

## Notes

# **INDIVIDUALIZED VS. GENERALIZED ASSESSMENTS: WHY RLUIPA SHOULD NOT APPLY TO EVERY LAND-USE REQUEST**

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### ABSTRACT

*Courts and advocates alike have struggled to articulate a coherent rule regarding when the Religious Land Use and Institutionalized Persons Act (RLUIPA) should apply to local governments' land-use decisions. When it is applied too broadly, RLUIPA runs roughshod over the ability of state and local governments to control their own land-use patterns, and it is inconsistent with the Supreme Court's First Amendment and federalism precedents. When applied too narrowly, RLUIPA fails to provide a remedy for victims of religious discrimination. This Note explains the legally cognizable—but previously unrecognized—differences between the types of land-use decisions that local governments make, and it argues that RLUIPA should apply to individualized assessments, such as use permits and variances, but that RLUIPA should not apply to generalized assessments, such as requests for zoning-ordinance amendments. This Note uses two recent Ninth Circuit cases—one of which would have been decided differently if the court had used the proposed distinction—to illustrate how an analysis of individualized and generalized assessments would work in practice.*

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## INTRODUCTION

In 2006, the International Church of the Foursquare Gospel (ICFG) entered into a contract to purchase property in San Leandro, California, that it believed would suit its growing congregation.<sup>1</sup> Several weeks later, church officials met with city staff, who informed the ICFG that the property was located in an industrial zoning district, which did not permit any type of assembly use, including churches.<sup>2</sup> After the city denied the church's requests to amend the city's zoning ordinance, the ICFG sued the city, alleging three claims under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)<sup>3</sup> and six constitutional claims.<sup>4</sup> The district court granted the city's motion for summary judgment on all claims,<sup>5</sup> expressing concern that "[c]arried to its logical conclusion, [the ICFG's] argument would ultimately exempt religious assemblies (as opposed to other entities) from the requirement of complying with any zoning regulation, regardless of how neutrally applied."<sup>6</sup> On appeal, the Ninth Circuit found that the city's consideration of the ICFG's requests was within the scope of RLUIPA and reversed the district court on two of the ICFG's RLUIPA claims.<sup>7</sup> The appellate court remanded the case, holding that the city failed to articulate a compelling reason for its denial of the ICFG's requests.<sup>8</sup>

Despite the district court's warning, the Ninth Circuit articulated no limiting principles to its holding in *International Church of the Foursquare Gospel v. City of San Leandro*.<sup>9</sup> Additionally, its application of RLUIPA to San Leandro's denial of the ICFG's rezoning requests suffers from three major flaws. First, the decision rests on a fundamental misunderstanding of what a request to amend a zoning ordinance actually entails. Specifically, the Ninth Circuit

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1. *Int'l Church of the Foursquare Gospel v. City of San Leandro*, 632 F. Supp. 2d 925, 930 (N.D. Cal. 2008), *rev'd*, 634 F.3d 1037 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 251 (2011).

2. *Id.* at 931–32.

3. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc-2 to 2000cc-5 (2006)).

4. *Int'l Church of the Foursquare Gospel*, 632 F. Supp. 2d at 935–36.

5. *Id.* at 946.

6. *Id.* at 943.

7. *Int'l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1061 (9th Cir.), *cert. denied*, 132 S. Ct. 251 (2011).

8. *Id.*

9. *Int'l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059 (9th Cir.), *cert. denied*, 132 S. Ct. 251 (2011).

erred when it determined that San Leandro’s consideration of the ICFG’s rezoning requests constituted an individualized assessment, which is subject to RLUIPA. Instead, it should have found that San Leandro’s consideration of the ICFG’s requests was a generalized assessment, which should fall outside the scope of the statute. Second, the Ninth Circuit’s construction of RLUIPA fails to comport with both Supreme Court precedent regarding the Free Exercise Clause and Congress’s Section 5 enforcement authority conferred by the Fourteenth Amendment. Third, the Ninth Circuit’s holding threatens to undermine the federal-state balance in which the regulation of land use has been a “traditional state power,”<sup>10</sup> “the quintessential state activity,”<sup>11</sup> and “a function traditionally performed by local governments.”<sup>12</sup> The Ninth Circuit’s decision thus enables a massive federal intrusion into an area of law that, as recognized in the Supreme Court’s decision in *Village of Euclid v. Ambler Realty Co.*,<sup>13</sup> traditionally has been reserved to the states.<sup>14</sup>

RLUIPA is Congress’s second attempt to establish strict scrutiny for local land-use decisions made when the applicant is a religious institution.<sup>15</sup> This goal is not entirely misguided; robust judicial deference to local control has sometimes come at the expense of the rights of minorities or the poor.<sup>16</sup> Indeed, even Justice Sutherland’s opinion in *Euclid* contains discriminatory language<sup>17</sup> that would offend the sensibilities of the many modern urban planners who are

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10. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 173 (2001).

11. *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1983).

12. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994).

13. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

14. *See id.* at 397 (1926) (upholding the general power of local governments to pass zoning ordinances). Although this Note focuses on California, its main argument—that courts may apply RLUIPA only to individualized assessments of land uses—is applicable in any jurisdiction that uses Euclidian zoning.

15. The Supreme Court declared Congress’s first attempt, the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)), *invalidated in part by City of Boerne v. Flores*, 521 U.S. 507 (1997), to be in part beyond the scope of Congress’s enforcement power under Section 5 of the Fourteenth Amendment, *see infra* notes 44–48 and accompanying text.

16. *See generally* DAVID M.P. FREUND, *COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA* (2007) (detailing how local organizations enabled and enforced racial segregation in housing from the 1920s through the 1970s).

17. *See Euclid*, 272 U.S. at 394 (“[V]ery often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.”).

“dedicated to advancing the art, science and profession of good planning—physical, economic and social—to create communities that offer better choices for where and how people work and live.”<sup>18</sup> A heightened consciousness of how land-use planning historically has been used as a tool for discrimination led Congress to enact statutes aimed at ensuring that municipalities use their extensive land-use power for legitimate ends.<sup>19</sup>

This Note offers a reading of RLUIPA that rests on the fundamental and legally cognizable differences between the individualized assessments that local governments conduct when considering land-use requests, such as use permits, and the generalized assessments that local governments conduct when considering requests to amend zoning ordinances. By its own terms, RLUIPA does not apply to generalized assessments, and this Note’s proposed reading of the statute is the best and most plausible construction because it avoids the constitutional problems raised by the Ninth Circuit’s holding in *San Leandro*. First, this proposed reading renders RLUIPA consistent with Supreme Court precedent regarding the scope of Congress’s Section 5 power to enforce the Free Exercise Clause. Second, it strikes the appropriate federal-state balance in an area of regulation that traditionally has been reserved to the states. Third, it preserves RLUIPA for cases in which governments conduct individualized assessments, cases in which arbitrary or discriminatory denials of land-use requests may be more likely.

To illustrate these arguments, this Note compares *San Leandro* to another Ninth Circuit RLUIPA case from 2006, *Guru Nanak Sikh Society of Yuba City v. County of Sutter*.<sup>20</sup> In *Guru Nanak*, the religious institution sought and, on two separate occasions, was denied a use permit to construct a temple in the unincorporated area of Sutter County, California.<sup>21</sup> Under California’s land-use and planning statutes, a use permit is procedurally and substantively distinct from the rezoning applications that were at issue in *San*

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18. *About Planning*, AM. PLANNING ASS’N, <http://www.planning.org/aboutplanning> (last visited Aug. 26, 2012).

19. For example, the Fair Housing Act of 1968, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601–3619 (2006)), protects the buyers and renters of real estate from discriminatory practices.

20. *Guru Nanak Sikh Soc’y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978 (9th Cir. 2006).

21. *Id.* at 982.

*Leandro*.<sup>22</sup> The individualized assessment conducted by Sutter County was not the same as the generalized assessment conducted by San Leandro. Had the Ninth Circuit recognized this important difference between the cases, it would have reached a different conclusion in *San Leandro* and affirmed the district court's grant of summary judgment in favor of the city.

This Note provides a new and principled way for courts to analyze whether a local land-use decision is subject to RLUIPA.<sup>23</sup> Part I discusses the background of RLUIPA and the Supreme Court's jurisprudence regarding the Free Exercise Clause and Congress's Section 5 enforcement authority. Part II contains a summary of zoning ordinances in general and California land-use law in particular. Part III explains the differences between *Guru Nanak* and *San Leandro*. Part IV proposes a construction of RLUIPA and describes why the Ninth Circuit was correct in *Guru Nanak* but incorrect in *San Leandro*. Part V describes several constitutional problems with the Ninth Circuit's reading of RLUIPA in *San Leandro*, problems that are avoided by construing RLUIPA based on the distinction between individualized and generalized assessments.

## I. THE ROAD TO RLUIPA

The First Amendment's Free Exercise Clause states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>24</sup> In *Sherbert v. Verner*,<sup>25</sup> the Supreme Court held that any state action that substantially burdens the free exercise of religion would be subject to strict scrutiny.<sup>26</sup> The

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22. For a discussion of the differences between use permits and rezoning applications, see *infra* Part II.B.

23. Additionally, this Note helps to resolve the circuit split regarding the application of RLUIPA. *Compare* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 275–77 (3d Cir. 2007) (holding that applying a neutral, generally applicable law does not constitute an individualized assessment within the scope of RLUIPA), *and* Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 764 (7th Cir. 2003) (same), *with* Int'l Church of the Foursquare Gospel v. City of San Leandro, 673 F.3d 1059, 1066 (9th Cir.) (holding that any case-by-case assessment of a land-use proposal is subject to RLUIPA), *cert. denied*, 132 S. Ct. 251 (2011), *and* Konikov v. Orange Cnty., 410 F.3d 1317, 1323 (11th Cir. 2005) (same).

24. U.S. CONST. amend. I. The Supreme Court has recognized Congress's authority to enforce the Free Exercise Clause through Section 5 of the Fourteenth Amendment since 1940. *See* *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment.").

25. *Sherbert v. Verner*, 374 U.S. 398 (1963).

26. *Id.* at 404.

Court defined “substantial burden” as something that requires one to “choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand.”<sup>27</sup>

Nearly thirty years later, however, in *Employment Division v. Smith*,<sup>28</sup> the Supreme Court applied rational basis review rather than strict scrutiny to a substantial burden imposed by government on the exercise of religion. The Court concluded that the State of Oregon did not violate the Free Exercise Clause when it denied unemployment benefits to two men who were fired for ingesting an illegal drug, notwithstanding the fact that the men had ingested the drug during a religious ceremony.<sup>29</sup> The Supreme Court drew an important distinction between engaging in religious conduct that is permitted by law and engaging in religious conduct that is prohibited by law.<sup>30</sup> The Court stated that “[i]t is a permissible reading of the text . . . to say that if prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision [of a law], the First Amendment has not been offended.”<sup>31</sup> Writing for the majority, Justice Scalia went on to say that “more than a century of our free exercise jurisprudence contradicts” the proposition “that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”<sup>32</sup>

*Smith* divided free-exercise jurisprudence into two lines. The pre-*Smith* line—in which courts apply strict scrutiny and typified by cases such as *Hobbie v. Unemployment Appeals Commission*,<sup>33</sup> *Thomas v. Review Board*,<sup>34</sup> and *Sherbert*—still applies when the government substantially burdens religious exercise “where the State has in place a system of individual exemptions” and refuses “to extend that system

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27. *Id.* In spite of the test that the Court applied in *Sherbert*, the level of scrutiny applied to free-exercise claims was not always clear. See Garrett Epps, *The Story of Al Smith: The First Amendment Meets Grandfather Peyote*, in CONSTITUTIONAL LAW STORIES 455, 455 (Michael C. Dorf ed., 2d ed. 2009) (“For years, the Court[] . . . was unclear, although language in the Warren and Burger Courts’ opinions suggested that the Constitution required government to show a ‘compelling interest.’”).

