (granting summary judgment to city on undue burden claim under RLUIPA where plaintiff was free to locate its facility anywhere outside the four-block area affected by the

disputed zoning ordinance); *see also Daniel and Francine Scinto Found'n v. City of Orange*, No. SA CV 15-1537-DOC (JCGx), 2016 WL 4150453, at *11 (C.D. Cal. 2016) (denying plaintiff's motion for summary judgment on RLUIPA undue burden claim where plaintiff did not cite anything indicating it was precluded from carrying out its religious mission or religious activities at other locations).

Accordingly, the availability of alternative locations is evidence that that the City's zoning restrictions that apply to the Church's desired operations at the Beverly Building do not constitute a substantial burden.

2. Uncertainty, delay, and expense

Where the alternative locations require substantial delay, uncertainty, or expense, a substantial burden may exist. *Foursquare Gospel*, 673 F.3d at 1068. The only evidence New Harvest has presented on this point is that the alternative location identified by Mr. Burgess would require people travelling from the direction of downtown Salinas to make a U-turn. Dkt. 38 at ¶ 5; Ex. E to Dkt. 48-1. As discussed above, New Harvest has failed to demonstrate why this fact renders the alternative location substantially burdensome. Thus, New Harvest has failed to show that the City's zoning actions subject it to substantial delay, uncertainty, or expense that might constitute a substantial burden.

3. New Harvest's own actions

The City presents evidence that New Harvest was aware at the time it bought the Beverly Building that it was not zoned for assembly uses on the ground floor and that the City would oppose the church's efforts to conduct religious services there. Ex. A to Dkt. 28-1 at 153:6-155:19; Ex. D to Dkt. 28-5 at 17:19-18:12; *see also* Dkt. 1 at ¶¶ 31, 33. The City argues that a self-imposed burden is not a substantial burden under RLUIPA and that thus New Harvest cannot prevail on its substantial burden claim because New Harvest purchased the Beverly Building without a reasonable expectation of being allowed to use that property for its intended religious purposes. *See* Dkt. 28 at 13-14 (citing *Livingston Christian Schools*, 858 F.3d at 1004; *Andon, LLC v. City of Newport News, Va.*, 813 F.3d 510, 515 (4th Cir. 2016); *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007)).

New Harvest argues that "[i]n this jurisdiction, it is not an affirmative defense to any of RLUIPA's four provisions that a religious institution acquired property 'without a reasonable expectation of being able to use that land for religious purposes.'" Dkt. 45 at 3 (citing City's motion for summary judgment at 12). New Harvest notes that the authorities cited by the City in support of its self-imposed burden argument are from other circuits. Dkt. 45 at 2-3. New Harvest also cites several cases from the Ninth Circuit and courts within the circuit in which churches prevailed despite apparently purchasing properties prior to permit approval

and with knowledge of zoning restrictions. *Id.* at 3-4 and cases cited therein.

The Court is not persuaded by New Harvest's argument. None of the in-circuit cases it cites rejected or even discussed the self-imposed burden doctrine followed in other circuits. In fact, at least one district court within the Ninth Circuit recently relied on the self-imposed burden doctrine (as articulated in *Livingston Christian Schools* and other out-of-circuit authorities cited by the City) in evaluating a claim of substantial burden under RLUIPA. *See Spirit of Aloha Temple v. County of Maui*, 322 F. Supp. 3d at 1065. Under these circumstances, the Court is free to look to other circuits for guidance, and the Court finds the cases cited by the City persuasive on this point.

New Harvest's own actions in buying the Beverly Building when it knew that it was not zoned for ground floor assemblies and having been expressly informed that the City would oppose the church's efforts to conduct religious services on the ground floor is evidence that the City's actions do not impose a substantial burden within the meaning of RLUIPA.

4. Conclusion on substantial burden claim

New Harvest's substantial burden argument is that the City's zoning restriction denies New Harvest the use of one suitable space and thus constitutes a substantial burden on the exercise of its religious beliefs. *See* Dkt. 35 at 18-19; Dkt. 50 at 5-6. At its core,

this is an argument that churches are exempt from zoning restrictions. That is not the law. *See*, *e.g.*, *San Jose Christian College*, 360 F.3d at 1035 (affirming summary judgment for city on RLUIPA substantial burden claim because "while the [City's] ordinance may have rendered [the religious institution] unable to provide education and/or worship at the Property, there is no evidence in the record demonstrating that [the religious institution] was precluded from using other site within the city" nor "any evidence that the City would not impose the same requirements on any other entity").

Applying the proper legal standards and considering the record as a whole—including evidence regarding the availability of feasible alternative locations; the absence of evidence concerning uncertainty, delay, and expense to New Harvest associated with those alternative locations; and evidence that the burden of which New Harvest complains is self-imposed—the Court concludes that New Harvest has not carried its burden of demonstrating that the City's actions have imposed a substantial burden on New Harvest's religious exercise. *See Foursquare Gospel*, 673 F.3d at 1066. Accordingly, New Harvest's motion for summary judgment on its substantial burden claim is **DENIED** and the City's motion for summary judgment on that claim in **GRANTED.**

B. Equal Terms Claim

Under RLUIPA's equal terms provision, governments are prohibited from imposing land use restrictions on a religious assembly "on less than equal terms" with a non-religious assembly. *Centro Familiar*, 651 F.3d at 1169 (citing 42 U.S.C. § 2000cc(b)). To succeed on a claim under the equal terms provision, the claimant must demonstrate four elements: (1) an imposition or implementation of a land use regulation, (2) by a government, (3) on a religious assembly or institution, (4) on less than equal terms with a nonreligious assembly or institution. *Id.* at 1170-71. In analyzing a claim under the equal terms provision, courts examine whether a government regulation subjects religious and secular assemblies or institutions that are "similarly situated with respect to an accepted zoning criteria" to different land use treatment. *See id.* at 1173; *see also Corp. of the Catholic Archbishop of Seattle v. City of Seattle*, 28 F. Supp. 3d 1163, 1167 (W.D. Wash. 2014). If a religious institution demonstrates all four prongs of an equal terms claim, the burden of proof shifts to the government on all elements. *Centro Familiar*, 651 F.3d at 1171 (citing 42 U.S.C. § 2000cc-2(b)).

1. Facial violation

Section 37-40.310(a)(2), (3) does not, on its face, establish a *prima facie* violation of RLUIPA's equal terms provision. Such a violation has been found where, for example, a city code allowed secular

membership organizations as of right but required religious organizations to obtain a conditional use permit. *See Centro Familiar*, 651 F.3d at 1175. By contrast, the text of Salinas's zoning provision treats secular and religious places of assembly the same: neither are allowed on the ground floor in the Main Street restricted area. Section 37-40.310(a)(2) ("Assembly and Similar Uses. Clubs, lodges, places of religious assembly, and similar assembly uses shall only be permitted above the ground floor of buildings facing Main Street within the downtown core area."). As such, New Harvest has failed to demonstrate that the assembly uses provision, on its face, violates RLUIPA's equal terms provision. *See Calvary Chapel Bible Fellowship v. County of Riverside*, 948 F.3d 1172, 1176 (9th Cir. 2020).

New Harvest also argues that Salinas's zoning ordinance violates the equal terms provision because it allows "live entertainment" in the form of "musical, theatrical, dance, karaoke, cabaret or comedy act" in secular venues but not religious assemblies within the Main Street restricted area. Dkt. 35 at 10-11 (citing Zoning Code Section 37-40-.310(a)(3)(A)). This argument overlooks the fact that these six types of entertainment are permitted in the Main Street restricted area only as *accessory uses* to a permitted underlying principal use, such as a restaurant, art gallery, music studio, or food and beverage sales establishment. *See* Ex. C to Dkt. 28-5 at Section 37-40.310(a)(3). On its face, this accessory use provision is neutral as to content, allowing both religious and

secular music and other entertainment as accessories to otherwise-permitted uses. Thus, the existence of the accessory uses provision also does not establish a facial violation of RLUIPA's equal terms provision.

2. "As applied" violation

Turning to the question of whether the City's application of its zoning ordinance violates RLUIPA's equal terms provision, the Court views the key inquiry to be as set forth in *Centro Familiar*: the City violates the equal terms provision only when a church is treated on less than equal basis with a secular comparator, similarly situated with respect to accepted zoning criteria, such as "parking, vehicular traffic, and generation of tax revenue." *See Centro Familiar*, 651 F.3d at 1173 (citing *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 373 (7th Cir. 2010) (en banc)).

a. Accepted zoning criteria

The goal of the City's assembly uses provision is "to stimulate commercial activity within the City's downtown, which had been in a state of decline, and to establish a pedestrian-friendly, active and vibrant Main Street." Dkt. 28-5 at ¶ 5; *see generally* Dkt. 40-2 at 20:13-22 (deposition testimony of Megan Hunter that focus in downtown core area is on "creating a special entertainment oriented mixed use district with residential above the ground floor stories where you have a lot of excitement, vibrancy . . . "); Ex. C to Dkt.