28. *Emp’t Div. v. Smith*, 494 U.S. 872 (1990).

29. *Id.* at 886–90.

30. *Id.* at 876.

31. *Id.* at 878.

32. *Id.* at 878–79.

33. *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136 (1987).

34. *Thomas v. Review Bd.*, 450 U.S. 707 (1981).

to cases of ‘religious hardship’ without compelling reason.”<sup>35</sup> But when the substantial burden is imposed incidental to a law of general applicability, *Smith* dictates that courts apply rational basis review.<sup>36</sup>

The Court’s decision in *Smith* surprised many observers and caused “a nationwide outcry by religious groups across the political and theological spectrum.”<sup>37</sup> In response, Congress adopted the Religious Freedom Restoration Act of 1993 (RFRA)<sup>38</sup> by a nearly unanimous vote.<sup>39</sup> RFRA stated that “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability . . . [unless the application of the regulation] (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling interest.”<sup>40</sup> In adopting RFRA, Congress found that

in *Employment Division v. Smith* . . . the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and . . . the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.<sup>41</sup>

Congress stated that its purpose in enacting RFRA was “to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened.”<sup>42</sup>

Four years after Congress enacted RFRA, the Supreme Court was squarely presented with the task of deciding the statute’s constitutionality in *City of Boerne v. Flores*.<sup>43</sup> In *Boerne*, the Catholic Archbishop of San Antonio sued the City of Boerne under RFRA after the city refused to grant a church a permit to expand one of its buildings when the expansion would have violated the city’s historic-

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35. *Smith*, 494 U.S. at 883–84 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)).

36. *E.g.*, *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 273 (3d Cir. 2007).

37. Epps, *supra* note 27, at 455–56.

38. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)), *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

39. Epps, *supra* note 27, at 477; *see also* 139 CONG. REC. 9687, 26,416 (1993) (noting that the bill passed by a voice vote in the House and a 97-3 vote in the Senate).

40. 42 U.S.C. § 2000bb-1 (1994).

41. *Id.* § 2000bb(a)(4)–(5).

42. *Id.* § 2000bb(b)(1).

43. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

preservation ordinance.<sup>44</sup> The Court responded by holding that RFRA exceeded Congress's enforcement authority under Section 5 of the Fourteenth Amendment.<sup>45</sup> The Court stated that "[w]hile preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved."<sup>46</sup> RFRA, the Court determined, "cannot be considered remedial, preventive legislation" and was therefore unconstitutional.<sup>47</sup> *Boerne* thus represents a strong defense of states' rights relative to Congress's Section 5 power.<sup>48</sup>

In 2000, Congress responded to the *Boerne* decision by enacting RLUIPA.<sup>49</sup> RLUIPA did three significant things that RFRA did not. First, RLUIPA is confined to two subject areas: land use and institutionalized persons.<sup>50</sup> Second, RLUIPA includes two additional jurisdictional hooks: a Spending Clause hook<sup>51</sup> and a Commerce Clause hook.<sup>52</sup> Third, Congress drafted the Section 5 hook in a way that responds directly to language from *Boerne*, wherein Justice Kennedy distinguished *Boerne* and *Smith* from the *Sherbert* line of free-exercise cases. In *Boerne*, Justice Kennedy had written:

44. *Id.* at 512.

45. *Id.* at 511. The Supreme Court repeatedly cited *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), perhaps in an effort to remind Congress that "the Federal Government is one of enumerated powers . . . [and] that the 'powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written,'" *Boerne*, 521 U.S. at 516 (quoting *Marbury*, 5 U.S. (1 Cranch) at 176).

46. *Boerne*, 521 U.S. at 530.

47. *Id.* at 532.

48. Epps, *supra* note 27, at 479.

49. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5 (2006)).

50. *See* 42 U.S.C. § 2000cc (2006) (concerning land use for religious exercise); *id.* § 2000cc-1 (concerning exercise of religion by institutionalized persons). Limiting RLUIPA to these two categories may have been in response to the Supreme Court's statements in *Boerne* denouncing the breadth of RFRA: "RFRA is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." *Boerne*, 521 U.S. at 532. In 2005, the Supreme Court rejected a facial challenge to the constitutionality of RLUIPA under the Establishment Clause. *Cutter v. Wilkinson*, 544 U.S. 709, 724-25 (2005).

51. *See* 42 U.S.C. § 2000cc(a)(2) ("This subsection applies in any case in which (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability . . .").

52. *See id.* § 2000cc(a)(2)(B) ("This subsection applies in any case in which . . . (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability . . .").

Those cases [that impose a strict scrutiny test] . . . stand for ‘the proposition that where the State has in place a system of *individual exemptions*, it may not refuse to extend that system to cases of religious hardship without compelling reason.’ By contrast, where a general prohibition, such as Oregon’s, is at issue, ‘the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to [free exercise] challenges.’ *Smith* held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.<sup>53</sup>

RLUIPA’s Section 5 hook states that the Act applies when a “substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, *individualized assessments* of the proposed uses for the property involved.”<sup>54</sup> By using the phrase “individualized assessments,”<sup>55</sup> Congress attempted to equate land-use decisions with the “individual exemptions”<sup>56</sup> that continue to trigger strict scrutiny after *Smith*.<sup>57</sup> But an assessment is

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53. *Boerne*, 521 U.S. at 514 (third alteration in original) (emphasis added) (citations omitted) (quoting *Emp’t Div. v. Smith*, 494 U.S. 874, 884–85 (1990)).

54. 42 U.S.C. § 2000cc(a)(2)(C) (emphasis added). Because neither *Guru Nanak* nor *San Leandro* reached the question of whether the municipality’s land-use decision fell within the scope of RLUIPA pursuant to either the Spending Clause or the Commerce Clause, this Note focuses exclusively on RLUIPA’s Section 5 hook. Spending Clause jurisprudence suggests that a municipality receiving federal funds for its land-use planning would be required to comply with RLUIPA. See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (recognizing that to fall within the Spending Clause power, “conditions on federal grants” must, among other things, relate “to the federal interest in particular national projects or programs”). The analysis would be less straightforward if the municipality received federal funds for a program only tangentially related to its land-use planning, such as for community policing. An analysis of the constitutionality of RLUIPA under the Commerce Clause could involve inquiring whether the regulated activity—the imposition of a substantial burden on religious exercise from a rule of general applicability—substantially affects interstate commerce or whether the regulated activity is economic or noneconomic in nature. See *United States v. Lopez*, 514 U.S. 549, 559 (1995) (discussing “those activities that substantially affect interstate commerce”). See generally *United States v. Morrison*, 529 U.S. 598 (2000) (discussing the economic/noneconomic dichotomy).

55. 42 U.S.C. § 2000cc(a)(2)(C).

56. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993) (“As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government ‘may not refuse to extend that system to cases of religious hardship without compelling reason.’” (quoting *Smith*, 494 U.S. at 884) (internal quotation marks omitted)).

57. For example, in a statement issued prior to the passage of RLUIPA, Senators Orrin Hatch and Ted Kennedy stated that “the land use provisions of this bill satisfy the constitutional

not the same thing as an exemption. An exemption is “[f]reedom from a duty, liability, or other requirement.”<sup>58</sup> RLUIPA does not define “assessment” or “individualized assessment,” and *Black’s Law Dictionary* provides no on-point definition. It is reasonable to conclude, however, that Congress intended the term to have its ordinary dictionary meaning of “the act of assessing; appraisal; evaluation.”<sup>59</sup> This definition would encompass decisions about whether to grant an exemption to religious institutions from otherwise generally applicable rules, decisions that, presumably, would still be subject to strict scrutiny following *Smith* and *Boerne*.

Courts that broadly apply RLUIPA to every land-use decision ignore the fact that RLUIPA, by its own terms, applies only to individualized assessments. Although a broad reading of RLUIPA may eliminate discrimination by providing a federal cause of action to religious institutions, it does so at a high cost. RLUIPA reaches deeply into state land-use law and local land-use decisions by requiring municipalities to articulate a compelling reason for applying an otherwise-valid and generally applicable system of land-use regulations. Because understanding land-use law is critical to understanding RLUIPA and its associated jurisprudence, the following Part contains a general discussion of land-use law and a closer examination of California land-use law.

## II. A LAND-USE LAW PRIMER

### A. *Land-Use Law and Zoning Generally*

In the 1920s, zoning began to replace nuisance law and private restrictive covenants as the primary way to avoid conflicts between

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standard [of Section 5] legally.” 146 CONG. REC. 16,699 (2000) (joint statement of Sens. Hatch and Kennedy). They went on to explain that “[w]here government makes such individualized assessments, permitting some uses and excluding others, it cannot exclude religious uses without compelling justification.” *Id.* The senators cited *Babalu Aye* and *Smith* to support their assertion. *Id.* But *Smith* did not involve an individualized assessment, it concerned a request for an exemption from a generally applicable law. See *supra* note 35 and accompanying text. In *Babalu Aye*, the individualized assessment that the Court found objectionable was the city’s evaluation of the reasons motivating the slaughter of animals. *Babalu Aye*, 508 U.S. at 538–39. Thus, even if a land-use assessment is individualized and not generalized, the *Babalu Aye* test would not preclude a city from disapproving the construction of a religious facility, so long as the disapproval was based on an assessment of the land-use impacts, as opposed to an assessment of the religious motivations behind the conduct of constructing the facility.

58. BLACK’S LAW DICTIONARY 653 (9th ed. 2009).

59. RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY 75 (2005).

users of land.<sup>60</sup> Like all land-use regulations, zoning is an application of the police power, which is “the power of the states and their legislatures to enact regulations over persons and property to prohibit all things inimical to their citizens’ health, safety, morals, and general welfare.”<sup>61</sup> The police power is reserved generally to the states<sup>62</sup> and functions pursuant to each state’s constitution.<sup>63</sup> Municipalities, such as cities and counties, are creatures of the states and may only exercise power granted by the state government.<sup>64</sup> Therefore, municipal zoning powers must be derived from a state policy explicitly conferring such authority.<sup>65</sup>

In 1924, the United States Department of Commerce developed the Standard Zoning Enabling Act<sup>66</sup> to serve as a model for states that wished to delegate land-use authority to their municipalities.<sup>67</sup> Since then, every state has adopted a statewide zoning-enabling act that delegates land-use regulatory authority to municipalities and other planning agencies.<sup>68</sup> Following the Supreme Court’s 1926 decision in *Euclid*, municipalities across the United States have adopted zoning ordinances, including every large city—with the exception of Houston<sup>69</sup>—and the majority of smaller cities and localities.<sup>70</sup> Zoning

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60. BARLOW BURKE, UNDERSTANDING THE LAW OF ZONING AND LAND USE CONTROLS 75 (2d ed. 2009).