28-5 at Section 37-40.290 (defining "Purpose" of central city overlay regulations to include "(a) Encourag[ing] and accommodat[ing] the increased development intensity for mixed use, commercial, retail, and office uses within the central city . . . (c) Promot[ing] live entertainment uses in the downtown core area of the city ..; and (3) Encourag[ing] pedestrian-oriented neighborhoods where local residents and employees have services, shops, entertainment, jobs, and access to transit within walking distance of their homes and workplace.").

Similar goals have been regarded as accepted zoning criteria. *See Centro Familiar*, 651 F.3d at 1172-73 (identifying accepted zoning criteria to include parking, vehicular traffic, and generation of tax revenue); *Victory Center*, 2012 WL 1133643, at *6 (considering whether religious organization was treated on less than equal terms than similar secular institutions with respect to zoning ordinance that sought to encourage pedestrian-oriented retail activity on the street level within a four-block subarea of city center); *see also River of Life*, 611 F.3d at ("If the reasons for excluding some category of secular assembly—whether traditional reasons such as effect on traffic or novel ones such as creating a "Street of Fun" . . . —are applicable to a religious assembly, the ordinance is deemed neutral and therefore not in violation of the equal terms provision").

Accordingly, the Court finds that the City's accepted zoning criteria are "to stimulate commercial activity within the City's downtown, which had been in a

state of decline, and to establish a pedestrian-friendly, active and vibrant Main Street." *See* Dkt. 28-5 at ¶ 5.

b. Main Street theaters and cinemas

The Court must next consider whether the assembly uses provision treats New Harvest on a less than equal basis with similarly situated secular comparators with respect to the City's zoning criteria. New Harvest identifies the following four uses within the Main Street restricted area as relevant comparators: Maya Cinema, El Rey Theater, Fox Theater, and Ariel Theatre. Dkt. 35 at 5-6, 12. According to New Harvest, these four properties are "similarly situated secular comparators with respect to the zoning criteria." *Id.* at 12. New Harvest characterizes the four uses as "secular assemblies." *Id.* New Harvest's arguments and evidence regarding the operations of the four cinemas/theaters, which focus on seating capacity, are as follows:

- **Maya Cinema:** New Harvest states that this cinema is a "modern facility which shows first run films" in "14 theater rooms, all located on the ground floor" with one theater room seating 177, one seating 144, and the rest seating 44 persons. Dkt. 35 at 6; *see also* Dkt. 42 (Andrews Decl.) at ¶ 3.
- **El Rey Theater:** New Harvest states that this theater had 800 seats when it opened in 1935, currently has a seating capacity of 400 on the main floor. Dkt. 35 at 6; Dkt. 36 at ¶ 17; Dkt. 40-8. According to New Harvest, this

theater has sat vacant for a number of years but has recently been sold. Dkt. 35 at 6.

- **Fox Theater:** New Harvest describes this property as a "multi-purpose venue" that "hosts weddings, quinceneras, business conferences, live music concerts, live comedy shows, and banquets." Dkt. 35 at 6. According to New Harvest, the building has multiple meeting rooms located on the first and second floors and advertises rentals of its facilities with banquet seating for 350 and wedding ceremony seating for over 500 persons. *Id.*; *see also* Dkt. 36 at ¶ 18.

- **Ariel Theatre:** New Harvest states that this is a venue with a capacity of 289 persons that houses a non-religious children's theater program where children and youth perform in large stage productions on Fridays and Saturdays and where classes for children are offered. Dkt. 35 at 5-6; *see also* Dkt. 37 (Palacio Decl.) at ¶ 4.

The City argues that these uses are not relevant secular comparators to New Harvest because each promotes the City's accepted zoning criteria:

> They are open to the general public. Their doors are open regularly and for extended periods throughout the week. They draw tourists and City residents who are seeking leisure or entertainment. Their windows and doors are large and open to the street, promoting foot traffic and personal safety. They form the backbone of Main Street's commercial

> activity. Unlike private clubs and churches, cinemas and theatres support *all* of the City's regulatory purposes.

Dkt. 48 at 9 (emphasis in original).