61. *Id.* at 3.

62. *Id.* at 3–4.

63. *Id.* at 7.

64. The Supreme Court affirmed this state-municipal relationship in *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), when it said that “[m]unicipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,” *id.* at 178. Nonetheless, many states have amended their constitutions to allow cities to adopt a charter to partially exempt themselves from the tight legislative control described by Dillon’s Rule. *See, e.g.*, CAL. CONST. art. XI, § 5. Moreover, charter cities in California are granted autonomy only over municipal affairs as opposed to matters of statewide concern, and the line between municipal affairs and matters of statewide concern may change over time. *See Cal. Fed. Sav. & Loan Ass’n v. City of Los Angeles*, 812 P.2d 916, 924 (Cal. 1991) (“We have said that the task of determining whether a given activity is a ‘municipal affair’ or one of statewide concern is an ad hoc inquiry; that ‘the constitutional concept of municipal affairs is not a fixed or static quantity’ . . . .” (quoting *Pac. Tel. & Tel. Co. v. City & Cnty. of San Francisco*, 336 P.2d 514, 517 (Cal. 1959))).

65. BURKE, *supra* note 60, at 75.

66. U.S. Dep’t of Commerce, *A Standard State Zoning Enabling Act* (rev. ed. 1926), reprinted in MODEL LAND DEV. CODE art. 8, app. C (Tentative Draft No. 1, 1968).

67. *See id.*

68. BURKE, *supra* note 60, at 75–76.

69. Danyahel Norris, *Houston Gentrification: Options for Current Residents of the Third Ward*, 35 T. MARSHALL L. REV. 239, 243 (2010).

70. *Id.*

is one of the main functions of local governments,<sup>71</sup> which use zoning ordinances to preserve land for agriculture and open space, redevelop blighted neighborhoods, conserve natural resources, and achieve countless other goals that may be unique to each locale.<sup>72</sup>

### B. California Land-Use Law

Modern land-use planning in California grew out of the perceived mistakes that occurred in conjunction with rapid economic growth and the resulting land development during the 1940s and 1950s.<sup>73</sup> Heightened social and environmental awareness nationwide led Congress to pass the National Environmental Policy Act<sup>74</sup> in 1969 and California to pass the California Environmental Quality Act<sup>75</sup> in 1970.<sup>76</sup> Although California has required municipalities to adopt general plans for development since 1927,<sup>77</sup> the state modified the California Government Code in 1971 to make the local general plan “a ‘constitution’ for future development.”<sup>78</sup>

1. *General Plans.* The State of California has delegated its land-use authority to cities and counties, and it requires all municipalities to adopt and follow general plans to “guide future local land use

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71. BURKE, *supra* note 60, at 75.

72. See generally Edna Sussman, *Reshaping Municipal and County Laws To Foster Green Building, Energy Efficiency, and Renewable Energy*, 16 N.Y.U. ENVTL. L.J. 1 (2008).

73. See 1 JAMES LONGTIN, *LONGTIN'S CALIFORNIA LAND USE* 9–10 (3d prtg. 1994) (“The mistakes of the ’40s and ’50s became painfully apparent to the social activist generation of the ’60s, thus spawning the advent of serious planning and environmental controls.”); see also *Selby Realty Co. v. City of San Buenaventura*, 514 P.2d 111, 117 (Cal. 1973) (“The deleterious consequences of haphazard community growth in this state and the need to prevent further random development are evident to even the most casual observer. The Legislature has attempted to alleviate the problem by authorizing the adoption of long-range plans for orderly progress.”). See generally KEVIN STARR, *CALIFORNIA: A HISTORY* 237–42 (2005) (providing an excellent discussion of the rapid and massive growth of California following World War II). In *Trent Meredith, Inc. v. City of Oxnard*, 170 Cal. Rptr. 685 (Ct. App. 1981), the California Court of Appeals upheld a local ordinance that made the collection of school fees a condition precedent to the development of property, capturing the state’s sentiment about unmanaged growth when it stated, “[d]evelopment is a privilege, not a right.” *Id.* at 691.

74. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321–4335, 4341–4347 (2006 & Supp. IV 2011)).

75. California Environmental Quality Act of 1970, ch. 1433, 1970 Cal. Stat. 2780 (codified as amended at CAL. PUB. RES. CODE §§ 21000–21177 (West 2011 & Supp. 2012)).

76. LONGTIN, *supra* note 73, at 10.

77. Act of June 2, 1927, ch. 874, § 26, 1927 Cal. Stat. 1899, 1910–11.

78. *Leshar Commc’ns, Inc. v. City of Walnut Creek*, 802 P.2d 317, 321 (Cal. 1990).

decisions.”<sup>79</sup> The general plan is “located at the top of ‘the hierarchy of local government law regulating land use.’”<sup>80</sup> Every municipality must “adopt a comprehensive, long-term general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency’s judgment bears relation to its planning.”<sup>81</sup> All general plans are required to address seven “elements . . . to the extent that the subject of the element exists in the planning area.”<sup>82</sup> The seven required elements are (1) land use, (2) circulation, (3) housing, (4) conservation, (5) open space, (6) noise, and (7) safety.<sup>83</sup> A municipality may amend its general plan when “it deems it to be in the public interest,”<sup>84</sup> but it may not amend any required element—including the land-use element—more than four times per year.<sup>85</sup>

Although the California Legislature requires cities and counties to adopt and follow general plans, the Legislature did not intend for all general plans to look alike.<sup>86</sup> One major way that general plans differ from one another is through the land-use element, which must designate the “general location and extent of the uses of the land for housing, business, industry, open space, including agriculture, natural resources, recreation, and enjoyment of scenic beauty, education, public buildings and grounds, solid and liquid waste disposal facilities, and other categories of public and private uses of land.”<sup>87</sup> The land-use element of a typical general plan contains many broad policy statements and goals as well as a map showing the location of each appropriate type of land use in the jurisdiction.<sup>88</sup>

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79. *DeVita v. Cnty. of Napa*, 889 P.2d 1019, 1025 (Cal. 1995).

80. *Id.* at 1024 (quoting *Neighborhood Action Grp. v. Cnty. of Calaveras*, 203 Cal. Rptr. 401, 406 (Ct. App. 1984)).

81. CAL. GOV’T CODE § 65300 (West 2010).

82. *Id.* § 65301(c).

83. *Id.* § 65302 (West 2010 & Supp. 2012).

84. *Id.* § 65358(a) (West 2010).

85. *Id.* § 65358(b). The code creates certain exemptions to this general rule, such as amendments to accommodate housing occupied by low-income individuals, *id.* § 65358(c), and amendments in response to a court order, *id.* § 65358(d)(1).

86. *See id.* § 65300.7 (“The Legislature finds that the diversity of the state’s communities and their residents requires planning agencies and legislative bodies to implement this article in ways that accommodate local conditions and circumstances, while meeting its minimum requirements.”).

87. *Id.* § 65302(a) (West 2010 & Supp. 2012).

88. *See, e.g., Yuba City, Cal., Yuba City General Plan ch. 3 (2004)*, available at <http://www.yubacity.net/documents/Planning/YC-GPAC-Apr-04-Ch-3-FINAL.pdf> (including “[t]he guiding principles of the land use framework [and] the General Plan Diagram”).

The California Government Code requires planning agencies to implement the general plan through other documents, one of which is the zoning ordinance.<sup>89</sup> If the general plan is analogous to a “constitution” for future development,<sup>90</sup> a zoning ordinance is analogous to a statute. The zoning ordinance itself, and decisions made pursuant to the zoning ordinance, must follow the general plan.<sup>91</sup> “Additionally, general plans are policy documents, whereas zoning ordinances are laws.”<sup>92</sup> Therefore, a “general plan does not violate substantive due process as long as it advances any legitimate public purpose”<sup>93</sup> whereas a zoning law “must clearly delineate the conduct it proscribes.”<sup>94</sup> Because the zoning ordinance implements the general plan, a zoning regulation can be construed by referring to the general plan.<sup>95</sup>

2. *Zoning Ordinances: Permitted and Conditionally Permitted Uses.* California’s legislature permits municipalities to “divide a county, a city, or portions thereof, into zones.”<sup>96</sup> In granting municipalities control over zoning decisions, the legislature provided only a few limitations “in order that counties and cities may exercise the maximum degree of control over local zoning matters,”<sup>97</sup> while at the same time specifying certain minimum standards with which the municipalities must comply.<sup>98</sup> For example, the legislature stated that all zoning regulations must “be uniform for each class or kind of

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89. GOV’T § 65103(b) (West 2010).

90. *Leshor Commc’ns, Inc. v. City of Walnut Creek*, 802 P.2d 317, 322 (Cal. 1990) (internal quotation marks omitted).

91. GOV’T § 65860 (West 2009); *see also* *Fonseca v. City of Gilroy*, 56 Cal. Rptr. 3d 374, 379 (Ct. App. 2007) (“Local land use decisions must be consistent with the general plan. Thus, for example, zoning ordinances, which are subordinate to the general plan, are required to be consistent with it.”).

92. JOHN EASTMAN, *EASTMAN’S CALIFORNIA LAND USE & MUNICIPAL LAW* § 8.01 (2008).

93. *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994).

94. *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998) (internal quotation marks omitted).

95. *See* EASTMAN, *supra* note 92, § 8.01 (“[Z]oning regulations may be construed by reference to the general plan; the general plan provides the backdrop against which zoning regulations are interpreted.”).

96. GOV’T § 65851.

97. *Id.* § 65800.

98. *Id.* § 65850.

building or use of land throughout each zone, but the regulation in one type of zone may differ from those in other types of zones.”<sup>99</sup>

Zoning ordinances regulate land use via two mechanisms: (1) they divide the municipality into distinct geographic districts, and (2) they establish criteria and procedures for the evaluation of proposed uses within each district.<sup>100</sup> Within the first mechanism, the zoning ordinance must conform to the policies contained in the general plan. As the Supreme Court of California explained:

The Planning and Zoning Law itself precludes consideration of a zoning ordinance which conflicts with a general plan as a pro tanto repeal or implied amendment of the general plan. The general plan stands. A zoning ordinance that is inconsistent with the general plan is invalid when passed and one that was originally consistent but has become inconsistent must be brought into conformity with the general plan. The Planning and Zoning Law does not contemplate that general plans will be amended to conform to zoning ordinances. The tail does not wag the dog. The general plan is the charter to which the ordinance must conform.<sup>101</sup>

Within the second mechanism, the evaluation of proposed uses, the zoning ordinance typically includes two types of regulations: (1) regulations that pertain to the “structural and architectural design of the buildings,” such as limitations on the height, size, and distance between buildings and property lines, and (2) regulations that “prescribe the use to which buildings within certain designated districts may be put.”<sup>102</sup> A zoning map provides the zoning of each parcel, and a zoning ordinance contains the standards governing the allowable uses in a particular zone. To provide a clearer explanation of how zoning ordinances work, this Note uses Yuba City, California, to illustrate how one determines whether a use is permitted and what level of review is required to permit the use.<sup>103</sup>

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99. *Id.* § 65852. This provision is professionally known by planners and developers as the “like uses alike” principle.

100. LONGTIN, *supra* note 73, at 234.

101. *Leshar Commc’ns, Inc. v. City of Walnut Creek*, 802 P.2d 317, 322 (Cal. 1990) (citations omitted).

102. LONGTIN, *supra* note 73, at 234.

103. Because *Guru Nanak* and *San Leandro* only dealt with the permissibility of uses, this Note does not undertake a detailed discussion of structural and architectural standards, such as minimum lot size or height requirements. Exceptions to structural and architectural standards may be granted pursuant to a variance. Variance procedures are described in detail in section 65906 of the California Government Code. Under this Note’s proposed reading of RLUIPA, a request for a variance would be an individualized assessment and thus within the scope of

Yuba City's zoning ordinance<sup>104</sup> is typical in that it employs a table to describe the allowable uses in a particular zone. The tables below are excerpted from the chapters pertaining to the M-1 (Light Industrial) and the R-1 (One-Family Residence) districts in Yuba City's zoning ordinance.<sup>105</sup> Although each zoning district permits different types of uses, the tables are similar in how they are organized: the first column provides a list of categorically permitted uses in the zoning district, and the second, third, and fourth columns correspond to the three types of review that Yuba City conducts for the allowable uses. The stringency of the review assigned to each use is based on the likelihood that the use will conflict with other existing or allowable uses in the same zoning district.<sup>106</sup>

*Table 1. M-1, Light Industrial Use Table*

Uses	Permitted	Zoning Clearance	Use Permit
Auto body and painting shop	X		
Cabinet shop	X		
Bulk product storage (indoor)	X		
Commercial coach (temporary)			X
Commercial coach (less than 10,000 square feet)		X	

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RLUIPA, assuming that the municipality's zoning ordinance includes a mechanism for approving variance requests.

104. YUBA CITY, CAL., MUN. CODE, tit. 8, ch. 5 (2011).

105. For a complete list of uses in the M-1 district, see *id.* § 8-5.2002. For the list of uses in the R-1 district, see *id.* § 8-5.502.

106. See, e.g., *id.* § 8-5.7001 (stating that "[t]he process provides for increasing levels of review based on the size or intensity of a project").

Table 2. R-1, One-Family Residence Use Table

Uses	Permitted	Zoning Clearance	Use Permit
Model homes		X	
One-family residence	X		
One-family residence (zero-lot line)	X		
Parking lot for an off-site use			X
Public parks and playgrounds		X	

*a. Permitted Uses and Uses Requiring a Zoning Clearance.* Certain uses are permitted as a matter of right in each district. For example, in the M-1 district, one may operate an auto body and painting shop; in the R-1 district, one may construct a one-family residence. For permitted uses, planning staff review is limited to ensuring that all proposed uses conform to the minimum structural and architectural standards established for each district, such as lot size, minimum distance from property lines, and height requirements.<sup>107</sup>

Certain uses, such as having a model home in the R-1 district, require a zoning clearance before they may be undertaken. To obtain a zoning clearance, the project proponent must demonstrate to the planning staff that the proposed project conforms to objective, use-specific standards listed in the code in addition to the standards that are required for the permitted uses in the district.<sup>108</sup> For example, an applicant who wants to establish a model home must first meet the minimum requirements of the R-1 district and must also obtain a zoning clearance to ensure compliance with the additional model-home standards.<sup>109</sup> If the proposal meets all of the requirements,

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107. See, e.g., *id.* § 8.5-503 (requiring a “[m]inimum lot size” of “5,000 sq. ft., 6,000 sq. ft. for corner lots”).

108. For a description of Yuba City’s zoning-clearance procedures, see *id.* § 8-5.7002.

109. See *id.* § 8-5.5002(c) (establishing several standards specific to model homes, including a time limit for the operation of the home).

including the additional use-specific requirements, the code requires that the proposed use be approved.<sup>110</sup>

*b. Uses Requiring a Use Permit.* Although the California Government Code neither defines nor establishes standards for approving use permits,<sup>111</sup> the California Supreme Court has stated that a use permit may be granted “after consideration by a governmental agency as to whether the proposed other use will be in the best interests of public convenience and necessity and not contrary to the public welfare.”<sup>112</sup> Municipalities have substantial discretion in setting their own standards for issuing use permits, provided that the standards are set forth in a zoning ordinance.<sup>113</sup> Generally, the municipality reviews the proposed use in relation to the surrounding neighborhood and may approve the proposal if the use meets certain standards, including the “general welfare standard” and the “nuisance standard.”<sup>114</sup> Use permits must conform not only to

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110. *Id.* § 8-5.7002.

111. The government code does, however, refer to use permits. *See, e.g.*, CAL. GOV'T. CODE § 65850.5(b) (West 2009) (“[T]he city or county may require the applicant [of a solar energy system] to apply for a use permit.”); *id.* § 65852.7 (“A mobile home park . . . shall be deemed a permitted land use on all land planned and zoned for residential land use as designated by the applicable general plan; provided, however, that a city, county, or a city and county may require a use permit.”).

112. *Sports Arenas Props., Inc. v. City of San Diego*, 710 P.2d 338, 341 (Cal. 1985); *see also* *People v. Perez*, 29 Cal. Rptr. 781, 783 (App. Dep't Super. Ct. 1963) (“The device of providing for the issuance of a special use permit is well recognized as legitimate zoning procedure. It permits the inclusion in the zoning pattern of uses considered by the legislative body to be essentially desirable to the community, but which because of the nature thereof or their concomitants (noise, traffic, congestion, effect on values, etc.) militate against their existence in every location in a zone, or in any location without restrictions tailored to fit the special problems which the uses present.”).

113. Section 65905 of the California Government Code requires a planning agency to hold a public hearing for consideration of a use permit. To meet constitutional requirements for due process, the agency must also provide advance public notice, an opportunity to be heard, and a fair hearing. *See* *Horn v. Cnty. of Ventura*, 596 P.2d 1134, 1140 (Cal. 1979) (“We therefore conclude that, whenever approval of a tentative subdivision map will constitute a substantial or significant deprivation of the property rights of other landowners, the affected persons are entitled to a reasonable notice and an opportunity to be heard before the approval occurs.”).

114. *The Conditional Use Permit*, GOVERNOR'S OFFICE OF PLANNING & RESEARCH (Aug. 1997), <http://ceres.ca.gov/planning/cup/condition.htm>. For a discussion of the general welfare standard, *see* generally *Hawkins v. Cnty. of Marin*, 126 Cal. Rptr. 754, 758 & n.8 (Ct. App. 1976). For a discussion of the nuisance standard, *see* generally *Snow v. City of Garden Grove*, 10 Cal. Rptr. 480, 481 (Ct. App. 1961).

the zoning ordinance<sup>115</sup> but to the general plan as well.<sup>116</sup> Additionally, the municipality must make written findings in support of any decision to approve or deny a use permit.<sup>117</sup>

Yuba City requires a use permit for uses that may have an “effect on surrounding uses and the environment [that] typically cannot be determined in advance . . . for a particular location.”<sup>118</sup> To determine when a use permit is required, one simply consults the appropriate use table. The planning commission must conduct a noticed public hearing and make findings about the appropriateness of the proposed use, given the surroundings and the “general welfare of the City.”<sup>119</sup> The use-permit process is designed to ensure that the proposed use is compatible with its surroundings. For example, one who applies to Yuba City for a use permit to construct a parking lot in Yuba City’s R-1 district might be required to shield parking lot lights to reduce glare on neighboring residences, to provide a larger setback than what would normally be required by the zoning ordinance, or to install additional landscaping or a wall to create a sound buffer. The conditions are context-specific and are imposed so as to permit a

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115. See *O’Hagen v. Bd. of Zoning Adjustment*, 96 Cal. Rptr. 484, 488 (Ct. App. 1971) (“To obtain a use permit, the applicant must generally show that the contemplated use is compatible with the policies and terms of the zoning ordinances . . .”).

116. See *Neighborhood Action Grp. v. Cnty. of Calaveras*, 203 Cal. Rptr. 401, 407 (Ct. App. 1984) (“Although use permits are not explicitly made subject to a general plan meeting the requirements of state law, that condition is necessarily to be implied from the hierarchal relationship of the land use laws. . . . [Thus,] a use permit is struck from the mold of the zoning law [GOV’T § 65901 (West 1966 & Supp. 1982)]; the zoning law must comply with the adopted general plan [GOV’T § 65860]; [and] the adopted general plan must conform with state law [GOV’T §§ 65300, 65302 (West 1966)]. The validity of the permit process derives from compliance with this hierarchy of planning laws.”).

117. See *Topanga Ass’n for a Scenic Cmty. v. Cnty. of Los Angeles*, 522 P.2d 12, 13 (Cal. 1974) (“We conclude that variance boards . . . must render findings to support their ultimate rulings.”).

118. YUBA CITY, CAL., MUN. CODE, tit. 8, ch. 5, § 8-5.7003 (2011).

119. See *id.* § 8-5.7003D (“Approval . . . shall only be granted when the following findings can be made, based on information in the record: 1. The proposal is consistent with the General Plan[, Yuba City, Cal., Yuba City General Plan ch. 3 (2004), available at <http://www.yubacity.net/documents/Planning/YC-GPAC-Apr-04-Ch-3-FINAL.pdf>]. 2. The site for the proposed use is adequate in size and shape to accommodate said use, public access, parking and loading, yards, landscaping and other features required by this chapter. 3. The streets serving the site are adequate to carry the quantity of traffic generated by the proposed use. 4. The site design and the size and design of the buildings will complement neighboring facilities. 5. The establishment or operation of the use or building applied for will not be detrimental to the health, safety, peace, comfort, and general welfare of persons residing or working in the vicinity of the proposed use or be detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the City.”).

specific use on one specific property that might otherwise be prohibited due to the incompatibility of the proposed use with the existing or anticipated uses of neighboring properties.<sup>120</sup>

3. *Unlisted or Prohibited Uses and Zoning Ordinance Amendments.* Zoning ordinances cannot anticipate every potential land use, and municipalities manage this uncertainty in a variety of ways. Some ordinances contain a provision that “uses not specifically permitted are prohibited.”<sup>121</sup> Other zoning ordinances contain rules of construction that give an official, such as the planning director, the discretion to determine whether a proposed use is similar “in character and impact to a listed use.”<sup>122</sup> If it is, the planning director has the discretion to treat the proposed use in the same way as the listed use.<sup>123</sup>

If a person proposes a use in a zoning district that does not explicitly list the use, and if a reasonable construction of the zoning ordinance leads to the conclusion that the zoning district does not permit the use, the person has the option of seeking a zoning amendment. Zoning amendments generally come in two forms: a zoning-text amendment and a zoning-map amendment. A zoning-text amendment amends the zoning code itself to change the list of permitted uses in the applicable zoning district to include the proposed use.<sup>124</sup> A zoning-map amendment occurs when the parcel’s zoning designation is changed to a different zoning designation that permits the proposed use.<sup>125</sup>

The California Government Code sets forth the minimum procedures that govern both types of amendments.<sup>126</sup> First, the

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120. As noted in Part II.A, section 65852 of the California Government Code requires that zoning regulations “be uniform for each class or kind of building or use of land throughout each zone.” Nonetheless, courts have held that it does not violate the uniformity requirement to, with the consent of the project proponent, impose reasonable conditions of approval on projects, even if the conditions vary from parcel to parcel. *See, e.g., J-Marion Co. v. Cnty. of Sacramento*, 142 Cal. Rptr. 723, 726 (Ct. App. 1977) (“[U]se limitations imposed upon land by consensual agreement are not violative of the uniformity provisions of section 65852 . . .”).