To evaluate a RLUIPA equal terms claim, the Court must identify the "objective criteria addressed in the [challenged] code section" and evaluate whether the disallowed religious use is similarly situated to "any secular comparator permitted in, not excluded from, the zone." *Archbishop of Seattle*, 28 F. Supp. 3d at 1169 (citing *Centro Familiar*, 651 F.3d at 1174). According to expert testimony regarding city planning submitted by Salinas, which New Harvest does not refute, "[i]n the city planning field, it is well known that private assembly-type uses . . . detract from a city's efforts to promote a vibrant, pedestrian-friendly downtown" because such uses are "typically open only to organization members, operate during limited hours, generate limited interest among the general public, and typically have 'blank facades.'" Dkt. 28-2 (Aknin Decl.) at ¶ 6. By contrast, "movie theatres, nightclubs, restaurants, bars and other entertainment venues . . . tend to attract far greater numbers of pedestrians to a city's downtown, again encouraging increased commercial activity and a vibrant downtown atmosphere" because such uses "are generally open more days of the week and hours of the day, including evenings and weekends, are freely open to the general public, attract [a] far greater number of people into a downtown area, and generate interest among city residents, residents from nearby communities, and tourists to a far greater

extent than do private clubs or churches." *Id.* at ¶ 7, Ex. A.

With regards to New Harvest's proffered comparators, New Harvest has failed to show that the Maya Cinema or Fox Theater are relevant comparators. While the seating capacity of the Maya Cinema and Fox Theater may be similar to New Harvest's proposed use of the Beverley Building, New Harvest's own evidence establishes that these properties, unlike New Harvest, offer numerous activities throughout the week that would reasonably be expected to attract the general public, such as first run films, weddings, concerts, comedy shows, and other events. By contrast, New Harvest offers no evidence that its activities actually draw any non-members, and no evidence that its activities have a positive impact on commercial activity or vibrancy within the Main Street restricted area.

Similarly, New Harvest has failed to establish that the El Rey Theater is a relevant comparator. The *only* evidence presented by New Harvest regarding the El Rey Theater is its seating capacity, both currently (400 seats on the ground floor) and when the theater opened in 1935 (800 seats). Dkt. 35 at 6; Dkt. 36 at ¶ 17; Dkt. 40-8. However, this capacity information provides no basis for comparing the operations of the El Rey Theater to New Harvest's proposed use of the Beverly Building with respect to the City's zoning criteria of stimulating commercial activity and vibrancy in the Main Street restricted area.

The evidence concerning the Ariel Theatre is more extensive and suggests more parallels with the proposed operations of New Harvest, in that the theater is currently in use and appears to offer shows mainly on weekends. However, there is also evidence in the record that schools use the theater, which indicates weekday activities at the property. Dkt. 40-2 at 38:10-13 (testimony of Salinas Community Development Director Megan Hunter that "both the Fox Theater and Ariel Theater have a lot of schools that use their facilities so they have a lot of activity there"). Moreover, there is evidence that rehearsals and classes also occur at that theater, which suggests that participants (and their parents) visit the theater area throughout the week. *Id.* at 43:9-10 (testimony of Megan Hunter that Ariel Theater has classes and "rehearsals, and other things that they do there."). This evidence establishes that the Ariel Theater is not similarly situated to New Harvest's proposed use of the Beverly Building with respect to the accepted zoning criteria, which include fostering an active and vibrant Main Street.

Based on the evidence in the record concerning the particular Main Street cinemas and theaters identified by New Harvest, the Court concludes that these properties are not "similarly situated" to New Harvest's proposed use of the Beverly Building with respect to the City's zoning criteria, which seek "to stimulate commercial activity within the City's downtown, which had been in a state of decline, and to establish a pedestrian-friendly, active and vibrant Main Street." *See* Dkt. 28-5 at ¶ 5. Accordingly, the permitting of theaters

and cinemas within the Main Street restricted area does not establish a *prima facie* violation of RLUIPA's equal terms provision.

c. Other uses in Downtown Core Area

New Harvest also cites the following actual or permitted uses within the Downtown Core Area as evidence in support of its RLUIPA equal terms claim: nursing homes, hospitals, and residential care facilities; cemeteries; and government offices such as a post office, city hall, and police stations. Dkt. 35 at 15-16. New Harvest argues that such uses "are not conducive to an exciting and vibrant downtown which pulls in foot traffic." *Id.* at 15. However, New Harvest has not offered any evidence that the City has permitted such uses within the Main Street restricted area. The actual or permitted existence of such facilities within the larger Downtown Core Area does not support New Harvest's contention that the City's restriction of religious assemblies within the three-block Main Street restricted area treats religious organizations differently than secular organizations within that area.