121. BURKE, *supra* note 60, at 89.

122. *E.g.*, MUN. CODE § 8-5.111.

123. *Id.*

124. *See, e.g., Text and Map Amendments*, UNIV. CITY, MO., <http://www.ucitymo.org/index.aspx?NID=318> (last visited Sept. 8, 2012) (“A text amendment is a procedure that changes the written provisions of the ordinances contained in the [z]oning [c]ode.”).

125. *See, e.g., id.* (“A map amendment is a procedure that changes the zoning district for a piece of property and therefore changes the zoning map.”).

126. GOV’T §§ 65853–65857 (West 2009).

planning commission is required to conduct a public hearing.<sup>127</sup> Following the public hearing, the commission must provide a written recommendation supported by its reasons to the municipality's legislative body, such as the city council.<sup>128</sup> If the planning commission recommends approval of the zoning amendment, the legislative body must hold a noticed public hearing after which it may approve, modify, or disapprove the planning commission's recommendation.<sup>129</sup>

4. *Procedural Distinctions Between Zoning Amendments and Use Permits.* Decisions about whether to adopt or amend zoning ordinances are “legislative acts,”<sup>130</sup> whereas decisions about whether to approve use permits are adjudicative, or “quasi-judicial” acts.<sup>131</sup> “[A] legislative act generally predetermines what the rules shall be for the regulation of future cases falling under its provisions, while an adjudicatory act applies law to determine specific rights based upon specific facts ascertained from evidence adduced at a hearing.”<sup>132</sup> This distinction is significant because California land-use law and the California Code of Civil Procedure<sup>133</sup> treat legislative and adjudicative acts differently in terms of how such acts are approved as well as in terms of how a party may challenge the validity of each type of act.

First, “only those governmental decisions which are *adjudicative* in nature are subject to procedural due process principles. *Legislative* action is not burdened by such requirements.”<sup>134</sup> As such, the California Government Code requires planning agencies to conduct a

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127. *Id.* § 65854.

128. *Id.* § 65855.

129. *Id.* §§ 65856–65857.

130. *See Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1239 n.11 (9th Cir. 1994) (“[Z]oning enactments that affect large populations are legislative in nature.”); *DeVita v. Cnty. of Napa*, 889 P.2d 1019, 1024 n.3 (Cal. 1995) (“[T]he current planning law recognizes unequivocally that planning is a legislative undertaking . . .”); *Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565, 566–67 (Cal. 1980) (“California precedent has settled the principle that zoning ordinances, whatever the size of parcel affected, are legislative acts.”).

131. *See The Conditional Use Permit, supra* note 114 (“The approval of a conditional use permit is an administrative, quasi-judicial act. It is not a change of zone, but rather a project-specific change in the uses allowed on a specific property. Conditional use permits do not involve the establishment of new codes, regulations, or policies. Instead, a conditional use permit applies the provisions of the zoning ordinance and its standards to the specific set of circumstances which characterize the proposed land use.”).

132. *Joint Council of Interns & Residents v. Bd. of Supervisors*, 258 Cal. Rptr. 762, 766 (Ct. App. 1989).

133. CAL. CIV. PROC. CODE §§ 1084–1097 (West 2007 & Supp. 2012).

134. *Horn v. Cnty. of Ventura*, 596 P.2d 1134, 1137 (Cal. 1979).

noticed public hearing prior to making a decision about whether to approve or deny a use permit.<sup>135</sup> Municipalities are also required to make findings prior to approving or denying a use permit. By contrast, because the amendment of a zoning ordinance is a legislative action, municipalities are not required to make findings regarding a decision to approve or deny a zoning amendment.<sup>136</sup>

Second, in California, local land-use decisions must be challenged by seeking a writ of mandate (also called *mandamus*), and the nature of the writ differs based on the decision being challenged.<sup>137</sup> “The importance of proceeding by a writ of mandate in land use litigation in state court cannot be overemphasized. The failure to seek the writ may be a sufficient ground by itself for adverse judgment.”<sup>138</sup> Writs of mandate take two forms: the writ of ordinary mandate<sup>139</sup> and the writ of administrative mandate.<sup>140</sup> The writ of ordinary mandate is the appropriate procedure to challenge legislative acts, such as the adoption or amendment of a zoning ordinance.<sup>141</sup> The writ of administrative mandate must be used to challenge adjudicative acts, such as the decision about whether to approve a use permit.<sup>142</sup> Courts are much more deferential to the planning agency in ordinary mandate than they are in administrative

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135. The public hearing requirement is contained in section 65905 of the California Government Code, and the notice requirements are contained in section 65091 of the California Government Code.

136. See *Native Sun/Lyon Cmty. v. City of Escondido*, 19 Cal. Rptr. 2d 344, 355 (Ct. App. 1993) (“Legislative acts, of course, do not require findings.”).

137. For procedural requirements for the use of these writs, see CIV. PROC. §§ 1084–1097.

138. EASTMAN, *supra* note 92, § 21.01.

139. CIV. PROC. § 1085.

140. *Id.* § 1094.5. The terms “ordinary” and “traditional” mandate are not used in the California Code of Civil Procedure. The terms are used by practitioners to distinguish the procedure in section 1085 from the procedure in section 1094.5. Likewise, the term “writ of administrative mandate” is not used in the California Code of Civil Procedure.

141. See *Cnty. of Del Norte v. City of Crescent City*, 84 Cal. Rptr. 2d 179, 184 (Ct. App. 1999) (“Mandate will also lie to correct the exercise of discretionary legislative power, but only if the action taken is fraudulent or so palpably unreasonable and arbitrary as to reveal an abuse of discretion as a matter of law. This test is highly deferential, as it should be when the court is called upon to interfere with the exercise of legislative discretion by an elected governmental body. Legislative enactments are presumed to be valid; to overcome this presumption the petitioner must bring forth evidence compelling the conclusion that the ordinance is unreasonable and invalid.” (citations omitted)).

142. CIV. PROC. § 1094.5.

mandate.<sup>143</sup> Thus, in California the distinctions between zoning amendments and use permits have great significance.

### III. DISTINGUISHING TWO APPLICATIONS OF RLUIPA: *GURU NANAK* AND *SAN LEANDRO*

This Note now builds upon the RLUIPA and land-use background information introduced in the preceding Parts to examine two Ninth Circuit RLUIPA cases. One case involved a rezoning, and the other case involved a use permit. In *Guru Nanak*, the Ninth Circuit found that Sutter County, California, imposed a substantial burden on a religious organization when the county denied two successive use-permit applications, on two separate parcels, made by the Guru Nanak Sikh Society of Yuba City (Guru Nanak) to build a temple.<sup>144</sup> In *San Leandro*, the Ninth Circuit found that the City of San Leandro, California may have imposed a substantial burden on a religious organization without articulating a compelling reason when the city denied the organization's requests for a zoning-map amendment, a zoning-text amendment, and a use permit that was contingent upon approval of either of the rezoning requests.<sup>145</sup> In reaching its decision in *San Leandro*, the Ninth Circuit relied heavily on the reasoning contained in *Guru Nanak*<sup>146</sup> but failed to distinguish between the types of land-use applications and the types of assessments that the municipalities conducted in the two cases. *Guru Nanak* involved an individualized assessment of a use permit, whereas *San Leandro* involved a generalized assessment of two zoning ordinance amendments. The Ninth Circuit should have drawn this distinction between the use permits at issue in *Guru Nanak* and the

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143. *Compare* Garrick Dev. Co. v. Hayward Unified Sch. Dist., 4 Cal. Rptr. 2d 897, 902 (Ct. App. 1992) (“Such limited review [under the narrower standards of ordinary mandate] is grounded on the doctrine of separation of powers which (1) sanctions the legislative delegation of authority to the agency and (2) acknowledges the presumed expertise of the agency.”), with *Topanga Ass’n for a Scenic Cmty. v. Los Angeles Cnty.*, 522 P.2d 12, 13 (Cal. 1974) (requiring Los Angeles County to vacate its grant of a variance in administrative mandate, stating that “a reviewing court must determine whether substantial evidence supports the findings of the administrative board and whether the findings support the board’s action”).

144. *Guru Nanak Sikh Soc’y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 981 (9th Cir. 2006).

145. *See Int’l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1061 (9th Cir.) (“We find that there is a triable issue of material fact regarding whether the City imposed a substantial burden on the Church’s religious exercise under RLUIPA.”), *cert. denied*, 132 S. Ct. 251 (2011).

146. *See id.* at 1066–70 (citing *Guru Nanak* repeatedly).

amendments to zoning ordinances at issue in *San Leandro*. Therefore, the Ninth Circuit should have concluded that decisions by a municipality about whether to amend its zoning ordinance are “generalized assessments” that fall outside the scope of RLUIPA’s Section 5 hook.

A. *Guru Nanak Sikh Society of Yuba City v. County of Sutter*

In 2001, Guru Nanak proposed to construct a temple to serve seventy-five people on a 1.89-acre parcel that it owned on Grove Road in Sutter County, California.<sup>147</sup> The parcel was located in the R-1 district, which was used primarily for large-lot, single-family homes, and which allowed churches and temples, subject to the issuance of a conditional-use permit.<sup>148</sup> Sutter County’s zoning code’s goal is to ensure that uses that “have the potential to negatively impact adjoining properties and uses” receive “a more comprehensive review . . . in order to evaluate and mitigate any potentially detrimental impacts.”<sup>149</sup> The planning commission may—but need not—approve or conditionally approve the use permit after it makes several findings regarding the impact of the proposed use and its consistency with the general plan.<sup>150</sup> Sutter County’s planning staff reviewed Guru Nanak’s proposal and recommended that the planning commission grant Guru Nanak’s use permit, subject to certain conditions designed to mitigate any potential conflicts between the temple and the nearby established residences.<sup>151</sup> In spite of the planning staff’s recommendation, and based on concerns about increased traffic and noise resulting from the proposed temple, the planning commission unanimously denied the use permit.<sup>152</sup>

In 2002, Guru Nanak acquired a 28.79-acre parcel located on George Washington Boulevard in Sutter County.<sup>153</sup> Guru Nanak proposed to convert a 2300-square-foot single-family home located on the parcel into a temple by adding approximately five hundred square feet to the structure.<sup>154</sup> The property contained an orchard, as did all

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147. *Guru Nanak*, 456 F.3d at 981–82.

148. *Id.* at 982.

149. SUTTER COUNTY, CAL., ZONING CODE § 1500-8210 (2010).

150. *Id.* § 1500-8216.

151. *Guru Nanak*, 456 F.3d at 982.

152. *Id.*

153. *Id.*

154. *Id.*

surrounding parcels.<sup>155</sup> The nearest residence was over two hundred feet from Guru Nanak's northern property line and over three hundred feet from the proposed temple.<sup>156</sup> The parcel was located in land zoned as AG, a classification for general agricultural use, which, like the R-1 district, permitted churches and temples subject to the issuance of a use permit.<sup>157</sup>

Guru Nanak applied for a use permit and proposed to limit each service to seventy-five people.<sup>158</sup> Once again, staff recommended that the planning commission approve the project, subject to several conditions, including the addition of landscaping beyond what the zoning ordinance required, limitations on the type of lighting, construction dust mitigation, a prohibition on any type of development within twenty-five feet of the north property line, prohibitions on any outdoor services or musical events, and a limit on the number of people on the site to seventy-five at a time.<sup>159</sup>

During the public hearing, a representative of the temple pointed out the differences between Guru Nanak's earlier Grove Road application and its new George Washington Boulevard application.<sup>160</sup> Several neighbors spoke in opposition to the project, again citing noise and traffic concerns.<sup>161</sup> Some also believed that the temple would conflict with the surrounding agricultural uses and depreciate property values in the area.<sup>162</sup> By a vote of four to three, the planning commission approved the project.<sup>163</sup> Several neighbors appealed the planning commission's decision to the Sutter County Board of Supervisors.<sup>164</sup>

County planning staff prepared a report for the board meeting that specifically addressed the neighbors' concerns and recommended that the board affirm the planning commission's approval.<sup>165</sup> In spite

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155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 983.

159. SUTTER CNTY. PLANNING STAFF MEMORANDUM, Sutter Cnty. Planning Comm'n 5-9, 11-12 (Mar. 27, 2002), available at [http://www.co.sutter.ca.us/pdf/cs/pc/staff\\_reports/2002/UP\\_02-01\\_Nanak\\_Sikh.pdf](http://www.co.sutter.ca.us/pdf/cs/pc/staff_reports/2002/UP_02-01_Nanak_Sikh.pdf).

160. *Guru Nanak*, 456 F.3d at 983.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* The church agreed to concessions which included, among other things, increasing the approved twenty-five-foot buffer along the north property line to one hundred feet. *Id.*

of the planning staff's recommendation, the board unanimously reversed the planning commission and denied Guru Nanak's use permit.<sup>166</sup> Guru Nanak sued Sutter County under RLUIPA, claiming that the board's denial of its second use permit constituted a "substantial burden" on its religious exercise.<sup>167</sup>

The district court granted Guru Nanak's motion for summary judgment, invalidated the county's denial, and enjoined the county to immediately grant Guru Nanak's application because it found that Sutter County had substantially burdened religious exercise without evidence of a compelling interest to justify the burden.<sup>168</sup> The district court was troubled by the county's multiple denials, especially in light of the fact that Guru Nanak purchased its second property to address the county's stated concerns behind its denial of Guru Nanak's first application.<sup>169</sup> The county appealed, and the Ninth Circuit affirmed the district court's decision.<sup>170</sup>

*B. International Church of the Foursquare Gospel v. City of San Leandro*

Founded in San Leandro in 1947, the Faith Fellowship Foursquare Church, a congregation affiliated with the ICFG,<sup>171</sup> had sixty-five members in 1993.<sup>172</sup> Although it constructed a new sanctuary with nearly seven hundred seats in 2003, the congregation had outgrown its space by 2005 and began to look for a larger property.<sup>173</sup>

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166. *Id.* at 984.

167. *Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 326 F. Supp. 2d 1140, 1148 (E.D. Cal. 2003) (internal quotation marks omitted), *rev'd*, 634 F.3d 1037 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 251 (2011).

168. *Id.*

169. *Id.* at 1152 ("[T]he denial of the use permit, particularly when coupled with the denial of [Guru Nanak's] previous application, actually inhibits [Guru Nanak's] religious exercise.").

170. *Guru Nanak*, 456 F.3d at 981.

171. The plaintiff in the case was the ICFG, which "alleges that the real party in interest is Faith Fellowship Foursquare Church . . . , a congregation affiliated with ICFG, and located in San Leandro." *Int'l Church of the Foursquare Gospel v. City of San Leandro*, 632 F. Supp. 2d 925, 929 (N.D. Cal. 2008), *rev'd*, 634 F.3d 1037 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 251 (2011).

172. *Id.*

173. *Id.* The church conducted three Sunday services for more than 1,700 congregants. *Id.* During the week, it provided a variety of programs serving different groups, including "children, the disadvantaged, women, youth, and persons struggling with addictions." *Id.* On Wednesday nights, the church used a kitchen "smaller than the kitchen in most homes" to feed between three hundred and four hundred people. *Id.* The church asserted that its parking lot could accommodate only 154 vehicles, forcing members to park on surrounding residential streets, "as much as a 20-minute walk away from the Church." *Id.* at 930.

At the time, the city permitted “assembly uses” in the R (residential) districts subject to the issuance of a conditional-use permit, but it prohibited assembly uses in all commercial and industrial districts.<sup>174</sup> In March 2006, the ICFG signed a purchase agreement for a property in a district zoned IP (Industrial Park).<sup>175</sup> In May 2006, church officials met with the planning staff to discuss their proposed use.<sup>176</sup> The staff advised the ICFG officials that the IP zone did not allow assembly uses and that the text of the zoning code would need to be amended before a church, or any assembly use, could locate on an industrially zoned parcel, including the parcels that the ICFG had agreed to purchase.<sup>177</sup> The ICFG subsequently applied to rezone the property as IL (Industrial Limited), and applied to amend the text of the zoning code to establish use permit procedures for conditionally permitting assembly uses in the IL district.<sup>178</sup> On April 12, 2007, the city’s planning commission voted to deny the ICFG’s rezoning and amendment applications because they conflicted with two provisions of the city’s general plan.<sup>179</sup> The ICFG appealed the decision to the city council,<sup>180</sup> which on May 7, 2007, unanimously upheld the planning commission’s denial of the proposed rezoning.<sup>181</sup> The planning staff offered to assist the ICFG in its effort to locate a different, appropriately zoned parcel.<sup>182</sup> The ICFG accepted the planning staff’s offer but also filed a lawsuit on July 12, 2007.<sup>183</sup>

In its lawsuit, the ICFG alleged several constitutional claims and the following three RLUIPA claims: (1) “that the City’s land use restrictions place a ‘substantial burden on religious exercise,’” (2) “that the denial of the rezoning application constitutes ‘treatment of religious assembly on less than equal terms with nonreligious

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174. *Id.* at 930. Assembly uses included activities performed by secular and nonsecular users, such as churches, clubs, lodges, and other organizations. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 930–34. The ICFG also applied for a use permit pursuant to the new standards it requested the city to adopt in the IL district. *Id.* at 931.

179. *Id.* at 934.

180. At about the same time, the ICFG applied for a use permit under the existing zoning. *Id.* This application is somewhat inexplicable because the existing zoning did not allow use permits for assembly uses. *Id.* The city, nonetheless, processed and denied the use permit on the grounds that the proposed use was inconsistent with the property’s zoning. *Id.* at 934–35.

181. *Id.* at 934.

182. *Id.* at 935.

183. *Id.*

assembly,” and (3) “that the denial of the Church’s use of [its] property constitutes ‘total exclusion from jurisdiction or unreasonable limits on religious assemblies within jurisdiction.’”<sup>184</sup>

The district court granted San Leandro’s motion for summary judgment on all claims. Regarding the substantial-burden claim, the district court found the city’s zoning code to be “clearly neutral” because it “treats religious assemblies on the same footing as other assembly uses, and permits those uses with a conditional use permit in areas zoned R—which constitute more than 50% of the City’s land area.”<sup>185</sup> The district court further found that the ICFG failed to provide sufficient evidence to support its claim that no other suitable properties existed in the city, and that, even if the ICFG had provided sufficient evidence, a dearth of properties does not equal a substantial burden “[i]n the absence of a showing that the City acted arbitrarily in ways suggesting actual discrimination.”<sup>186</sup> The district court also noted that RLUIPA does not require cities to grant religious users “preferential rights over other property owners, or to protect churches from the reality that the marketplace might dictate that certain facilities are not available to those who desire them.”<sup>187</sup> Regarding the equal-terms claim, the district court held, among other things, that the city treated the ICFG’s proposed use no differently than any other assembly use when it denied the applications.<sup>188</sup> The court noted that the ICFG’s argument, “carried to its logical conclusion, would mean that the City could not zone its land for categories of uses.”<sup>189</sup> Regarding the ICFG’s total-exclusion claim, the district court held that churches are not totally excluded from San Leandro because approximately 54.6 percent of the city can accommodate assembly uses.<sup>190</sup> The court further noted that the ICFG’s claim could not rest “simply on the fact that the Church has

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184. *Id.* at 935–36 (quoting 42 U.S.C. § 2000cc(a), (b)(1), (b)(3) (2006)).

185. *Id.* at 942.

186. *Id.*

187. *Id.*

188. *Id.* at 946–47.

189. *Id.* at 947.

190. After meeting with the church officials, the planning staff examined all nonresidential parcels in San Leandro to determine whether any of them could accommodate assembly uses in a way that would comply with the general plan. *Id.* at 933–34. At the end of its review, the staff determined that an additional 196 properties could accommodate assembly uses. *Id.* The city created the “AU Overlay District” to allow assembly uses on these 196 parcels without changing the remainder of each parcel’s underlying zoning. *Id.*

decided that the only property that will suit it is one that the City will not zone for assembly use.”<sup>191</sup>

The ICFG appealed, and the Ninth Circuit reversed the district court’s grant of summary judgment, finding that “there is a triable issue of material fact regarding whether the City imposed a substantial burden . . . under RLUIPA” and “that the City failed as a matter of law to prove a compelling interest for its actions.”<sup>192</sup> The Ninth Circuit concluded that “while the zoning scheme itself may be facially neutral and generally applicable, the individualized assessment that the City made to determine that the Church’s rezoning and CUP [conditional-use permit] request should be denied is not.”<sup>193</sup> The Ninth Circuit determined that the city’s denial was subject to RLUIPA’s compelling interest test when it said:

The City’s treatment of the Church’s applications constitutes an “individualized assessment.” *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978, 987 (9th Cir. 2006). Further, the City’s Zoning Code undeniably is a “system of land use regulations” within the meaning of RLUIPA because it is a system of “zoning [laws] . . . that limits or restricts a claimant’s use or development of land . . .” 42 U.S.C. § 2000cc-5(5).<sup>194</sup>

The Ninth Circuit thus relied on *Guru Nanak* as a guide for its RLUIPA analysis, but in doing so, the court ignored the most important distinguishing feature between the two cases. Specifically, the Ninth Circuit failed to acknowledge that Sutter County conducted an *individualized assessment* in response to Guru Nanak’s requested use permit, whereas San Leandro conducted a *generalized assessment* in response to the ICFG’s requested zoning amendments. Part IV offers a reading of RLUIPA that distinguishes between individualized and generalized assessments, a distinction that the Ninth Circuit failed to recognize in *San Leandro*.