V. CONCLUSION

For the reasons discussed above, the Court **ORDERS** as follows:

1. New Harvest's evidentiary objections (Dkt. 46) are **OVERRULED.**

2. The City's evidentiary objections (Dkt. 48 at 21-22) are **OVERRULED.**

3. New Harvest's request for judicial notice (Dkt. 41) is **GRANTED.**

4. New Harvest's motion for summary judgment (Dkt. 35) is **DENIED.**

5. The City's motion for summary judgment (Dkt. 28) is **GRANTED**.

SO ORDERED.

Dated: May 29, 2020

/s/ Susan Van Keulen
SUSAN VAN KEULEN
United States Magistrate Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEW HARVEST CHRISTIAN FELLOWSHIP Plaintiff-Appellant, v. CITY OF SALINAS, Defendant-Appellee.	No. 20-16159 D.C. No. 5:19-cv-00334-SVK Northern District of California, San Jose ORDER (Filed May 31, 2022)

Before: NGUYEN and COLLINS, Circuit Judges, and RAKOFF,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judge Nguyen and Judge Collins have voted to deny the petition for rehearing en banc, and Judge Rakoff has so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35. The petitions for panel rehearing and rehearing en banc are denied.

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

Sec. 37-40.310. Use classifications.

(a) **Downtown Core Area.** The use classifications for properties located in the downtown core (DC) area shall be those of the underlying base district (as identified in Article III: Base District Regulations of the Zoning Code), with the following exceptions:

(1) Residential Uses. Residential uses are not permitted on the ground floor fronting Main Street regardless of the underlying base district designation.

(2) Assembly and Similar Uses. Clubs, lodges, places of religious assembly, and similar assembly uses shall only be permitted above the ground floor of buildings facing Main Street within the downtown core area.

(3) Live Entertainment Uses. Live entertainment uses shall be a permitted use in the downtown core area and shall not be subject to the approval of a conditional use permit for a live entertainment permit if the live entertainment use meets the following requirements:

(A) The live entertainment use shall be limited to a musical, theatrical, dance, karaoke, cabaret, or comedy act performed by one or more persons (excludes adult entertainment);

(B) The venue or location where the live entertainment use will be conducted or performed shall be a restaurant, art gallery, music studio, food and beverage sales establishment, or similar use which is

allowed in the applicable zoning district as either a permitted use or as a use permitted subject to the issuance of a site plan review;

(C) The live entertainment use shall be an accessory use to the principal use;

(D) The live entertainment use shall be conducted entirely in an enclosed building;

(E) No admission or cover change shall be charged for the live entertainment;

(F) The hours of operation (for the live entertainment) shall be limited to Friday, Saturday, and holidays from 9:00 a.m. to 12:00 a.m. and on Sunday through Thursday from 9:00 a.m. to 10:00 p. m.;

(G) The principal use and building complies with all applicable Fire and Building Codes, including accessibility requirements for the disabled, including the maximum occupancy established for seated patrons in the room(s) or areas where the entertainment is provided;

(H) The maximum noise level shall not exceed a maximum of sixty-five decibels at any property line of the lot or parcel where the live entertainment use is being conducted or performed. For mixed use buildings and developments, the applicant shall demonstrate to the satisfaction of the city planner that sound attenuation measures or other buffering features have been incorporated into the building

to ensure that the interior noise level (inside any residential dwelling unit) located on the subject site will not exceed a maximum of forty-five decibels;

(I) The city planner has the authority to require and verify compliance with the requirements of this division and to bring enforcement action in accordance with Article VI, Division 18: Enforcement and Penalties in regard to any live entertainment use, which is not be operated in compliance with the requirements of this Zoning Code; and

(J) For live entertainment uses that do not meet one or more of the above-referenced requirements, or for which the principal use is not a permitted use or use subject to a site plan review approval in the applicable zoning district, a conditional use permit for a live entertainment permit shall be required.

(b) **Downtown Neighborhood Area.** The use classifications for properties located in the downtown neighborhood area shall be those of the underlying base district identified in Article III: Base District Regulations of this Zoning Code.

(Ord. No. 2463 (NCS).)