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191. *Id.* at 948.

192. *Int’l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1061 (9th Cir.), *cert. denied*, 132 S. Ct. 251 (2011).

193. *Id.* at 1066.

194. *Id.* (alterations in original).

#### IV. GENERALIZED VS. INDIVIDUALIZED ASSESSMENTS: THE CORRECT CONSTRUCTION OF RLUIPA

This Part argues that the Ninth Circuit was correct in *Guru Nanak* but incorrect in *San Leandro* when it held that the land-use requests in each case were individualized assessments within the scope of RLUIPA. It offers an analysis of RLUIPA that draws a principled distinction between the two cases and shows that San Leandro's denials of the ICFG's rezoning requests were outside the scope of RLUIPA because the city conducted a generalized assessment rather than an individualized assessment.

In *San Leandro*, the ICFG requested both a zoning-map and a zoning-text amendment. The zoning-map amendment would have changed the zoning of the ICFG's parcel of land, and the zoning-text amendment would have permitted assembly uses on all parcels already located in the proposed zoning classification throughout the city.<sup>195</sup> When it held that San Leandro's "treatment of the Church's applications constituted an 'individualized assessment,'"<sup>196</sup> the Ninth Circuit fundamentally misunderstood the nature of a zoning ordinance and the nature of a request to amend a zoning ordinance.<sup>197</sup> Specifically, the Ninth Circuit failed to recognize what a municipality actually does when it reviews amendments to the zoning ordinance; the municipality conducts a generalized assessment of the implications of approving a zoning-map amendment, and it conducts a generalized assessment of the jurisdiction-wide effects of the zoning-text amendments. The assessments are generalized because the municipality considers jurisdiction-wide impacts beyond the specific impacts of the project that prompted the proposed amendments.

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195. See *supra* Part III.B.

196. *San Leandro*, 673 F.3d at 1066 (quoting *Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978 (9th Cir. 2006)).

197. Interestingly, when the Ninth Circuit denied San Leandro's petition for a rehearing *en banc*, it issued an amended opinion that made four changes. *Id.* at 1060–61. One of the changes modified a sentence in the original opinion that read as follows: "There is no dispute that the City's treatment of the Church's applications constitutes an 'individualized assessment.'" *Int'l Church of the Foursquare Gospel v. City of San Leandro*, 634 F.3d 1037, 1043 (9th Cir. 2011), *reh'g en banc denied, amended, and superseded by San Leandro*, 673 F.3d. The amended opinion deleted the words "[t]here is no dispute that." *San Leandro*, 673 F.3d at 1060. The sentence now reads as follows: "The City's treatment of the Church's applications constitutes an 'individualized assessment.'" *Id.* at 1066.

### A. Consideration of a Zoning-Map Amendment

When a municipality considers a request for a zoning-map amendment, it must evaluate the implications of the project under consideration. But for two reasons, the municipality's assessment goes beyond an evaluation of the effects of that single project. First, as soon as the zoning map is amended, the owner of that parcel may establish any of the uses permitted in the new zoning classification.<sup>198</sup> If one or more of the permitted uses in the proposed zoning classification have the potential to conflict with the uses of the surrounding properties, then a municipality would have a valid reason for denying the map amendment.<sup>199</sup> Second, the new zoning classification will apply to that parcel indefinitely, not only during the life of the sought-after use.<sup>200</sup> In *San Leandro*, the city would have considered the potential impacts of the ICFG's proposed church, but it also would have considered the potential impacts of every other possible use on the subject parcel that the new zoning classification would permit. Stated differently, after the zoning of the parcel was amended, the ICFG—and any future user—could have operated any of the other uses permitted in the new district. San Leandro's assessment of the rezoning proposal was therefore generalized.

By contrast, when a municipality considers a request for a use permit, it makes an individualized assessment of that proposed use. For example, when Guru Nanak applied to Sutter County for its use permits, the county evaluated only the proposed temple in the context of the surrounding properties.<sup>201</sup> In both use permit applications, planning staff recommended conditions of approval that were tailored to the specific use and location, such as a limit to the number of people on the property, additional landscaping, and a larger building setback.<sup>202</sup> Even if Guru Nanak had chosen not to use its property for the proposed temple, the underlying zoning of its parcel would have remained the same. Sutter County's assessment of the religious land use was individualized because approval of the use

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198. See *supra* Part II.B.

199. Generally, a municipality may not place conditions on one particular parcel within a zoning classification to preclude certain permitted uses it might find objectionable. For a discussion of the "like uses alike" principle, see *supra* note 99 and accompanying text.

200. See *supra* Part II.B.

201. See *supra* Part II.B.2.b.

202. See *supra* Part III.A.

permit would allow no other uses beyond those that were specifically requested.

*B. Consideration of a Zoning-Text Amendment*

Similarly, when a municipality considers a proposal to amend the text of its zoning code, it must necessarily consider implications beyond those associated with the project that prompted the proposed amendment.<sup>203</sup> Because of the “like uses alike” principle, all parcels in a zoning district must be governed by the same rules.<sup>204</sup> Therefore, when the ICFG requested to amend the zoning ordinance to allow assembly uses in the IL district with a use permit, San Leandro would have assessed the request for its suitability on the ICFG’s property, but it also needed to consider the implications of the proposed change on every parcel with IL zoning throughout the entire city. Even if the proposal had been suitable on the ICFG’s property, San Leandro could have determined that the proposal to allow assembly uses with a use permit would have been unworkable on at least one other parcel with the same zoning classification. Denying the zoning-text amendment for this reason would have been legitimate and completely unrelated to the ICFG’s use of its property.

By contrast, when a municipality considers a request for a use permit, the permit is confined to the property that was the subject of the application for the time allowed by the permit. The assessments that Sutter County conducted in *Guru Nanak* were individualized assessments because approval of the requested use permit would have been limited to Guru Nanak’s parcel and would have had no effect on any other properties in the county.

In *San Leandro*, the Ninth Circuit relied on *Guru Nanak* for the premise that RLUIPA applies to land-use decisions that result from an individualized assessment of a proposed project.<sup>205</sup> Assuming RLUIPA’s constitutionality,<sup>206</sup> this reliance represents a correct statement of the law, but the Ninth Circuit failed to distinguish between the different types of land-use entitlements that were at issue in the two cases. The court specifically stated that “while the zoning

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203. See *supra* Part II.B.3–4.

204. CAL. GOV’T CODE § 65830 (West 2009).

205. See *supra* notes 192–194 and accompanying text.

206. Not all would agree that RLUIPA is constitutional even as applied to individualized assessments of the type conducted by Sutter County in *Guru Nanak*. See, e.g., MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2007).

scheme itself may be facially neutral and generally applicable, the individualized assessment that the City made to determine that the Church's rezoning and CUP request should be denied is not.<sup>207</sup> The Ninth Circuit never acknowledged that the ICFG's use-permit application could be processed only after the zoning map was amended to change the ICFG's property from IP to IL, and only after the zoning-ordinance text was amended to allow assembly uses with a use permit in the IL district. Although San Leandro considered the impacts of the proposal on the ICFG's parcel, it also had to consider the impacts that the proposal would have had on the rest of the city.<sup>208</sup> To say that the city conducted an individualized assessment of the ICFG's rezoning applications only comprehends part of what the city assessed. By applying RLUIPA to generalized assessments such as the ones the city conducted in *San Leandro*, the Ninth Circuit expanded the coverage of RLUIPA's Section 5 jurisdictional hook, which, by its own terms, applies only to "*individualized assessments*."<sup>209</sup> The Ninth Circuit's construction of RLUIPA renders the statute overbroad by precluding legitimate conduct in the process of attempting to prevent unconstitutional discrimination.

#### V. CONSTITUTIONAL DOUBTS AVOIDED BY A NEW ANALYSIS OF RLUIPA

According to the Supreme Court, "The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts."<sup>210</sup> Courts presume that the legislature would not intend to pass a law that raises constitutional questions.<sup>211</sup> Thus, when a statute could be interpreted in multiple ways, a court will

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207. *Int'l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1066 (9th Cir.), *cert. denied*, 132 S. Ct. 251 (2011).

208. In fact, after the city's planning staff received and began to evaluate the ICFG's application, they expressed concern about the citywide impacts of amending the zoning text to allow assembly uses on other parcels in the IL district. *Int'l Church of the Foursquare Gospel v. City of San Leandro*, 632 F. Supp. 2d 925, 931 (N.D. Cal. 2008), *rev'd*, 634 F.3d 1037 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 251 (2011). The staff therefore began to develop an alternative mechanism for liberalizing the treatment of assembly uses citywide. *Id.* at 932. As a result of this effort, the city adopted the "Assembly Use Overlay District," and recommended applying it to 196 nonresidential parcels. *Id.* at 933. The ICFG's parcel was not one of the 196. *Id.* at 934.

209. *See supra* note 54 and accompanying text.

210. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

211. *See Rust v. Sullivan*, 500 U.S. 173, 191 (1991) ("This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations.").

“avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.”<sup>212</sup>

As discussed in Part IV, RLUIPA’s scope-of-application section has two plausible readings, only one of which raises serious constitutional questions. Under one reading, the reading for which this Note advocates, RLUIPA applies only when the government conducts an individualized assessment of the religious institution’s proposed use of its land. Under the other reading, the reading declared by the Ninth Circuit in *San Leandro*, RLUIPA applies to any assessment of a land-use entitlement that is requested by a religious user, regardless of whether granting the entitlement will change the allowable uses of property other than the property owned by the religious institution. This latter reading creates constitutional doubt.

The reading of RLUIPA proposed by this Note has three major virtues in addition to those discussed in Part IV. First, unlike the Ninth Circuit’s decision in *San Leandro*, it comports with Supreme Court precedent regarding the Free Exercise Clause and Congress’s Section 5 power to enforce it. Second, it preserves the ability of state and local governments to exercise their reserved police powers for land-use planning. Third, it continues to allow RLUIPA to protect religious institutions such as Guru Nanak when the government substantially burdens their religious exercise in the course of making an individualized assessment about whether to grant an exemption from the generally applicable land-use rules.

A. *Congressional Authority To Enforce, Not Expand, the Free Exercise Clause*

RLUIPA prohibits governments from imposing a substantial burden on religious exercise through land-use regulations “under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.”<sup>213</sup> This language appears to be tailored to track the Court’s language in *Boerne* when it quoted *Smith* to distinguish those two cases from an earlier line of Free Exercise Clause cases that imposed

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212. *Gomez v. United States*, 490 U.S. 858, 864 (1989).

213. 42 U.S.C. § 2000cc(a)(2)(C) (2006).

strict scrutiny on government acts which caused religious hardship “where the State has in place a system of individual exemptions.”<sup>214</sup> But an *individual exemption* is not the same thing as an *individualized assessment*. Because assessments cover more actions than exemptions, the Ninth Circuit’s reading of RLUIPA expands Congress’s Section 5 power beyond what the Court recognized in *Boerne*.

Contrasting *San Leandro* and *Guru Nanak* is helpful here. In *Guru Nanak*, the applicant sought a use permit pursuant to the system and procedures that were established in Sutter County’s zoning code.<sup>215</sup> When a use permit is granted, the underlying zoning remains the same; the applicant therefore requests something akin to an exemption from the zoning that otherwise would prohibit the use for which he or she applied. In other words, a use permit is an exemption from a generally applicable law. In *San Leandro*, the religious institution applied for a zoning-map and a zoning-text amendment.<sup>216</sup> Although zoning ordinances may be amended, the amendment process is not an exemption because a zoning amendment *changes the underlying law* that applies to the applicant as well as to every other land user in the jurisdiction. Stated differently, a zoning amendment is not a request for an exemption to a generally applicable law. It is a request to change the law itself.

When San Leandro assessed the ICFG’s application for a zoning-map and a zoning-text amendment, it was not evaluating whether to grant the ICFG an exemption. When considering the zoning-map amendment, the planning commission conducted a generalized assessment to determine whether to change the underlying law that would apply to the ICFG’s property. The zoning-text amendment required a similar generalized assessment to determine whether to change the underlying law that would apply throughout the entire IL zoning district. The Ninth Circuit’s construction of RLUIPA in *San Leandro* requires governments to articulate a compelling interest whenever they deny a request for a change in the underlying law. A proper reading of RLUIPA in light of *Smith* and *Boerne* would require a compelling interest only when a government fails to extend a preexisting system of exemptions to a religious institution. *Smith* and *Boerne* simply do not acknowledge a congressional authority to

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214. *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997) (quoting *Emp’t Div. v. Smith*, 494 U.S. 872, 884 (1990)); *see also supra* note 53 and accompanying text.

215. *See supra* Part III.A.

216. *See supra* Part III.B.

impose strict scrutiny when a government denies a request by a religious institution to change the underlying, generally applicable law.<sup>217</sup>

*B. Reading Congruence and Proportionality into RLUIPA To Preserve Values of Federalism*

As discussed in Part II, land-use planning in California is a highly specialized subset of California law, best thought of as a hierarchy of regulation types. As the California Supreme Court has stated, “[T]he general plan truly became, and today remains, a ‘constitution . . . for future development’ located at the top of the ‘hierarchy of local government law regulating land use.’”<sup>218</sup> If general plans are constitutions and zoning ordinances are statutes implementing the constitutions, use permits are “a system of individual exemptions”<sup>219</sup> from the generally applicable rules governing the permissible uses of property within a jurisdiction.<sup>220</sup>

Beyond requiring jurisdictions to articulate a compelling interest when they refuse to approve a rezoning request, the Ninth Circuit’s decision in *San Leandro* makes plain that the city’s reasons for denying the rezoning request—that approving the request would have conflicted with two important general plan provisions—did not constitute a compelling interest.<sup>221</sup> But approving the application to avoid liability under the Ninth Circuit’s interpretation of RLUIPA would result in a conflict with the California Government Code, which states that “[c]ounty or city zoning ordinances shall be consistent with the general plan of the county or city.”<sup>222</sup>

To solve this dilemma, a municipality could amend the general plan to conform to the religious institution’s proposed zoning. This solution might not be possible in all instances, however, because the

217. See *supra* note 53 and accompanying text.

218. *DeVita v. Cnty. of Napa*, 889 P.2d 1019, 1024 (Cal. 1995) (alteration in original) (citations omitted) (internal quotation marks omitted) (quoting *Leshar Commc’ns, Inc. v. City of Walnut Creek*, 802 P.2d 317, 321 (Cal. 1990); and *Neighborhood Action Grp. v. Cnty. of Calaveras*, 203 Cal. Rptr. 401, 406 (Ct. App. 1984)).

219. *Boerne*, 521 U.S. at 514.

220. See *supra* Part II. In other words, by having a process by which a municipality may approve something that is otherwise prohibited, the municipality establishes a system of individual exemptions similar to those that were at issue in *Smith*.

221. *Int’l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1061 (9th Cir.), *cert. denied*, 132 S. Ct. 251 (2011).

222. CAL. GOV’T CODE § 65860(a) (West 2009).

general plan must be internally consistent.<sup>223</sup> Moreover, this solution misses the point of a general plan. As the California Supreme Court has stated, “The Planning and Zoning Law does not contemplate that general plans will be amended to conform to zoning ordinances. The tail does not wag the dog.”<sup>224</sup> The Ninth Circuit’s holding thus intrudes into California’s land-use decision-making process in two ways: it upends the relationship between the zoning ordinance and the general plan, and it takes away the authority of local governments to make legislative decisions that would otherwise be valid. At a more fundamental level, by requiring jurisdictions to approve a rezoning request even if the request conflicts with the general plan, the Ninth Circuit places municipalities in the position of choosing between complying with RLUIPA or complying with a valid state law.

The Ninth Circuit’s decision in *San Leandro* also interferes with the distinction that the California Code of Civil Procedure draws between the writs of ordinary and administrative mandate. Municipalities are accustomed to assembling a detailed record that contains the basis for quasi-judicial decisions, such as decisions about whether to approve an application for a use permit, because such decisions must be challenged by the more stringent writ of administrative mandate.<sup>225</sup> By contrast, legislative decisions, such as decisions about whether to approve a rezoning request, are subject to judicial review through the writ of ordinary mandate, which does not require the municipality to present a detailed administrative record.<sup>226</sup> Thus, when Sutter County was sued in federal court under RLUIPA, its administrative record was thorough because it was responding to a request for a use permit, which is a quasi-judicial act subject to administrative mandate. *San Leandro*’s record was unlikely to be as thoroughly developed, however, because the city was responding to a request for a zoning-map amendment and a zoning-text amendment, both of which are legislative acts and subject to the more deferential writ of ordinary mandate.<sup>227</sup> The Ninth Circuit’s decision in *San Leandro* could catch municipalities off guard if they are now required

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223. *Id.* § 65300.5 (West 2010).

224. *Leshar Commc’ns, Inc. v. City of Walnut Creek*, 802 P.2d 317, 322 (Cal. 1990) (citations omitted).

225. CAL. CIV. PROC. CODE § 1094.5 (West 2007 & Supp. 2012).

226. *See supra* note 141 and accompanying text.

227. For a discussion of the differences between these writs of mandate, see *supra* Part II.B.4.

to articulate a compelling interest for their legislative decisions to deny a religious institution's rezoning request.

The regulation of land uses has consistently been recognized as a constitutional exercise of state and local governments' reserved police powers.<sup>228</sup> As discussed in Part IV, by requiring San Leandro to articulate a compelling reason for denying the ICFG's rezoning application and simultaneously holding that San Leandro's adherence to its unchallenged general plan is not a compelling interest, the Ninth Circuit's decision precludes San Leandro—and all other municipalities in the circuit—from denying rezoning requests regardless of the jurisdiction-wide impacts on its state-mandated, and otherwise-valid, general plan. This reading of RLUIPA evinces the same lack of congruence and proportionality that RFRA also lacked. Such a reading makes it seem as if RLUIPA is not “responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.”<sup>229</sup> Under the Ninth Circuit's analysis, RLUIPA presents the same separation of powers problem that RFRA presented in *Boerne*.<sup>230</sup>

In the wake of *San Leandro*, when a religious institution applies to amend either the zoning map or the text of the zoning ordinance, municipalities are held to higher substantive and procedural standards than what California law requires.<sup>231</sup> The Ninth Circuit could have avoided these conflicts by applying the reading suggested in this Note and distinguishing between the types of land-use entitlements at issue in *Guru Nanak* and *San Leandro*.<sup>232</sup>

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228. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (“[R]egulation of land use [is] a function traditionally performed by local governments.”).

229. *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997).

230. *See supra* note 45 and accompanying text.

231. This higher standard is also the heart of the problem described by Justice Stevens in his concurring opinion in *Boerne*, in which he said that RFRA “has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.” *Boerne*, 521 U.S. at 537 (Stevens, J., concurring).

232. Alternatively, the Ninth Circuit could have held that RLUIPA does not apply to any request that seeks to amend the zoning ordinance because, as applied to San Leandro, RLUIPA is an unconstitutional intrusion into substantive and procedural California law. Such a holding would have preserved the notion that a general plan is a local constitution and a zoning ordinance is a statute implementing the constitution, but it would have sacrificed all of RLUIPA.

### C. Preserving RLUIPA

Finally, this Note's reading of RLUIPA does not render the statute meaningless. On the contrary, a religious land user whose request involves the government's individualized assessment regarding whether to grant an exemption from the generally applicable rules would still be able to bring a cause of action under RLUIPA. Variances and use permits such as those at issue in *Guru Nanak* still would be within RLUIPA's scope of application. Before applying RLUIPA's strict-scrutiny and compelling-interest standards, courts would need to examine the nature of the requested entitlement and make a determination that the request necessitates an individualized assessment. Therefore, the statute still would protect applicants like Guru Nanak, whereas cities like San Leandro would maintain control over their ability to conduct long-range planning.

### CONCLUSION

In *San Leandro*, the Ninth Circuit applied strict scrutiny to San Leandro's denial of the ICFG's rezoning applications pursuant to its interpretation of RLUIPA. Its decision to do so, however, was based neither on a careful analysis of whether the statute applied to the case, nor on a reasoned decision regarding which line of free-exercise cases to use. Instead, the Ninth Circuit simply applied the reasoning and holding of another RLUIPA case, *Guru Nanak*, without analyzing the differences between the types of land-use entitlements at issue in the two cases: an individualized assessment of a use permit in *Guru Nanak* and a generalized assessment of a rezoning in *San Leandro*.

The best and most plausible construction of RLUIPA rests on the fundamental and legally cognizable distinction between the individualized assessments and generalized assessments that governments conduct when considering whether to approve different types of land-use entitlements. By its own terms, RLUIPA applies only when the government conducts an individualized assessment, such as Sutter County's consideration of the use permits for which *Guru Nanak* applied; RLUIPA does not apply to generalized assessments such as the one that San Leandro conducted in response to the ICFG's proposed zoning-ordinance amendments.

The distinction between individualized and generalized assessments is not only consistent with the text of RLUIPA, it also comports with Supreme Court precedent regarding Congress's

Section 5 power to enforce the Free Exercise Clause. According to the two lines of free-exercise cases, strict scrutiny applies when the government has a mechanism in place for approving exemptions to generally applicable laws, whereas courts use rational basis review when a government simply applies its generally applicable rules. In other words, in instances in which the government conducts an individualized assessment to consider whether to grant an exemption, such as Sutter County did in *Guru Nanak*, the government's decision not to grant the exemption would be subject to strict scrutiny. Reading RLUIPA to exclude generalized assessments from its scope of application ensures that Congress has not altered the substance of the First Amendment by providing religious institutions with a mechanism of forcing local governments to change their generally applicable land-use laws.

Finally, applying RLUIPA only to land-use assessments that are individualized ensures that state and local governments can continue to exercise their ability to control their own destiny based on the specific needs of their community. Such a reading of RLUIPA still preserves a federal cause of action for those whose religious exercise is substantially burdened when the government has conducted an individualized assessment. This reading of RLUIPA strikes the appropriate balance between preservation of the traditional powers of the states and the federal government's interest in eliminating discrimination.